Survey of Developments in Maryland Law, 1983-84

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I. Administrative Law

A. Environmental Law

1. Legislation.—In 1984, the Maryland General Assembly expanded the Occupational Safety Subtitle of the Division of Labor and Industry Article of the Maryland Code to include various provisions relating to worker exposure to certain types of hazardous and toxic chemicals. In furtherance of the declared legislative purpose of assuring safe and healthful working conditions, the new provisions require employers to compile and maintain information regarding the hazardous and toxic materials with which their employees come in contact, to provide such information to governmental agencies charged with fire protection, and to educate their employees with regard to appropriate safety procedures and the dangers associated with the toxic substances with which they work.

The new provisions apply to employers who use or store hazardous chemicals, to persons who import or sell such chemicals, and to those who repackage or manufacture such chemicals in the state of Maryland. “Hazardous chemical” is carefully defined to include substances with certain flammable or explosive qualities as well as substances identified as health hazards by the United States Occupational Safety and Health Administration. Employers are required to compile and maintain a “chemical information list” containing specified information for each hazardous chemical handled, and to develop or obtain a “material safety data sheet” or the equivalent for each hazardous chemical identified on their information list. This information must be supplied to the Maryland Department of Health and Mental Hygiene, and, if requested, to the local fire department. In addition, employees or their designated representa-

5. Id. § 32B(a).
6. Id. §§ 32C, 32D.
7. Id. § 32E.
8. Id. § 32F.
9. Id. § 32H.
10. Id. § 32I.
tive may request access to this information. With certain exceptions, employers are not required to disclose trade secrets or confidential business information.

The new provisions require that all containers of hazardous chemicals be appropriately labeled. They also require employers to implement an employee training and education program designed to inform employees of the nature of the hazardous chemicals with which they work, to teach them appropriate safety procedures for handling such chemicals, and to apprise them of their legal rights under the new law. All provisions of the new law must be complied with no later than May 25, 1986.

2. Case Law.—In United Steelworkers, Local 2610 v. Bethlehem Steel Corp., the Maryland Court of Appeals discussed two issues: the relationship of industry custom and practice to the precautions required under the Maryland Occupational Safety and Health Act (MOSHA) general duty clause, and the content of an agency decision necessary to facilitate judicial review.

The action originated when two Bethlehem Steel Corporation employees died after suffering heat stroke in separate furnace areas of the employer’s Sparrows Point mill. The Commissioner of Labor and Industry’s safety and health staff (MOSH) investigated the incident and cited Bethlehem for a serious and willful violation of the MOSHA general duty clause, giving them three days to correct the alleged violation. Bethlehem contested the citation, and after thirteen days of hearings, the Commissioner’s examiner found

11. Id. § 32L.
12. Id. § 32N.
13. Id. § 32G.
14. Id. § 32M.
17. Id. at 671-73, 472 A.2d at 65-66.
18. Id. at 673-81, 472 A.2d at 66-70.
19. Id. at 667-68, 472 A.2d at 63.
20. Id. at 668, 472 A.2d at 63-64. The MOSHA general duty clause requires each employer to “furnish to each of his employees employment and a place of employment which are safe and healthful as well as free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .” Md. Ann. Code art. 89, § 32(a)(1) (1979). MOSH relied upon the general duty clause because no standards for occupational exposures to hot environments had been established by the Commissioner. 298 Md. at 668, 472 A.2d at 64.
that MOSH had not met its burden of showing that precautions taken by Bethlehem were unreasonable in the absence of a recognized heat standard, and he vacated the citation. United Steelworkers of America, AFL-CIO Local 2610 filed exceptions, and the Commissioner reversed the determination and imposed a $1000 penalty.

Bethlehem appealed to the Circuit Court for Baltimore County, which found the charge was not supported by substantial evidence and reversed the Commissioner's order. The Court of Special Appeals affirmed. It determined that there were no existing standards for occupational exposures to hot environments, that the precautions taken by Bethlehem were consistent with those taken by other employers in the industry, and that none of the additional precautions suggested in the hearings before the Commissioner's examiner had been mentioned to Bethlehem in any of more than 130 previous MOSH inspections, and concluded that the imposition of higher standards of conduct on Bethlehem would be arbitrary and unreasonable. The Court of Appeals granted certiorari to consider whether the precautions required under the MOSHA general duty clause are limited to industry custom and practice, and whether the Commissioner's decision was supported by substantial evidence.

The Court of Appeals accepted United Steelworkers' argument wishes to contest a citation with an opportunity for a hearing. Id. § 37(d) provides for the appointment of a hearing examiner who will prepare an official record, including testimony and exhibits, and prepare a written report of his determinations. The hearing examiner's report shall be the final decision of the Commissioner, unless any affected employer, employee, or employee representative requests a review by the Commissioner within fifteen working days after the report is prepared, or the hearing officer or Commissioner orders a review of the proceedings.

22. 298 Md. at 669, 472 A.2d at 64.
23. Id.
24. Id. Md. Ann. Code art. 89, § 37(e) (1979 & Supp. 1984) allows the Commissioner, after a review of the proceedings, to affirm, modify or vacate the citation or proposed penalty.
26. 298 Md. at 670, 472 A.2d at 64.
28. Id. at 376-77, 454 A.2d at 855.
29. Id. at 377, 454 A.2d at 856.
30. Id. at 375, 454 A.2d at 855.
31. Id. at 378, 454 A.2d at 856.
32. 298 Md. at 670, 472 A.2d at 65.
that industry custom and practice should not be a per se limitation on precautions required by the general duty clause. Finding that the MOSHA general duty clause requires those precautions that a "reasonable person who is familiar with the practices of the subject industry" would take, the court held that this standard is not limited to current industry practice because that limitation would not "prevent an industry, which fails to take sufficient precautionary measures against hazardous conditions, from subverting the underlying purposes of the [the Act]." Industry custom and practice does play a role, however, in determining what is reasonable.

The court did not reach the issue of whether the Commissioner's decision was supported by substantial evidence, because it found the administrative record so inadequate as to preclude judicial review. It found that the Commissioner's decision failed to resolve significant conflicts of fact, failed to identify the act or omission which constituted the violation, and failed to suggest ways for Bethlehem to avoid future citations. The court noted that judicial review of agency action looks to agency findings and statements of reasons to see if the action was justified. When, as here, the agency does not adequately disclose the reasons for its decision, the court's function cannot be performed. "We must know what a decision means before the duty becomes ours to say

33. Id. at 671, 472 A.2d at 65.
34. Id. The court adopted the test employed by many federal appellate circuits when reviewing agency actions taken under generally worded OSHA standards. See, e.g., L.R. Willson & Sons, Inc. v. OSHRC, 698 F.2d 507, 513 (D.C. Cir. 1983); Tri-State Roofing & Sheet Metal, Inc. v. OSHRC, 685 F.2d 878, 880 (4th Cir. 1982) (per curiam); Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th Cir. 1981).
35. 298 Md. at 672, 472 A.2d at 66.
36. Id. (quoting Bristol Steel & Iron Works v. OSHRC, 601 F.2d 717, 723 (4th Cir. 1979)).
37. Id. at 672-73, 472 A.2d at 66.
38. Id. at 673, 472 A.2d at 66.
39. Id. at 674, 472 A.2d at 67.
40. Id. at 667, 472 A.2d at 63.
41. Id. at 680, 472 A.2d at 70.
42. Id. at 679, 472 A.2d at 69. See also Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-68 (1962) (Since the court defers to the agency, it is important that the agency make findings that support its decision, and those findings must be supported by substantial evidence.).
43. The court refused to "search the subject record for evidence sufficient to support any one or more of the theories advanced by Steelworkers or by MOSH, and then to decide if that theory constitutes a violation of the general duty clause . . . ." 298 Md. at 680, 472 A.2d at 69-70.
whether it is right or wrong.' "44

The court reasoned that it is especially important for the Commissioner to substantiate his decisions when, as here, the violation does not involve an express safety standard.45 When the violation concerns the general duty clause, the decision must "'specify the particular steps a cited employer should have taken to avoid citation, and . . . demonstrate the feasibility and likely utility of those measures.' "46 Due to the many inadequacies of the Commissioner's decision, the court found it necessary to remand the case for further proceedings.47

Maryland courts in other recent decisions have either expanded or maintained the already substantial power exercised by agencies.48 These decisions have recognized the importance of agency proceedings by: (1) giving administrative agencies sufficient autonomy to establish and interpret agency bylaws;49 (2) requiring parties to exhaust all administrative remedies and await a final agency decision before resorting to the courts;50 and (3) narrowly focusing the scope of judicial review of agency action.51 In United Steelworkers, however, the Maryland Court of Appeals refused to uphold a decision by the Commissioner of Labor and Industry because it failed to specify the omission that constituted the MOSHA violation and failed to instruct the offending party as to how to avoid future violations.52 This decision indicates that, although administrative agencies enjoy substantial autonomy and discretion, the courts will not permit agencies to abuse their discretion by ignoring statutorily prescribed

44. Id. at 679, 472 A.2d at 69 (quoting United States v. Chicago, M., St. P.&P.R. Co., 294 U.S. 499, 511 (1935)).
45. Id. at 680, 472 A.2d at 70.
46. Id. (quoting National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973)).
47. Id. at 680-81, 472 A.2d at 70.
49. McIntyre, 55 Md. App. at 224, 461 A.2d at 66.
51. Waeldner, 298 Md. at 362-64, 470 A.2d 336-37.
52. 298 Md. at 680-81, 472 A.2d at 70.
procedures. Such procedures must be followed carefully and completely by the agencies to avoid infringing on the rights of those parties whose activities are affected.

B. Education

Recently, each level of Maryland’s appellate system had an opportunity to consider issues involving the scope of the Maryland State Board of Education’s power and autonomy. Their decisions leave the State Board a wide area within which to operate and exert its substantial, but not unchecked, power.

In McIntyre v. Board of Education, the Court of Special Appeals was called upon to decide whether the Maryland State Board of Education was empowered to interpret the language of the teacher’s contract that the State Board compels the county boards to use. The action originated when three Kent County school administrators were transferred to lower-paying positions. Their contract prohibited reductions in pay for the remainder of the year when transfers were made “during a school year.” The administrators petitioned the State Board of Education for a determination of the meaning of “school year.” The State Board granted the request...
and issued a declaratory ruling on the question. The County Board appealed to the Circuit Court for Kent County, contending that the State Board had no jurisdiction to interpret a contract to which it was not a party. The circuit court agreed with this contention.

The Court of Special Appeals reversed. Characterizing the State Board’s authority as “awesome” and citing a need for uniformity throughout the state, the court held that the State Board did have authority to interpret the prescribed contract:

There would be little purpose in permitting the State Board authority to compel by rule, regulation or bylaw the use of a precisely worded contract, without deviation, then say that despite its unprecedented authority to interpret the meaning of its own school laws, the same authority did not apply to the interpretation of its prescribed contracts.

The Court of Special Appeals decision in McIntyre is indicative of that court’s desire to afford the State Board substantial autonomy in establishing the educational policies of this state. The Court of Appeals evidently favors the same policy. In Board of Education v. Waeldner, the Court of Appeals recognized considerable authority in the State Board to review and set aside decisions of the county

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60. 55 Md. App. at 222, 461 A.2d at 65.
61. Id.
62. Id. at 222-23, 461 A.2d at 65.
63. Id. at 226, 461 A.2d at 67. The court stressed that the contract was a required contract, not a recommended one. Id.
64. Id. at 225, 461 A.2d at 66. The Court of Special Appeals indicated that even if the language of the contract were less ambiguous or the parties had agreed to its meaning, a conflicting interpretation by the State Board of Education would control. Id.
65. Id.
66. The State Board’s authority to interpret the contract comes not only from article 41, § 250, but from Md. Educ. Code Ann. § 2-205(c) (1978) (The State Board is directed to adopt bylaws, rules and regulations, having the force of law, for the administration of public schools.), and id. § 2-205(e) (The State Board is empowered and directed to interpret those bylaws, rules and regulations, to explain the true intent and meaning of the school law, and to decide all controversies and disputes that arise under it, with the decision being final.). Id. at 224-25, 461 A.2d at 66.
67. 55 Md. App. at 224, 461 A.2d at 63.
68. The State Board’s broad powers do not include the right to appeal from a reversal of its own decision, however. In McIntyre, the State Board of Education had joined the individual appellants in appealing the decision of the circuit court. The Court of Special Appeals dismissed the State Board’s appeal, stating that it “fail[ed] to see how the agency, having functioned in a quasi-judicial capacity, can appeal from a reversal of its own decision...” Id. at 226, 461 A.2d at 67.
boards,\textsuperscript{70} while emphasizing that judicial review of State Board action remains narrowly focused.\textsuperscript{71} In \textit{Waeldner}, a Prince George's County public school teacher appealed his dismissal by the County Board to the State Board of Education.\textsuperscript{72} The County Board had found the teacher guilty of misconduct in office and incompetency and dismissed him;\textsuperscript{73} the State Board modified the sanction from dismissal to suspension.\textsuperscript{74} The County Board appealed that modification to the Circuit Court for Prince George's County, maintaining that the State Board had exceeded its statutory authority when it modified the disciplinary sanction.\textsuperscript{75} Both the circuit court and the Court of Special Appeals affirmed the State Board's decision.\textsuperscript{76}

The Maryland Court of Appeals likewise affirmed.\textsuperscript{77} The court concluded that the State Board did not exceed its authority when it conducted an independent evaluation of the record and replaced the County Board's sanction with what it believed to be a more appropriate remedy.\textsuperscript{78} The Court of Appeals stressed that the State Board's authority to modify disciplinary sanctions imposed by the County Boards must be examined in the light of the broad dominion over public education\textsuperscript{79} granted to the State Board by the legislature\textsuperscript{80} and recognized by the court itself in prior deci-

\textsuperscript{70} Id. at 361-62, 470 A.2d at 335-36.
\textsuperscript{71} Id. at 361-63, 470 A.2d at 335-36.
\textsuperscript{72} Id. at 356, 470 A.2d at 333. Md. Educ. Code Ann. § 6-202(a) (1985) authorizes a county board to dismiss a teacher. Section 6-202(a)(4) authorizes an appeal from the decision of the county board to the State Board.
\textsuperscript{73} 298 Md. at 357-58, 470 A.2d at 333-34.
\textsuperscript{74} Id. at 359, 470 A.2d at 334.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 356, 470 A.2d at 333.
\textsuperscript{77} Id. at 364, 470 A.2d at 337.
\textsuperscript{78} Id. at 362, 470 A.2d at 336. The County Board had contended "that the State Board's authority on appeal under [Md. Educ. Code Ann.] § 6-202(a)(4) 'is limited to determinations of whether the County Board's actions were irregular or an abuse of authority and whether there is adequate evidence to justify the statutory grounds for dismissal relied upon by the County Board.'" Id. at 359, 470 A.2d at 334.
\textsuperscript{79} Id. at 361, 470 A.2d at 335.
\textsuperscript{80} Id. at 360, 470 A.2d at 335. Under Md. Educ. Code Ann. § 2-205(g)(2) (1985), the State Board is directed to "exercise general control and supervision over the public schools and educational interests of this State." Section 2-205(b) empowers the State Board to "[d]etermine the elementary and secondary educational policies of this State"; section 2-205(c) directs the State Board to "adopt bylaws, rules, and regulations for the administration of the public schools." Section 2-205(e) provides that the State Board "shall explain the true intent and meaning of the provisions of . . . [the Education Article] . . . within its jurisdiction"; the same subsection mandates that the State Board "shall decide all controversies and disputes under these provisions" and further states that "[t]he decision of the Board is final." Id.
sions. Accordingly, the court stated:

[W]e think it evident from the statutory scheme of the Education Article, and the allocation of power between the State and County Boards, that the legislature intended that the State Board would exercise its independent judgment on the record before it in determining whether disciplinary infractions, as charged, had been established and, if so, whether the sanction imposed was too severe under the circumstances.82

The court then conducted its own review of the State Board's action.83 Emphasizing that judicial review of agency decisions is "narrowly focused" and limited chiefly to a determination of whether the agency's action was arbitrary or capricious,84 the court noted that "[t]he test to be applied in making this determination is limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached."85 . . . [A] court upon judicial review of a decision of an administrative agency will not substitute its judgment on the facts for that of the agency."86 Utilizing this standard, the court upheld the action of the State Board, concluding that its action was not arbitrary or capricious.87

The court's decision in Waeldner represents the final step in establishing in the State Board a power hinted at in an earlier Court of Appeals decision, Resetar v. State Board of Education88 and clearly expressed in Board of Education v. McCrumb,89 a recent decision by the Court of Special Appeals. In Resetar, the State Board had upheld the County Board's decision to dismiss a teacher for misconduct in office. The Court of Appeals implied, however, that the State Board

81. See, e.g., Resetar v. State Bd. of Educ., 284 Md. 537, 556, 399 A.2d 225, 235 (State Board invested with last word on any matter concerning educational policy or administration of the school system), cert. denied, 444 U.S. 838 (1979); Zeitschel v. Board of Educ., 274 Md. 69, 81, 332 A.2d 906, 912 (1975) (State Board authorized to superintend the activities of the local boards of education to keep them within the legitimate sphere of their operations); Wilson v. Board of Educ., 234 Md. 561, 565, 200 A.2d 67, 70 (1964) (mere fact that the solution is initially within the scope of the County Board's authority does not negate power of the State Board to review it and set it aside).

82. 298 Md. at 361, 470 A.2d at 335.
83. Id. at 363-64, 470 A.2d at 336-37.
84. Id. at 362, 470 A.2d at 336.
85. Id. at 363, 470 A.2d at 336 (citing Resetar, 284 Md. at 554, 399 A.2d at 225).
86. Id. (citing Zeitschel, 274 Md. at 82, 332 A.2d at 913).
87. Id. at 364, 470 A.2d at 337. The State Board had considered the teacher's excellent record, his concern for the students in his care, and the fact that no children had been hurt. Id.
89. 52 Md. App. 507, 450 A.2d 919 (1982).
had the authority to impose a lesser sanction. In *McCrum*, the Court of Special Appeals found modification of a penalty imposed on personnel by a local board of education clearly within the power of the State Board of Education. In *Waeldner*, the Maryland Court of Appeals has undoubtedly decided to invest the State Board of Education with the last word in matters concerning teacher discipline. The result of this decision may be uniformity at the cost of efficiency.

In *Elprin v. Howard County Board of Education*, the Court of Special Appeals considered the scope of judicial review of another kind of school board decision. The court indicated that Maryland State Board of Education decisions reviewing local board of education decisions about the closing and consolidating of public schools may not be subject to judicial review. The court held that the State Board's approval of a decision by the Howard County Board of Education to close two elementary schools could not be appealed to the circuit court under the Maryland Administrative Procedure Act because the appeal did not involve a "contested case."

90. 284 Md. at 562, 399 A.2d at 238.
91. 52 Md. App. at 514, 450 A.2d at 924.
92. 298 Md. at 361, 470 A.2d at 335-36. "[U]nder its visitorial power, the last word or final decision rests with the State Board as to any dispute concerning the administration of the public school system, including whether, under § 6-202(a), teacher misconduct warrants dismissal or a lesser sanction." *Id.*
93. The court's decision could lead to a duplication of effort by the State Board and various county boards of education.
95. *Id.* at 464-67, 470 A.2d at 836-37. Courts generally afford great deference to actions of state and local school boards, even when judicial review is allowed. *See*, e.g., Bernstein v. Board of Educ., 245 Md. 464, 470-75, 226 A.2d 243, 247-50 (1967) (court would not review substance of local board of education decision transferring students, as local board is not a state agency under Maryland Administrative Procedure Act; court would review charges of procedural unfairness using arbitrary and capricious standard); see also *supra* text accompanying notes 84-86.
96. The appellants and other concerned citizens requested that the Maryland State Board of Education review the Howard County Board of Education's decision to close the two schools and transfer the students involved to other nearby schools. *See* Md. Educ. Code Ann. § 2-205 (1978); Md. Admin. Code tit. 13, § 13.A.02.09 (1974). The State Board granted review but upheld the County Board's decision. Thereafter, the appellants appealed to the Circuit Court for Howard County but that court dismissed their appeal for lack of subject matter jurisdiction, finding that the proceeding before the State Board did not involve a "contested case" under the Maryland Administrative Procedure Act, Md. State Gov't Code Ann. §§ 10-101 to -706 (1984). 57 Md. App. at 463, 470 A.2d at 835.
98. Section 10-215 of the Administrative Procedure Act provides that "[a] party who is aggrieved by the final decision in a *contested case* is entitled to judicial review of the decision as provided in this section." *Id.* § 10-215(a) (emphasis added). Section 10-201
The court noted that a decision by a state administrative agency is a "contested case" subject to judicial review under the Administrative Procedure Act "only when that decision determines the legal rights, duties or privileges of specific parties, which have been determined by the state agency after a hearing required by law or constitutional right." The court concluded that the State Board's decision did not meet this standard for a number of reasons. First, the State Board's action did not in any way affect legal rights, entitlements or privileges, since Maryland law recognizes no legal right or privilege to attend a particular school. In addition, because the Board's decision did not adjudicate the rights of any specific person but instead affected the children, parents and community as a whole, the Board's review was quasi-legislative in nature and not an adversary proceeding. Finally, the State Board was not obligated to entertain the appeal from the County Board's decision, and thus the State Board proceeding was not a required hearing.

This decision affirms the long-standing position of the Maryland courts that disputes between school systems and parents are most properly resolved by boards of education and not by the courts. Although the court did not foreclose the possibility of judicial review of school closing decisions, it made such a possi-
bility unlikely. 106

C. Worker’s Compensation

Maryland courts considered a number of cases dealing with the administration of the worker’s compensation system. Issues considered included the reach of provisions authorizing special benefits to fire fighters, whether there can be dual recovery, and what constitutes a compensable activity.

1. Benefits.—The state legislature, recognizing the valuable service rendered to the community by fire fighters, has attempted to alleviate the consequences of the hazardous nature of their employment through special legislation allowing for increased worker’s compensation benefits. Section 64A of article 101 of the Maryland Code provides for increased benefits to fire fighters in two ways. First, it provides that fire fighters may receive payments from a pension fund without a reduction in worker’s compensation benefits.107 Second, when a benefit claim has been filed, it allows for a statutory presumption of compensability for any health problem caused by lung or heart diseases or hypertension.108 In two recent cases, the

106. Related Developments:

In Koontz v. Association of Classified Employees, 297 Md. 521, 467 A.2d 753 (1983) the court avoided consideration of a complaint by members of a school employees’ union alleging unfairness in the internal dealings of the union. Several delays in the trial resulted in the case being disposed of for mootness, since the employment agreement between the union and the school board, in which the complaining members allegedly had not had a voice, had already been implemented according to statute. The court noted, however, that the Md. Educ. Code Ann. § 6-511 (1978) (republished without change in 1985) allows the school board to make the final determination as to the specifics of an employment agreement in the event of budgetary constraints, as in this case, and that such determination could be implemented even if union ratification were invalid. The court did imply, however, that it could direct the board to consider the interests of certain employees prior to the implementation of the plan, but it remains to be seen whether the court will choose to adopt this dictum in a future case.

107. Any paid fire fighter or fire fighting instructor whose compensable claim results from a condition or impairment of health caused by lung diseases, heart diseases or hypertension . . . shall receive such benefits as are provided for in this article in addition to such benefits as he may be entitled to under the retirement system in which said fire fighter . . . was a participant at the time of his claim.


108. Any condition or impairment of health of any paid municipal . . . fire fighter . . . caused by lung diseases, heart diseases, or hypertension . . . resulting in total or partial disability or death shall be presumed to be compensable under this article and to have been suffered in the line of duty and as a result of his employment.
Court of Appeals considered problems regarding interpretation of section 64A.

In *Lovellette v. Mayor & City Council of Baltimore* the Court of Appeals examined the applicability of the statutory presumption of section 64A to a fire fighter who had retired following a heart attack. The issue was whether the statute could be construed to support a finding of occupational disease, even when the particular manifestation of heart disease would normally be characterized as an accidental injury. The fire fighter had suffered a disabling myocardial infarction while lifting an overhead door at the scene of a fire.

Both the lower court and the Court of Appeals admitted that, absent the presumption, such disability as the direct result of immediate sudden strenuous activity, with no prior manifestation of heart disease, would be characterized as an accidental injury. The lower court assumed such a finding would take the disability out of the reach of the presumption, but the Court of Appeals interpreted the legislative intent to permit a finding of occupational disease, and allowed the higher recovery.

*Lovellette* thus precludes any finding of accidental injury when heart or lung disease or hypertension manifests itself in a fire fighter, even if the manifestation is of a type that would ordinarily be compensable only as an accidental personal injury. Although the court characterized the section 64A presumption as a "rebuttable presumption of fact," it is difficult to conceive of a case involving heart or lung disease where accidental injury could be found. For all practical purposes, the presumption that such occupational disease was "suffered in the line of duty and as a result of his employment" is irrebuttable. However, the question still remained after *Lovellette* as to the force to be given to the presumption.

In *Montgomery County Fire Board v. Fisher*, the Court of Appeals

Id. § 64A(a).


110. Worker's compensation law defines "accident" to be broader than just trauma and to include strokes and heart attacks. See, e.g., Lord Baltimore Hotel v. Doyle, 192 Md. 507, 509, 64 A.2d 557, 558, cert. denied, 338 U.S. 817 (1949); see also Rieger v. Washington Suburban Sanitary Comm'n, 211 Md. 214, 216, 126 A.2d 598, 599 (1956) (injury only accidental when it results from unusual strain in condition of employment).

111. 297 Md. at 274, 465 A.2d at 1143.

112. Id. at 284, 465 A.2d at 1148.

113. Id. at 283-84, 465 A.2d at 1148.

114. Id. at 283, 465 A.2d at 1148.

115. Id. at 285, 465 A.2d at 1148.


determined that this presumption existed throughout the case as affirmative evidence, the burden of proof remaining on the employer.\textsuperscript{118} In this case, a fire fighter had a pre-existing heart condition and suffered two disabling incidents—the first, a heart attack while off-duty, and the second, a prolonged angina attack in the course of employment—and the court held that the section 64A presumption had been successfully rebutted as to the first incident but not as to the second incident.\textsuperscript{119} The court expressly rejected the Thayer-Wigmore ("bursting bubble") theory of presumptions, under which the presumption would have remained in effect only until the employer produced some evidence to rebut it, at which time the burden of proof would shift back to the claimant. The court reasoned that the legislature’s intent to give preferential treatment to fire fighters would be rendered impotent by such an easily rebuttable presumption. Thus the presumption was determined to be in the Morgan ("affirmative evidence") tradition.

*Fisher* and *Lovellette* together make it very likely that a fire fighter who suffers a heart attack during any job-related activity will be found to be entitled to compensation under section 64A. This is undoubtedly in accordance with the purpose of the statute. The costs of allowing additional recovery to possibly undeserving individuals may be offset by the ease of applicability of the rule and the resulting decrease in litigation costs.

2. *Dual Recovery.*—In *Ryder Truck Lines, Inc. v. Kennedy*,\textsuperscript{120} the Court of Appeals for the first time allowed actual dependents who were not lawfully related to a decedent employee to receive worker’s compensation benefits after a total compensation award had been made to the decedent’s lawful family by another court. Decedent, employed in Maryland, was killed in the course of employment in Virginia. He had two sets of dependents at the time of his death: a lawful wife and daughter who resided in Florida and were partially dependent, and a second family in Maryland who were actually fully dependent.\textsuperscript{121} Based on a presumption of total dependency under Virginia law, the lawful family was awarded total compensation.\textsuperscript{122} Both families filed claims in Maryland, where awards are based on actual dependency regardless of legal relationship.\textsuperscript{123}
In upholding the Commission's decision awarding total compensation to the Maryland family and denying compensation to the Florida family, the court interpreted for the first time the scope of article 101, section 21(c)(4) of the Maryland Code. The court determined that the purpose of the statute was to prevent a dependent or employee who had received an award in a different state from receiving an additional award in Maryland. Thus the statute did not apply to the Maryland dependents since they were not the same dependents who had received an award in Virginia. However, the statute did bar the lawful Florida family from receiving a Maryland award, since they had already received a total reward from the Virginia court.

The decision resulted in a kind of double recovery. Each set of dependants received an award of total compensation, obligating the employer to provide more dollars in benefits than the amount imposed by each state’s statutory maximum. The court used a balancing test in determining that the interests of the state and employer in preventing double recovery were outweighed by the overwhelming possibility that those persons the law was designed to protect would be denied protection as a result of irregularities in the law from state to state. Since the full faith and credit clause of the United States Constitution does not require a state to subordinate its own compensation policies to those of another state, a conflict between the compensation policies of two states may result, as it did here, in an employer being forced to honor two separate total awards for the same death or injury. Presumably the unusual set of facts required to create such a conflict will rarely arise.

3. Compensable Activities.—In City of Salisbury v. Parks, the Maryland Court of Special Appeals considered whether a cardiac rescue technician injured while participating in a voluntary training pro-

124. Md. Ann. Code art. 101, § 21(c)(4) (1979) states in pertinent part: "If an employee or the dependents of an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article."
125. 296 Md. at 539-40, 463 A.2d at 857.
126. Id. at 538-39, 463 A.2d at 856-57.
128. The court made it clear that employees having more than one set of dependents could be entitled to awards for each set. 296 Md. at 539-40, 463 A.2d at 857.
gram was entitled to worker's compensation. The court affirmed the jury's determination that the injury arose out of and in the course of employment. The court upheld the trial judge's instruction to the jury, which was based on the five-part test from Moore's Case. This test is usually applied in cases involving injuries occurring during employer-sponsored social or recreational activities. By extending the test to training program injuries, the court seems to be suggesting that all injuries that occur other than during regular working hours should be judged by the same standard when determining whether they were sustained within the scope of a worker's employment.

130. The plaintiff's employer, the City of Salisbury, encouraged the plaintiff and other cardiac rescue technicians to participate in various rescue training programs offered by the Maryland Fire and Rescue Institute. The plaintiff was injured while participating in such a course held after normal working hours but on city property. 57 Md. App. at 298-99, 469 A.2d at 1277.


132. 330 Mass. 1, 4-5, 110 N.E.2d 764, 766-67 (1953). In Sica v. Retail Credit Co., 245 Md. 606, 227 A.2d 33 (1967), the Maryland Court of Appeals considered the following five factors in determining that an employee injured during an employer-sponsored Christmas dance was not injured during an activity within the scope of her employment:

(1) the customary nature of the activity;
(2) the employer's encouragement or subsidization of the activity;
(3) the extent to which the employer managed or directed the recreational enterprise;
(4) the presence of substantial pressure or actual compulsion upon the employee to attend or participate; and
(5) the fact that the employer expected or received a benefit from the employee's participation in the activity.

Id. at 614-15, 227 A.2d at 37-38 (quoting Moore's Case, 330 Mass. 1, 4-5, 110 N.E.2d 764, 766-67 (1953)).

133. 57 Md. App. at 301, 469 A.2d at 1278.

134. Related Developments:

In Safeway Stores v. Altman, 296 Md. 486, 463 A.2d 829 (1983), the Court of Appeals held that a court may not enforce a proposed worker's compensation agreement when the claimant sought to withdraw from the agreement prior to Commission approval. Under Md. Ann. Code art. 101, § 52 (1979), claimants and employers may enter into agreements that provide for final settlement of claims. The court interpreted § 52 to require Commission approval for the settlement to become effective, and found that, under traditional common law principles, a contract had never been made. Thus, even though the Commission had made a belated finding that the proposed settlement was "fair and reasonable," the claimant's withdrawal from the agreement rendered it void.

In Continental Group v. Coppage, 58 Md. App. 184, 472 A.2d 1014 (1984), the Court of Special Appeals affirmed the basic notion that there is no special form or language in which the trial judge should instruct the jury on the issue of proximate cause in a worker's compensation case. Id. at 192, 472 A.2d at 1018. See also Bethlehem-Sparrows Point Shipyards v. Scherpenisse, 187 Md. 375, 382, 50 A.2d 256, 260 (1946); Larkin
D. Employment Discrimination

In Maryland Commission on Human Relations v. Bethlehem Steel Corp., a case involving an age discrimination claim, the Maryland Court of Appeals held that statutorily prescribed administrative and judicial remedies must be exhausted in cases involving the interpretation of an agency rule. The court had previously required the exhaustion of statutorily prescribed administrative and judicial remedies in cases involving the interpretation of statutory language, and it considered the exhaustion requirement equally appropriate with regard to interpretation of agency rules, since it would allow for the application of agency expertise.

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v. Smith, 183 Md. 274, 284, 37 A.2d 340, 344 (1944). Noting that the probable cause standard is more liberal in worker's compensation cases than in ordinary tort cases, 58 Md. App. at 190, 472 A.2d at 1017 (citing Paul Constr. Co. v. Powell, 200 Md. 168, 186, 88 A.2d 837, 846 (1952)), the court held that any instruction conveying the following idea is sufficient: "[T]he evidence must, at a minimum, establish beyond mere conjecture or guess that the injury could have caused the consequence and that there was no other intervening cause." Id. at 192, 472 A.2d at 1018. See also Montgomery County v. Athey, 227 Md. 312, 314, 176 A.2d 766, 767 (1962); Reeves Motor Co. v. Reeves, 204 Md. 576, 581, 105 A.2d 236, 239 (1954). Moreover, failure to include the words "probable" or "reasonably probable" is not reversible error. 58 Md. App. at 192, 472 A.2d at 1018.

In Miller v. Johns Hopkins Hosp., 57 Md. App. 135, 469 A.2d 466, cert. denied, 299 Md. 656, 474 A.2d 1345 (1984), the Court of Special Appeals rejected an attempt to make an employer liable under worker's compensation for an employee's injuries on public streets, when the employer has provided security patrols in recognition of a known risk. Id. at 142, 469 A.2d at 469. The court noted that no employer would provide security for its employees in a high crime area, if by so doing it would increase its liability. Petitioner based her argument on the "proximity rule," which allows for recovery where injuries are sustained as the result of a "special hazard" incident to travelling to and from work. But the court held that, since employees and non-employees alike were exposed to the same risks on public streets, there was no "special hazard" incident to petitioner's employment. Id. at 141-42, 469 A.2d at 469.


136. The case involved an age discrimination complaint filed by an employee who alleged that he was forced to retire at age 65 and that this constituted age discrimination. The Maryland Human Relations Commission investigated the complaint and issued a finding that there was no probable cause to believe Bethlehem had discriminated against the plaintiff. Id. at 587-88, 457 A.2d at 1147. The employee's complaint was dismissed, a reconsideration request was denied, an appeal to the circuit court was dismissed, and the plaintiff then requested reconsideration of the initial dismissal. Id. at 588, 457 A.2d at 1147-48.

137. Id. at 594, 457 A.2d at 1150.


139. 295 Md. at 592, 457 A.2d at 1149.

[Ag]ency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. A question concerning the interpretation of an agency's rule is as central to its operation as an interpretation of the agency's governing statute. Be-
The agency rule in question gave a party complaining of discriminatory treatment an opportunity to apply for reconsideration within thirty days of an adverse agency finding. The petitioner in this case, the Maryland Commission on Human Relations, had granted an application for reconsideration nearly one year after its finding that there was no probable cause to believe respondent Bethlehem had engaged in an illegal employment practice. In doing so, the Commission must have decided that the thirty-day requirement in the rule was directory rather than mandatory. Upon reconsideration of the complaint, the Commission amended its finding to state that there was probable cause to believe Bethlehem had discriminated against complainant. Before the complaint could be heard by a hearing examiner, Bethlehem sought judicial review, claiming the Commission had exceeded its jurisdiction and violated its rules.

Bethlehem maintained that it was not required to exhaust administrative remedies before seeking judicial review, arguing that cause the agency is best able to discern its intent in promulgating a regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute.

*Id.* at 593, 457 A.2d at 1150.

140. The rule provides in relevant part:

If the findings conclude that there is no probable cause to believe that a discriminatory act has been or is being committed, the complainant shall be given the opportunity to apply to the Commission's Executive Director for reconsideration of the administrative dismissal of the complaint. These applications shall be in writing, with notice to the respondent, shall state specifically the grounds upon which it is based, and shall be filed within 30 days from the date on which those findings were mailed or delivered to the complainant. When this application is made, the Executive Director shall review the entire file, and, in his discretion, shall grant or deny the application for reconsideration.


141. 295 Md. at 588-89, 457 A.2d at 1147-48.

142. *Id.*, 457 A.2d at 1147-48. The Executive Director inferred from the regulations that he had the discretion to reconsider the initial decision.

143. *Id.*, 457 A.2d at 1148.

144. *Id.* The Maryland Commission on Human Relations sought dismissal because Bethlehem's action prevented completion of the administrative proceedings. 

*Id.*

*Md. Ann. Code* art. 49B, §§ 10, 11 (1979 & Supp. 1984) establish that, if the Commission's staff finds probable cause to believe that a discriminatory act or acts have been committed, and if no agreement is reached for the elimination of the alleged discriminatory acts, a case is to be set for a hearing before a hearing examiner who is to render a decision. Article 49B, § 3(d) establishes that a party affected by a hearing examiner's decision may appeal to an "appellate panel of commissioners." Finally, article 49B, § 12(a) and article 41, § 255(a) establish that either the Commission or an aggrieved party may file an action for judicial review. Maryland Comm'n on Human Relations v. Mass Transit Admin., 294 Md. 225, 230, 449 A.2d 385, 387 (1982).

145. 295 Md. at 594-95, 457 A.2d at 1150-51.
this case fell within the recognized exceptions to the exhaustion of remedies doctrine.\(^\text{146}\) The Court of Appeals disagreed, holding that, when the interpretation of an agency rule is at issue, none of the limited exceptions to the doctrine of exhaustion of remedies applies.\(^\text{147}\) "Such a question ordinarily is and should be finally determined by the agency before recourse to the courts."\(^\text{148}\)

It is apparent from this decision that, even when a party to an administrative proceeding believes the agency has abused its discretion, that party must await final administrative action before recourse to the courts. But how is a party to know that there has been final administrative action entitling him to judicial review? In *Maryland Commission on Human Relations v. Baltimore Gas & Electric Co.*,\(^\text{149}\) the Maryland Court of Appeals for the first time defined "final administrative action."

In *Baltimore Gas & Electric Co.*, the Appeal Board for the Maryland Commission on Human Relations determined that the Baltimore Gas & Electric Company (BG&E) had engaged in a discriminatory practice when it refused to hire the spouse of an employee.\(^\text{150}\) The Appeal Board remanded the case to a hearing examiner, however, to decide if business necessity justified the refusal to hire.\(^\text{151}\) Before the hearing examiner could initiate further proceedings, BG&E filed a successful appeal to the Baltimore City Court (now the Circuit Court for Baltimore City),\(^\text{152}\) which remanded the

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146. Bethlehem contended that two of the exceptions discussed in Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1185 (1980), cert. denied, 449 U.S. 1083 (1981) were applicable. 295 Md. at 594-95, 457 A.2d at 1150-51.

Blumberg suggested that the doctrine of exhaustion of remedies is inapplicable when the issues presented do not require application of agency expertise or when the agency requires a party to follow an unauthorized procedure. 288 Md. at 285, 418 A.2d at 1161.

Bethlehem maintained that questions of agency jurisdiction do not require application of agency expertise and that the Commission's misinterpretation of its rule caused Bethlehem to engage in an unauthorized procedure. 295 Md. at 594-95, 457 A.2d at 1150-51.

147. 295 Md. at 596, 457 A.2d at 1151.

148. *Id.* at 595-96, 457 A.2d at 1151.

149. 296 Md. 46, 459 A.2d 205 (1983).

150. *Id.* at 49, 459 A.2d at 208.

151. *Id.*

152. *Id.* BG&E alleged that the Commission had violated Md. ADMIN. CODE tit. 14, § 14.03.01.09A(2)(d) (1974), which requires a complaint to be authorized by four commissioners. *Id.* The Commission moved to dismiss BG&E's appeal for failure to exhaust administrative remedies. 296 Md. at 49-50, 459 A.2d at 208. The trial court denied the Commission's motion and went on to find that the Commission did violate Md. ADMIN. CODE tit. 14, § 14.03.01.09A(2)(d) (1974). The Commission filed an appeal to the Court of Special Appeals. 296 Md. at 50, 459 A.2d at 208.
case to the Commission. The Commission appealed that remand, and certiorari was granted by the Court of Appeals before the Court of Special Appeals considered the matter. The issue before the Court of Appeals was whether the Appeal Board's order remanding the case to the hearing examiner constituted a "final decision" entitling BG&E to immediate judicial review.\(^{153}\)

The court once again stressed the importance of exhausting statutorily prescribed administrative and judicial remedies,\(^{154}\) but recognized that prior Maryland decisions had not adequately described the characteristics of final administrative action.\(^{155}\) The United States Supreme Court, however, has on numerous occasions discussed the essential characteristics of final agency action.\(^{156}\) The Maryland Court of Appeals looked to those decisions, as well as to its own decisions defining what constitutes the final order of a court,\(^{157}\) to develop an appropriate test. The court concluded that:

\[
\text{[O]rdinarily the action of an administrative agency, like the order of a court, is final if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their rights and interests in the subject matter in proceedings before the agency, thus leaving nothing further for the agency to do.}\(^{158}\)
\]

Applying the newly enunciated test to the facts in *Baltimore Gas & Electric Co.*, the court held that the order remanding the case to a hearing examiner was not a final administrative action.\(^{159}\)

\(^{153}\) 296 Md. at 47, 52, 459 A.2d at 207, 209.
\(^{154}\) *Id.* at 50, 459 A.2d at 208.

The decisions of an administrative agency are often of a discretionary nature, and frequently require an expertise which the agency can bring to bear in sifting the information presented to it. The agency should be afforded the initial opportunity to exercise that discretion and to apply that expertise. Furthermore, to permit interruption for purposes of judicial intervention at various stages of the administrative process might well undermine the very efficiency which the legislature intended to achieve in the first instance. Lastly, the courts might be called upon to decide issues which perhaps would never arise if the prescribed administrative remedies were followed. *Id.* at 51, 459 A.2d at 209 (quoting *Soley v. State of Md. Comm'n on Human Relations*, 277 Md. 521, 526, 356 A.2d 254, 257 (1976)).

\(^{155}\) 296 Md. at 53-54, 459 A.2d at 210.

\(^{157}\) 296 Md. at 52-56, 459 A.2d at 209-11.
\(^{158}\) *Id.* at 56, 459 A.2d at 211.
\(^{159}\) *Id.* at 58, 459 A.2d at 212.
The Appeal Board's order did not command Baltimore Gas & Electric to do or refrain from doing anything; did not grant or deny any benefit to which Baltimore Gas & Electric was entitled under the law; did not subject Baltimore Gas & Electric to any liability, civil or criminal; and did not change Baltimore Gas & Electric's existing or future status. Indeed, no legal consequence of any kind flowed from the Appeal Board's order. In short, the Appeal Board's order did not determine or conclude Baltimore Gas & Electric's rights and obligations. Those rights and obligations will not be determined until there has been further agency action.  

Accordingly, BG&E was not entitled to immediate judicial review.

E. Public Information

The Maryland Public Information Act gives the public a broad right of access to government information. The statute entitles the public to information regarding governmental affairs and "official acts of public officials and employees." Like its federal counterpart, the Freedom of Information Act (FOIA), the Public Information Act requires an agency to release public records to a

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160. Id. at 57-58, 459 A.2d at 212.
161. Id. at 58, 459 A.2d at 212.
162. Md. ANN. CODE art. 76A, §§ 1-6 (1980). The Act was repealed and recodified in the revised State Government Article of the Code. Act of May 8, 1984, ch. 284, 1984 Md. Laws 979 (codified at Md. STATE GOV'T CODE ANN. §§ 10-611 to -628 (1984)). There appear to be no significant substantive changes in the new legislation, although different language obviously may lead to different interpretations of the statute.
163. Id. § 10-612(a).
165. Md. STATE GOV'T CODE ANN. § 10-611 (1984) defines "public record" as:
   (1) the original or any copy of any documentary material that:
   (i) is made by a unit or instrumentality of the state government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business; and
   (ii) is in any form, including:
       1. a card;
       2. a computerized record;
       3. correspondence;
       4. a drawing;
       5. film or microfilm;
       6. a form;
       7. a map;
       8. a photograph or photostat;
       9. a recording; or
       10. a tape.
   (2) "Public record" includes a document that lists the salary of an employee of a unit or instrumentality of the State government or of a political subdivision.
requesting party, unless the requested records are protected by a statutory exemption. The Act, like FOIA, is intended to enhance government accountability and to foster an informed citizenry as a check against government corruption. In two recent cases, the Court of Appeals interpreted several sections of the Act to determine when an agency is subject to its disclosure requirements and when one of the statutory exemptions protects against disclosure. In a third case, the Court of Special Appeals looked at one aspect of the scope of the Act.

In *A. S. Abell Publishing Co. v. Mezzanote*, the Court of Appeals held that a quasi-public agency, the Maryland Insurance Guaranty Association (MIGA), is a state agency whose records are subject to public access under the Public Information Act. A reporter for *The Evening Sun*, owned by the appellant, A.S. Abell Publishing Company, had submitted a written request to inspect certain records of MIGA, pursuant to the Public Information Act. Mezzanote, Chairman of the Board of MIGA, denied access to the records, claiming that MIGA's status as a "non-profit unincorpo-

The definition of "public record" in § 10-611(f)(1)(ii) and (f)(2) differs slightly from that of the earlier statute: "unit or instrumentality of the State government" now replaces "agency or instrumentality of the State". MD. ANN. CODE art. 76A § 1(b) (1980).

166. The current exemptions under the Act are found in MD. STATE GOV'T CODE ANN. §§ 10-615 to -619 (1984). There are a number of categories of exemptions and three levels of exemptions; that is, there are records that a custodian must deny access to, may deny access to, or may deny access to on a temporary basis.


170. 297 Md. at 39, 464 A.2d at 1074.

171. The requested records, as indicated in the February 24, 1982 letter, were:

(a) MIGA budget and payroll data from the agency's inception, about 1971, to the present. These data should include a list of all employees, by name, with salary.

(b) All correspondence and memoranda between MIGA and the state insurance division, 1975 to the present.

(c) MIGA's selection of a claims adjusting firm and payments to that (or those) firms, since 1971. Included should be records related to the Free State adjusting company.

(d) Companies and individuals hired by MIGA since 1971, including consultants and attorneys. MIGA payments to these persons and firms should be included.

297 Md. at 29 n.2, 464 A.2d at 1069 n.2.
rated legal entity” rendered it beyond the purview of the Act. The trial court granted defendant’s summary judgment motion, concluding that MIGA was not a state agency or instrumentality within the scope of the Act. The Court of Appeals granted petitioner’s writ of certiorari before consideration by the Court of Special Appeals.

The Court of Appeals began by stating that the term “state agency” should be liberally construed “in order to effectuate the Public Information Act’s broad remedial purpose.” The court then examined the statutory provisions establishing MIGA. The purpose of the MIGA is to protect the public by providing “a mechanism for the prompt payment of covered claims under certain insurance policies” and by “avoid[ing] financial loss to claimants or policyholders because of the insolvency of [the] insurer.” MIGA’s autonomy is illustrated by its authority to issue a plan of operation for its administration, hire employees, borrow money, sue or be sued, enter into contracts, and perform other acts necessary to effectuate its purposes. MIGA is, however, partially controlled by the state through the actions of the State Insurance Commissioner of Maryland. The Commissioner appoints MIGA’s Board of Directors, approves the delegation of the Board’s powers, must approve the Board’s plan of operation, and may approve or revoke the Board’s designation of a member insurer as a servicing facility. MIGA is exempt from all state and local taxes except property taxes, and from liability from any action taken in

173. Mezzanote claimed exemption under two sections of the Act. First, that MIGA was not “a unit or instrumentality of the state,” Md. State Gov’t Code Ann. § 10-611(0(i), and in any case that the records were confidential and therefore exempt, id. § 10-615(1).
174. 297 Md. at 31, 464 A.2d at 1070.
175. Id. at 32, 464 A.2d at 1071.
178. Md. Ann. Code art. 48A, § 504(a). The scope of MIGA “shall apply to all kinds of direct insurance, except life insurance, health insurance, and annuities.” Id. § 504(b).
179. Id. § 504(a).
180. Id. § 509(a)(1).
181. Id. § 508(b)(1)-(5).
182. Id. § 507(a).
183. Id. § 509(d).
184. Id. § 509(a)(1).
185. Id. § 510(b)(3).
186. Id. § 515.
performance of its powers and duties.\(^{187}\)

The court rejected MIGA's contention that the determinative factor for state agency status is the presence or absence of complete control by the state.\(^{188}\) The court noted that previous decisions had established that no single factor could serve as the sole criterion in such a determination,\(^{189}\) and that \textit{Moberly v. Herboldsheimer}\(^{190}\) had shown that other factors besides degree of state control are important, including public purpose and immunity from tort liability.\(^{191}\)

The court concluded that MIGA is a state agency for purposes of the Public Information Act.\(^{192}\) The court based this holding on the entire relationship between MIGA and the state, including the degree of control exercised by the state, MIGA's public purpose, and MIGA's special tax and liability status.\(^{193}\) The opinion in \textit{Mezzanote} emphasizes that any quasi-public body is likely to be subject to the disclosure requirements of the Act.

In \textit{Faulk v. State's Attorney},\(^{194}\) the Court of Appeals was required to decide whether a defendant was entitled to disclosure of investigatory police reports compiled for law enforcement purposes. As initially enacted, the Public Information Act stated that the mandatory disclosure requirements did not apply to such investigatory records.\(^{195}\) In the 1978 amendments, the restriction against

\begin{footnotesize}
\begin{enumerate}
\item\(187.\) \textit{Id.} § 517.
\item\(188.\) 297 Md. at 34-37, 464 A.2d at 1072-74.
\item\(189.\) \textit{Id.} at 35, 464 A.2d at 1072 (citing \textit{Katz v. Washington Suburban Sanitary Comm'n}, 284 Md. 503, 510, 397 A.2d 1027, 1031 (1979) (relationship between state and governmental body must be examined in order to determine status as either a state agency or county or municipal agency for purposes of sovereign immunity); \textit{O&B, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n}, 279 Md. 459, 462, 369 A.2d 553, 555 (1977) (no single test exists for determining whether a governmental body is a state agency for purposes of sovereign immunity, but rather, it is necessary to examine the relationship between the state and the governmental entity to determine its status as either a state agency or a county or municipal agency); \textit{Board of Trustees v. John K. Ruff, Inc.}, 278 Md. 580, 587, 366 A.2d 360, 364 (1976).
\item\(190.\) 276 Md. 211, 345 A.2d 855 (1975).
\item\(191.\) \textit{Id.} at 214-16, 225, 345 A.2d at 857-58, 862-63. \textit{Moberly} involved the question of whether a particular hospital was a municipal agency within the scope of the Act. At the time, \textit{Md. Ann. Code} art. 76A, § 1(a) (1975) defined "public records" to include records made by municipalities as well as other political subdivisions. That section was amended by \textit{Act of May 29, 1978}, ch. 1006, 1978 Md. Laws 2887 to read "agency or instrumentality of the State, or of a political subdivision." The most recent recodification has further changed the definition to read "unit or instrumentality of the State government, or of a political subdivision." \\textit{Md. State Gov't Code Ann.} § 10-611(f)(i) (1984).
\item\(192.\) 297 Md. at 37-39, 464 A.2d at 1074-75.
\item\(193.\) \textit{Id.}
\item\(194.\) 299 Md. 493, 474 A.2d 880 (1984).
\item\(195.\) \textit{Id.} at 507, 474 A.2d at 887 (quoting \textit{Md. Code Ann.} art. 76A, § 3(b)(i) (1969 & Supp. 1970)).
\end{enumerate}
\end{footnotesize}
disclosure was eased; the exemption became applicable "only to the extent that the production of investigatory records would . . . interfere with valid and proper law enforcement proceedings." In Faulk, the court was given its first opportunity to interpret this amended exemption. In doing so, the court adopted the federal test, holding that a generic determination of interference may be made whenever a defendant in an ongoing criminal proceeding seeks access to investigatory police reports relating to that proceeding.

Following his grand jury indictment for burglary, petitioner Faulk filed a request for discovery for production of the investigatory police reports made of his alleged criminal offenses. When his request was denied, Faulk sought access to the reports under the provisions of the Public Information Act. The State's refusal to comply was upheld by the trial court, which dismissed Faulk's request despite the State's failure to present at a hearing any specific evidence that disclosure of the reports would interfere with the then pending criminal proceedings. The Court of Appeals granted petitioner's writ of certiorari to consider whether, as petitioner con-

196. Act of May 29, 1978, ch. 1006, 1978 Md. Laws 2887 (then codified at Md. Code Ann. art. 76A, § 3(b)(i)(A) (1980)). In addition to § 3(b)(i)(A) ("interfere with valid and proper law-enforcement proceedings,"), id. § 3(b)(i)(B)-(G) provide that the right to inspect the records may be denied only to the extent that the production of them would . . . (B) deprive another person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, (F) prejudice any investigation, or (G) endanger the life or physical safety of any person.


197. 299 Md. at 511, 474 A.2d at 889-90.

198. Id. at 497, 474 A.2d at 882. Md. R.P. 741(b)(5) states in pertinent part: "Upon the request of the defendant, the State shall . . . [p]roduce and permit the defendant to inspect and copy any books, papers, documents, recordings, or photographs which the State intends to use at the hearing or trial . . . ."

199. 299 Md. at 497, 474 A.2d at 882. Md. Ann. Code art. 76A, § 1A (1980) provided in pertinent part: "[A]ll persons are entitled to information regarding the affairs of government and the official acts of those who represent them as public officials and employees. To this end, the provisions of this act shall be construed in every instance with the view toward public access . . . ." This section now appears, in substantially the same form, at Md. State Gov't Code Ann. § 10-612(a), (b) (1984).

200. 299 Md. at 498, 474 A.2d at 883. Under the Public Information Act, an individual denied access is entitled to expedited judicial review. Md. Ann. Code art. 76A, § 5(b)(3) (1980) provides: "Except as to cases the court considers of greater importance proceedings before the court, as authorized by this section, and appeals therefrom shall take precedence on the docket over all other cases and shall be heard at the earliest practicable date and expedited in every way." Subsections 5(b)(1) and (b)(3) now ap-
tended, the State must present particularized evidence showing that the disclosure of such reports would interfere with the pending criminal proceedings, or whether, as the State contended, a generic determination of interference can be made when a defendant in an ongoing criminal proceeding seeks access to investigatory police reports relating to that proceeding.\(^{201}\)

In affirming the decisions of the lower courts, the Court of Appeals looked to the interpretation of the federal Freedom of Information Act,\(^{202}\) because its language and purpose parallel those of the Public Information Act.\(^{203}\)

The United States Supreme Court interpreted FOIA's exemption in *NLRB v. Robbins Tire & Rubber Co.*\(^{204}\) by balancing FOIA's basic policy in favor of disclosure against the potential harm that might result from premature disclosure of information affecting a pending proceeding.\(^{205}\) The Court of Appeals in *Faulk* applied a similar balancing test. The court determined that disclosure of investigatory police reports would interfere with law enforcement proceedings, by giving a defendant earlier or more extensive access to the State's case than he would otherwise have under normal discovery rules.\(^{206}\) Moreover, disclosure would create a substantial likelihood of delay in the adjudication of criminal proceedings, due to

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\(^{201}\) 201. 299 Md. at 498, 474 A.2d at 883.


\(^{203}\) 203. The statutory exemptions of FOIA and the Act developed similarly. Like the Act, FOIA contained an original exemption providing that the otherwise mandatory disclosure requirements did not apply to investigatory files compiled for law enforcement purposes, 5 U.S.C. § 552 (Supp. III 1965-69); that exemption was later limited by a requirement that investigatory records compiled for law enforcement purposes could only be withheld to “the extent that the production of such records would . . . interfere with enforcement proceedings.” Pub. L. No. 93-502, § 2, 88 Stat. 1561, 1563 (1974) (codified at 5 U.S.C. § 552(b)(7) (1980 & Supp. 1984)).

\(^{204}\) 204. 437 U.S. 214 (1978).

\(^{205}\) 205. The Court determined that disclosure of witnesses' statements during the pendency of an unfair labor practice proceeding would substantially alter the National Labor Relations Board's substantive discovery rules and cause substantial delays in the adjudication of unfair labor practice charges. The Supreme Court concluded that because the disclosure necessarily would interfere with a pending proceeding, 437 U.S. at 236-38, and because FOIA's purpose would not be defeated by deferring disclosure until completion of the proceeding, *id.* at 241, the NLRB was not required to present particularized evidence showing interference. Rather, a generic determination could be made in place of a case-by-case showing. *Id.* at 242-43.

\(^{206}\) 206. 299 Md. at 509, 474 A.2d at 889. The Supreme Court in *Robbins* had reached a similar conclusion:

*P*rehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an "interference" with NLRB enforce-
the special provision allowing for immediate review of the denial of a Public Information Act request.\textsuperscript{207}

The court noted that the Act's purpose would not be defeated by deferring disclosure until the completion of the criminal proceeding and concluded that "the strong presumption in favor of a disclosure under [the Act] is outweighed by the likelihood that the disclosure of investigatory police reports to a defendant in a pending criminal proceeding would disturb the existing balance of relations in criminal proceedings."\textsuperscript{208} Consequently, the court held that a generic determination of interference can be made whenever a defendant in an ongoing criminal proceeding seeks access to investigatory police reports relating to that pending process.\textsuperscript{209}

In \textit{Kline v. Fuller},\textsuperscript{210} the Court of Special Appeals held that public records\textsuperscript{211} in the hands of a state official, regardless of whether the records pertain to matters within that official's jurisdiction, are subject to the access provisions of the Public Information Act, even if, in the hands of local officials, the records may also be subject to the County Freedom of Information Act\textsuperscript{212} (a public local law).\textsuperscript{213}

The court further held that an action for judicial review of an agency's denial of a request for records may be brought within two

\textsuperscript{207} Md. Ann. Code art. 76A, § 5(b)(3) (1980) (now codified at Md. State Gov't Code Ann. § 10-623(c) (1984)) allows a public official's denial of a Public Information Act request to be immediately reviewed by a circuit court and, if desired, appealed. This provision is in marked contrast to ordinary discovery rulings which, because of their interlocutory nature, are not appealable until there is a final judgment.

\textsuperscript{208} 299 Md. at 510-11, 474 A.2d at 889.

\textsuperscript{209} Id. at 511, 474 A.2d at 889.

\textsuperscript{210} 56 Md. App. 294, 467 A.2d 786 (1983).

\textsuperscript{211} For the definition of public records used by the court, see Md. Ann. Code art. 76A, § 1(b) (1980) (repealed and recodified with stylistic changes not pertinent to the issue in \textit{Kline} at Md. State Gov't Code Ann. § 10-611(f) (1984)).


\textsuperscript{213} 56 Md. App. at 304, 467 A.2d at 791.
years.\textsuperscript{214}

The action originated when Kline, a disgruntled employee of the Charles County sheriff's office, requested permission of the sheriff to inspect and copy various categories of documents.\textsuperscript{215} The sheriff permitted access to only a portion of the requested records. Approximately four months later, Kline sought an order to produce records pertaining to promotion methods and correspondence between the sheriff and the local lodge of the Fraternal Order of Police.\textsuperscript{216} Moving to dismiss, the sheriff argued that the Charles County Freedom of Information Act was the applicable law,\textsuperscript{217} and that this Act specifies administrative remedies which must be exhausted before judicial review is available. The court agreed and granted the sheriff's motion to dismiss.\textsuperscript{218}

The Court of Special Appeals determined that the circuit court had erred in not applying the Public Information Act.\textsuperscript{219} It was not necessary for Kline to exhaust the additional administrative remedies required by the Charles County Freedom of Information Act before seeking judicial review.\textsuperscript{220}

The court further held that Kline's petition for judicial review was timely filed even though it was filed more than thirty days after final denial of his request.\textsuperscript{221} Recognizing an apparent conflict between two applicable provisions,\textsuperscript{222} the court considered whether section 5-110 of the Courts and Judicial Proceedings Article, which allows two years, was applicable to actions brought solely for production of documents without an accompanying request for money damages,\textsuperscript{223} or whether such an action would be governed only by Maryland Rule B4a.\textsuperscript{224} The court found that "it would be anomalous . . . to impose different time requirements depending on whether the applicant seeks" monetary relief in addition to pro-

\begin{itemize}
\item \textsuperscript{214} Id. at 309, 467 A.2d at 794.
\item \textsuperscript{215} Kline made his request "pursuant to Art. 76A of the Anno. Code." Id. at 302, 467 A.2d at 790.
\item \textsuperscript{216} Id. at 302-03, 467 A.2d at 790-91.
\item \textsuperscript{217} Id. at 303, 467 A.2d at 791.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. at 309, 467 A.2d at 794.
\item \textsuperscript{222} See Md. Cts. & Jud. Proc. Code Ann. § 5-110 (1984) (two-year statute of limitations for such actions); Md. R.P. B4(a) (requiring appeals from final administrative actions to be brought within 30 days).
\item \textsuperscript{223} 56 Md. App. at 308-09, 467 A.2d at 793-94.
\item \textsuperscript{224} Id. at 308, 467 A.2d at 793.
\item \textsuperscript{225} Id. at 309, 467 A.2d at 794.
\end{itemize}
duction of the documents. "Such a construction would, in fact, lead to the mischievous result of encouraging applicants to seek money damages against government officials and agencies when all they really want are the documents." The court therefore held that section 5-110 is applicable to an action to compel production of documents.

F. Government Contracts

Maryland courts addressed several issues in cases involving government contracts. The Court of Appeals in State v. Roger E. Holtman & Assocs. considered whether the sovereign immunity defense was available to the State, when it had entered into a letter agreement with an architect after the effective date of a statute waiving sovereign immunity in contract actions. The outcome depended on whether the written agreement between the State and the architect constituted a separate contractual undertaking independent of earlier, but related, agreements between the two parties, which were effected prior to the abrogation of sovereign immunity. The court held that the letter agreement was a separate contract, and that, therefore, the statutory waiver of sovereign immunity applied.

The original written agreement between Holtman and the state was executed and performed by both parties in 1971. In 1972 the state requested Holtman to do additional work, which was also completed and paid for. The request was made in a letter. After state legislation prohibiting state governmental entities from claiming sovereign immunity in written contract actions became effective in July 1, 1976, the state again, by letter, asked Holtman to perform further work. When the work was completed, a dispute arose as to the amount of compensation and a contract action was initiated.

226. Id.
227. Id. at 308, 467 A.2d at 793-94.
228. 296 Md. 403, 463 A.2d 803 (1983).
229. Id. at 411, 463 A.2d at 807. Act of May 4, 1976, ch. 450, 1976 Md. Laws 1180 was codified as Md. Ann. Code art. 21, §§ 7-101 to -104 (1981), and prohibited, inter alia, the State of Maryland, from asserting the sovereign immunity defense "in an action in contract based upon a written contract executed on behalf of the State." Section 7-101 of the statute provides that the statute "shall not apply to any action based on a contract entered into or executed prior to the effective date of this Act," i.e., July 1, 1976. Sections 7-101 to -164 have been recodified without substantive change at Md. STATE GOVT CODE ANN. §§ 12-201 to -204 (1984).
230. 296 Md. at 410-11, 463 A.2d at 807.
231. Id. at 405-06, 463 A.2d at 806.
232. Id. at 406-08, 463 A.2d at 805-06.
The trial court dismissed Holtman's complaint on sovereign immunity grounds; that dismissal was reversed by the Court of Special Appeals.\(^\text{233}\)

Utilizing standard contract law principles, the Court of Appeals affirmed the decision of the Court of Special Appeals.\(^\text{234}\) It rejected the State's contention that each of the latter two services performed by Holtman was merely an "extension" of the original agreement, and that therefore all laws governing state contracts at the formation of the parent contract applied to those subsequent agreements. The court reasoned that the "extensions" would be separate contracts if, under the initial agreement, the parties had no contractual responsibility to undertake any additional work.\(^\text{235}\) Because both prior agreements had been completed, neither party had any legal obligation to the other as of the date of the third agreement, and the third agreement thus constituted a separate contract. Because the commencement date of the contract was November 5, 1976, the contract fell within the prospective application of the July 1, 1976 statute waiving sovereign immunity as a defense in contract actions.

The Court of Special Appeals explored at some length the functioning of Maryland procurement law in *Kennedy Temporaries v. Comptroller of the Treasury*.\(^\text{237}\) In *Kennedy*, the court held that an unsuccessful bidder on a state contract who had failed to comply with the statutory and regulatory requirements of bid proposals lacked standing to challenge the award to the successful bidder.\(^\text{238}\) In reaching that determination, the court explained the functioning of the bid procurement process and the remedies available to an unsuccessful bidder.

Plaintiff Kennedy Temporaries (Kennedy) submitted a bid for a state contract to provide temporary personnel to process tax returns over a six-month period. Kennedy furnished the required bid secur-

\(^{233}\) Id. at 408, 463 A.2d at 806.
\(^{234}\) Id. at 411, 463 A.2d at 807.
\(^{235}\) Id. at 410, 463 A.2d at 807. The court also looked to the fact that the earliest and latest agreements involved different parties. Roger Holtman was the contractor in the earliest agreement with the state. His subsequent incorporation under the business name of Roger E. Holtman & Associates, Ltd. was not reflected in any of the later contractual agreements with the state. Id. at 407, 410, 463 A.2d at 805, 807.
\(^{236}\) The court had previously determined that the legislature intended that the statute be given a purely prospective application, "measured by the commencement date of the contract sued upon, determined as a matter of fact." John McShain, Inc. v. State, 287 Md. 297, 301, 411 A.2d 1048, 1050 (1980).
\(^{238}\) Id. at 37-39, 468 A.2d 1033-34.
ity in the form of a bank letter guaranteeing collateral against performance. Kennedy was underbid on the contract by Bay Services, Inc., whose bid security, although in proper form, was slightly less than the required five percent of its bid. Kennedy filed a complaint, alleging that the contract was improperly awarded to Bay Services; that complaint was heard by the procurement officer of the Board of Public Works, the Board of Contract Ap-

239. Md. Ann. Code art. 21, § 3-504(a) (1981 & Supp. 1983) provides: “Each bidder or offeror shall give a bid bond if the contract price is estimated by the procurement officer to exceed $25,000.” Kennedy’s bid was $621,502. 57 Md. App. at 30, 468 A.2d at 1030. The Code’s 1984 Supplement sets forth subsequent amendments to § 3-504, which raise the amount required and make other additions not relevant to the issues in Kennedy.

240. Md. Ann. Code art. 21, § 3-504(a) (1981 & Supp. 1983) provides: “[B]id bonds shall be provided by a surety company authorized to do business in this State, or the equivalent in cash, or in a form satisfactory to the procurement officer.” Md. Admin. Code tit. 21, § 21.06.07.01B(1)-(3) (1981) further states that the form of the bid security shall be limited to

(1) A bond in a form satisfactory to the State underwritten by a company licensed to issue bonds in this State;

(2) A bank certified check, bank cashier’s check, bank treasurer’s check, cash, or a trust account; or

(3) Pledge of securities backed by full faith and credit of the United States government or bonds issued by the State of Maryland.

The memorandum accompanying the invitation to bid, which included the above statutory and regulatory guidelines, stipulated that “failure to provide an acceptable bid security with the bid when required shall result in the bid being rejected” (emphasis in the original), quoted in 57 Md. App. at 30, 468 A.2d at 1029.

241. Md. Ann. Code art. 21, § 3-504(b) (1981 & Supp. 1983) provides: “The bid bond shall be in an amount equal to at least 5 percent of the amount of the bid or price proposal.” Bay Services, Inc. underbid Kennedy by approximately $13,000. Its bid was accompanied by a bid bond in the amount of $30,000, which was $407.95 short of five percent of its bid. 57 Md. App. at 30, 468 A.2d at 1029-30.

242. The procurement officer upheld the award to Bay Services on the basis of Md. Admin. Code tit. 21, § 21.06.07.02B(2) (1981). This regulation permits the failure to comply with bid security requirements to be considered “nonsubstantial” when “[t]he amount of the bid security submitted, though less than the amount required by the invitation for bids, is equal to or greater than the difference in the price stated in the next higher acceptable bid . . . .” Because the $30,000 bid bond filed by Bay Services was greater in amount than the $13,000 difference between its bid of $608,159 and that of Kennedy at $621,502, the procurement officer concluded that the deficiency was “nonsubstantial” and would therefore be excused altogether. 57 Md. App. at 32, 468 A.2d at 1030.

Ordinarily the procurement officer’s decision to award a contract is sufficient. However, in service contracts involving over $100,000, the procurement officer’s decision serves only as a recommendation to the Board of Public Works, which retains ultimate approval authority on such contracts. See Md. Admin. Code tit. 21, §§ 21.01.02.03 - .07 (1981). In this case, the officer’s recommendation to the Board of Public Works to award the contract to Bay Services was subsequently approved, despite Kennedy’s arguments before the Board. 57 Md. App. at 33, 468 A.2d at 1031.
peals, and the Baltimore City Circuit Court before reaching the Court of Special Appeals.

The court applied a "clean hands doctrine" in reaching its decision, stating: "If a disappointed bidder expects to hold the state to strict and literal compliance with all of the procedural requirements of the procurement law, he too must comply with the law." In this case, the court judged that Kennedy had not complied with the law in two fundamental respects: (1) he had not submitted a satisfactory instrument as bid security; and (2) he had failed to pursue his administrative remedy in conformance with the statutory provisions governing procurement dispute resolution.

The court determined that the bank letter accompanying Kennedy's bid did not qualify as proper bid security because the pledge of collateral was against "performance" rather than loss by virtue of default, and because it was not backed by the full faith and credit of the United States or the State of Maryland. The court concluded that if, as Kennedy contended, the procurement officer lacked the authority to waive the deficiency of the Bay Services' bid bond, he similarly lacked the authority to waive the inadequacy of Kennedy's letter as a proper bid bond.

The court also found that Kennedy had not acted within the seven-day regulatory time limit for protesting an award to a successful bidder, and that the seven-day requirement could not have been waived by the procurement officer. The requirement was more than an internal agency procedure; in triggering the dispute resolution process, it had substantial impact on the other parties.

243. The circuit court determined that Md. Admin. Code tit. 21, § 21.06.07.02(B) (1981), see supra note 242, was an improper extension of the procurement officer's administrative authority, and was thus null and void. 57 Md. App. at 36, 468 A.2d at 1032-33. The Court of Special Appeals refused to address the validity of the regulation, preferring instead to base its decision on Kennedy's lack of standing as a nonresponsive bidder. The question of Kennedy's standing was raised but not decided in the circuit court. Id. at 37 n.4, 468 A.2d at 1033 n.4.

244. 57 Md. App. at 37, 468 A.2d at 1033.


246. 57 Md. App. at 39, 468 A.2d at 1034. As a very limited kind of performance bond, a bid bond is designed to assure only that a bidder, if successful, will in fact enter into the contract he has bid on, and to provide a secure fund to compensate the state if the bidder defaults in executing the contract. The pledge of collateral in the bank letter was against performance should Kennedy's bid be accepted, not specifically against loss occurring by virtue of a default in entering into the contract.

247. 57 Md. App. at 39, 468 A.2d at 1034.

248. Id. at 40, 468 A.2d at 1034-35.

249. The dispute resolution process in procurement law involves four steps: (1) review by the procurement officer; (2) review of the procurement officer's decision by the
as well, particularly upon the would-be successful bidder. Moreover, the requirement was externally imposed by other agencies pursuant to clear statutory authority. Accordingly, the court found that there was no legal authority for the officer to waive the requirement.  

Kennedy had also failed to adhere to the statutory time limits and to proper procedures for appealing his case to the Board of Contract Appeals; this inaction amounted to a waiver of his right to an appeal. Consequently, the court held that Kennedy's appeal to the Board of Contract Appeals should have been dismissed.

G. State and Local Government

In State v. Mayor & City Council of Baltimore, the Court of Appeals held the City of Baltimore liable to the clerk of the Criminal Court (now Circuit Court) of Baltimore and to the State of Maryland for court costs incurred in criminal proceedings in which the charges are disposed of in the accused's favor or the accused is convicted but is indigent.

The State and the clerk brought this action in the Superior Court (now Circuit Court) of Baltimore City when the city refused to pay a total of more than two million dollars in such criminal court costs billed to it over a period of approximately five years. The State argued that article 38, section 4A of the Maryland Code, as
well as the common law,\textsuperscript{258} required the city to pay the costs and fees at issue. The city denied liability and sought an order requiring the State to pay $119,490 admittedly owed the city but withheld by the State Comptroller.\textsuperscript{259} The trial court held that the city was not liable and ordered the State to pay the $119,490.\textsuperscript{260}

The Court of Appeals reversed,\textsuperscript{261} relying on Maryland Code article 38, section 4A, the present codification of a statute enacted in 1781 and substantially unchanged since.\textsuperscript{262} This statute relieves the accused of the burden of paying costs and fees incurred in criminal proceedings when the charges are disposed of in his favor, and places that burden on the county holding the trial. Baltimore City's liability for such costs and fees was recognized in the 1920 case of \textit{Mayor & City Council of Baltimore v. Pattison}.\textsuperscript{263} Pattison also recognized the liability of the city, under Maryland common law, to pay criminal court costs and fees when the defendant is convicted but is indigent.\textsuperscript{264}

The city had successfully argued in the trial court that section 7-202(b) of the Courts and Judicial Proceedings Article\textsuperscript{265} exempted the city from liability,\textsuperscript{266} and that section 2-504 of the Courts and Judicial Proceedings Article\textsuperscript{267} abrogates both article 38, section 4A and the Pattison common law rule.\textsuperscript{268}

Rejecting both arguments, the Court of Appeals held that the

\begin{itemize}
\item \textsuperscript{258} See Mayor & City Council of Baltimore v. Pattison, 136 Md. 64, 110 A. 106 (1920) (imposing liability on the city); Mayor & City Council of Baltimore v. O'Conor, 147 Md. 639, 128 A. 759 (1925) (holding unconstitutional ch. 576 of the Acts of 1924, an act designed to change the Pattison rule as it applied to Baltimore City only).
\item \textsuperscript{259} 296 Md. at 69, 459 A.2d at 586. The Comptroller had withheld the money, which was owed to the city in connection with other matters, as a result of the city's refusal to reimburse the State for the criminal court costs. \textit{Id.}
\item \textsuperscript{260} Id. at 69-70, 459 A.2d at 586.
\end{itemize}
exemption embodied in section 7-202(b) applies only when the city or counties are parties to the proceedings. The court also held that there is no inconsistency between section 2-504 and article 38, section 4A or Pattison, stating: "The two statutes are concerned with totally different issues relating to fees and costs." The court refused to overrule Pattison, a decision that has "remained undisturbed for over fifty years."

The Court of Special Appeals also reviewed a case involving the issue of public expenditures for court costs. In Bowling v. Brown, the court considered whether a local government may pay for legal expenses incurred by government employees in defending against criminal charges arising from actions outside the scope of their authority or employment. Finding that a resolution by municipal officials approving such reimbursement of two municipal employees was an ultra vires act, the court held the defendant municipal officials personally liable for the money spent.

In reaching this decision, the court first considered whether the expenditure had been made for a public purpose. Defining a public purpose as one that promotes "public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents within the municipal corporation," the court found that the expenditure was not for such a purpose because the public at large did not enjoy the benefit of the expenditure. Although reimbursement for legal expenses arising from charges based upon acts that occur in the performance of official public duties are expenditures for a public purpose, the charges

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269. 296 Md. at 74-75, 459 A.2d at 588-89.
270. Id. at 77, 459 A.2d at 589.
271. Id. at 77-78, 459 A.2d at 590.
273. Id. at 262, 469 A.2d at 903. The two defendants, councilmen for the town of LaPlata in Charles County, approved a resolution to reimburse two town employees for legal expenses incurred in their defense of charges of criminal misconduct stemming from their use of a town secretary for personal business matters. All parties conceded that the two town employees acted beyond the scope of their employment. Id. at 253-55, 469 A.2d at 898-900.
274. Id. at 267, 469 A.2d at 906.
275. Id. at 258, 469 A.2d at 901.
276. Id. at 259, 469 A.2d at 902 (citing City of Frostburg v. Jenkins, 215 Md. 9, 16, 136 A.2d 852, 855-56 (1957) (to qualify as a public purpose an expenditure must be made for the good of the government and must benefit the community so as to bear a substantial relationship to the public welfare); Sommers v. City of Flint, 355 Mich. 622, 96 N.W.2d 119 (1959)).
277. Id.
in this case arose from acts outside the scope of employment, and consequently there was no benefit to the public in paying for the employee's defense.

Because the expenditures were not made for a public purpose, the court held that the defendants had the burden of proving they should not be personally liable for the amounts expended. Defendants argued they should not be personally liable, based on the defenses of immunity for discretionary acts and good faith. The court found that the immunity defense would not apply because the act in question was ultra vires and thus not a discretionary act within the scope of defendants' employment.

As for the argument that the defendants had acted in good faith, the court found that the case of Gloyd v. Talbott had established a standard of strict liability for such conduct, and the court declined to consider the adoption of a good faith standard because the defendants had failed to present sufficient evidence of good faith to raise the issue. A careful reading of Gloyd, however, reveals no express language establishing a strict liability standard. Moreover, subsequent cases citing Gloyd have not articu-
lated such a standard.\textsuperscript{285} If the strict liability standard is a correct statement of the Maryland law, the court should clarify the derivation of the standard.

\textit{H. Other Developments}

1. \textit{Election Procedures.---}\textsuperscript{286} In Burroughs v. Raynor,\textsuperscript{286} the Maryland Court of Special Appeals interpreted for the first time the present version of the statute granting authority to the Board of Supervisors of Elections of each county and Baltimore City to determine the sufficiency of a candidate's nominating petition.\textsuperscript{287} The effect of the decision is to validate the expanded authority granted by the statute. The court held that the Board of Supervisors of Elections of Baltimore City has the power not only to count the number of names on a candidate's nominating petition, but to determine whether those names are in fact the names of registered voters eligible to vote for the candidate submitting the petition, and to keep the candidate's name off the ballot if the petition is not signed by the requisite number of registered voters.\textsuperscript{288}

The appellants,\textsuperscript{289} relying upon Tawney v. Board of Supervisors of

\begin{itemize}
\item \textsuperscript{285} See, e.g., Central Collection Unit v. Atlantic Container Line, 277 Md. 626, 629, 356 A.2d 555, 557 (1976) (citing Gloyd for the proposition that the statute of limitations will run in a derivative action brought by a taxpayer of a municipality against town officials); Goldberg v. Howard County Welfare Bd., 260 Md. 351, 357, 272 A.2d 397, 400 (1971) (citing Gloyd to support the proposition that statute of limitations may be interposed in a derivative suit brought by a taxpayer to recover an illegal diversion of public funds).
\item \textsuperscript{286} MD. ANN. CODE art. 33, § 7-1 (1983 & Supp. 1984). The statute requires nominating petitions to be "signed by not less than three percent of the registered voters who are eligible to vote for the office for which the nomination by petition is sought." \textit{Id.} § 7-1(b)(2). The statute further provides that "[t]he board shall verify all legitimate signatures of persons who are registered voters and who have signed a [nominating] petition." \textit{Id.} § 7-1(g)(1). \textit{See also id.} § 7-1(g)(3). "If the required number of signatures is not properly appended to a petition . . . it shall be declared insufficient, and the name of the proposed candidate may not be placed on the ballot." \textit{Id.} § 7-1(l). \textit{See id.} § 7-1 (Supp. 1984) (minor amendments to other parts of § 7-1).
\item \textsuperscript{288} 56 Md. App. at 432, 468 A.2d at 141.
\item \textsuperscript{289} Appellants Leo W. Burroughs, Jr. and Rommani M. Amenu-El sought election to the Baltimore City Council as independant candidates from the Fifth Councilmanic District. In an effort to have their names placed on the ballot, each filed a nominating petition with the Board of Supervisors of Elections. After verifying the names of the voters signing the appellants' petitions, the Board concluded that neither contained the required number of signatures of voters registered to vote in the Fifth District. Appel-
argued that the Board's authority is limited to counting the number of names on a nominating petition and, accordingly, that the Board is required to certify any petition that contains the minimum number of names, without considering whether the persons signing the petition are actually registered voters. In rejecting this contention, the court noted that the present statute confers far greater authority upon the Board than its predecessor, considered in Tawney. The court found the present wording of the statute to be unambiguous and concluded that the plain language of the statute expressly allows the Board to verify the registered voter status of those persons signing a nominating petition. In so doing, the court essentially adopted an earlier interpretation of the statute by the Maryland Attorney General.

The court also rejected the appellants' argument that the legislature had unconstitutionally vested a judicial function in the executive branch by delegating to the Board the power to verify petition signatures. The court reaffirmed the basic principle that delegation of a fact-finding function to an administrative body, even

lants then filed a petition for mandamus, requesting that their names be placed on the ballot. The petition was denied by the circuit court. Id. at 434-35, 468 A.2d at 142.

The Court of Appeals in Tawney, interpreting an earlier version of the same statute involved in Burroughs, concluded that the Board of Election Supervisors' function is limited to examining nominating petitions to see if they are regular on their face and contain the requisite number of names. Beyond that, they have no authority to go. Their duties are entirely ministerial, and when they find the requisite number of names on a petition which is in all respects regular, their duty is to place the name of the candidate so nominated on the ballot. Id. at 128, 81 A.2d at 213.

Under former article 33, the Board's authority was limited to having "printed on the ballots the name of every candidate whose name has been certified to or filed with the proper officers" (§ 62) accompanied by the signatures of the required number of voters "residing in the political division in and for which the officer is to be elected" (§ 39). Md. Ann. Code art. 33, §§ 39, 62 (Supp. 1947) (codified as amended at Md. Ann. Code art. 33, § 7-1 (1983 & Supp. 1984)).

The Attorney General concluded that signature verification requires three basic substantive determinations: (1) is the person a registered voter of the appropriate jurisdiction; (2) has the person signed more than once for the same nominee; and (3) has the person signed petitions on behalf of more than one nominee for the same office. 58 Op. Md. Att'y Gen. 313, 314 (1973).

The Court of Appeals in Tawney had sug-
though the function is possibly quasi-judicial in nature,\textsuperscript{297} is not an unconstitutional usurpation of judicial powers, when, as in this instance, the administrative action is subject to judicial review.\textsuperscript{298}

2. \textit{Professional Standards}.—The Court of Appeals considered a number of cases relating to membership in the Bar. Most of the cases involved disciplinary actions against existing members of the bar for misconduct and required interpretation of a number of provisions of the Disciplinary Rules of the Code of Professional Responsibility.\textsuperscript{299} One case, however, dealt with the question of whether someone previously convicted of a number of felonies currently possesses the moral character necessary for admission to the Bar of Maryland. In \textit{In re Application of James G.},\textsuperscript{300} the court affirmed the notion that evidence of present good moral character can overcome evidence of prior criminal conduct to allow admission of an applicant to the Maryland Bar, even when the applicant's prior acts were crimes of deceit.

The applicant in this case had been a member of the District of Columbia Bar for two years without incident, and presented numerous letters in support of his application. His criminal record consisted of convictions of forgery and uttering and assault, as well as indictments for other crimes.\textsuperscript{301} These events had occurred within a short period of time, sixteen years prior to his application. The

\textsuperscript{297} Cf. White v. Laird, 127 Md. 120, 123, 96 A. 318, 319 (1915) (power of election board to conduct recount and to determine whether particular ballots should or should not be counted is quasi-judicial in nature).

\textsuperscript{298} 56 Md. App. at 441, 468 A.2d at 145. \textit{See, e.g.,} Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945).


\textsuperscript{300} 296 Md. 310, 462 A.2d 1198 (1983).

\textsuperscript{301} Applicant received a suspended sentence after pleading nolo contendere to a charge of conspiracy to commit forgery. He was found guilty of six counts of forgery and uttering, and received a sentence of twenty months to five years. He was also arrested in connection with the death of his first wife, but charges were dismissed. He was found not guilty on charges of homicide and assault resulting from the stabbing of a gas station attendant by one of his companions. He received a suspended sentence after
court, looking to the standard established in earlier decisions,\textsuperscript{302} determined that the evidence of present good moral character was clear and convincing, and therefore held that the applicant was completely rehabilitated.

In a forceful dissent, Judge Smith, joined by Judge Rodowsky, distinguished the instant case as involving crimes of deceit.\textsuperscript{303} The dissent would have held that conviction for crimes of deceit is evidence that the applicant does not have the requisite moral character, reasoning that lawyers are presented with constant opportunities for crimes of deceit, posing a danger that the past conduct would recur.\textsuperscript{304}

3. Law Enforcement.—Between June 1983 and March 1984, the Court of Special Appeals considered four cases relating to the Law Enforcement Officers’ Bill of Rights (LEOBR),\textsuperscript{305} which protects a police officer’s procedural rights in the event of an unwarranted punitive action. In one of these cases, \textit{Mayor of Ocean City v. Johnson},\textsuperscript{306} the court held that, when administrative approval is necessary as a condition precedent to the valid adoption of regulations, such approval may not be given tacitly through inaction, but instead requires some affirmative act by the approving body.\textsuperscript{307} This holding may produce repercussions in other administrative agencies.\textsuperscript{308}

In \textit{Johnson}, a police officer had been dismissed for violating regulations adopted by the police chief of Ocean City, under the au-
authority vested in him by the city's code. The regulations, however, were subject to the approval of the mayor and city council. Recognizing that "approval" was susceptible of various meanings, the court nonetheless reasoned that, because the regulations at issue were not limited to routine internal operations of the police department but also had substantial impact on the public at large, some overt, affirmative action by the mayor and city council was necessary as part of the approval process. Although a meeting to adopt officially the regulations was held, it did not take place until after the dismissal. Consequently, the court held that the police officer could not be discharged for failure to comply with the regulations because they lacked the requisite timely approval by the mayor and city council.

In two other cases, the Court of Special Appeals considered what constitutes an "investigation . . . for any reason which could lead to disciplinary action, demotion or dismissal" such as to trigger the protections afforded by the LEOBR. In Chief, Baltimore County Police Department v. Marchsteiner, the court held that the transfer of a police officer was not punitive in nature and did not trigger LEOBR protections because the transfer was not based on the complaints that had been made against him. The opinion in Marchsteiner also reiterated that an aggrieved officer need not pursue administrative remedies before taking advantage of his statutory right to judicial review. In Leibe v. Police Department, the court held that tracking of an officer's use of sick leave is not an investigation that will trigger LEOBR rights.

Lastly, in Jacocks v. Montgomery County, the court held that the presence of a witness in the hearing room during another witness's testimony in an LEOBR investigation was not prejudicial error. The defendant officer had requested that witnesses be sequestered;

310. 57 Md. App. at 514, 470 A.2d at 1314.
311. Id. at 515, 470 A.2d at 1314.
312. Id.
315. Id. at 117, 461 A.2d at 33.
316. Id. at 116, 461 A.2d at 32.
319. Id. at 323, 469 A.2d 1290.
321. Id. at 109, 472 A.2d at 492.
however, the disobedient witness had already testified and therefore his testimony could not be affected by remaining in the courtroom.

4. Motor Vehicle Administration.—In Department of Transportation v. Armacost, the Court of Appeals held that the statutory provision expressly permitting the Motor Vehicle Administration (MVA) to create and adopt regulations to implement the Vehicle Emissions Testing Program implicitly authorizes the MVA to amend the rules that it has adopted. The court adopted the widely held rule that "an agency with expressly granted rulemaking power has implied authority to amend and repeal the regulations it has adopted." The court reasoned that any other interpretation of the statute would lead to an "absurd result" which would frustrate the legislature's intent. By rejecting the challenge to the MVA's authority, the court confirmed a practice which was heretofore assumed to be valid.

5. Criminal Injuries Compensation Board.—In McGee v. Criminal Injuries Compensation Board, the Maryland Court of Special Appeals held that the Criminal Injuries Compensation Board's sua sponte action in reviewing a single board member's determination of a claimant's eligibility to compensation was premature, because the degree of the claimant's financial hardship had not yet been determined by that board member. The court construed section 9 of the Criminal Injuries Compensation Act to require that both the

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324. 299 Md. at 423-24, 474 A.2d at 206-07. The court also rejected a challenge to the constitutionality of the Vehicle Emissions Testing Program. See infra CONSTITUTIONAL LAW notes 152-78 and accompanying text.
325. 299 Md. at 424, 474 A.2d at 207.
326. Id.
328. Id. at 153-54, 469 A.2d at 475. The claimant, Ja-Wan McGee, was shot 3 times by an off-duty police officer who mistakenly thought that he was about to commit a crime. McGee, who was permanently paralyzed as a result of the incident, filed a claim for compensation under the Criminal Injuries Compensation Act. MD. ANN. CODE art. 26A (1981). To be eligible for an award under the Act, a claimant must demonstrate, inter alia, (1) that he was a victim of a crime for which he was not responsible, and (2) that he will suffer serious financial hardship. Id. §§ 5(b), 12(i)(i). The Criminal Injuries Compensation Board member to whom the case was assigned determined that McGee had been the victim of a crime, and a hearing on the issue of financial hardship was scheduled, but before the hearing occurred the full board reviewed the single board member's decision sua sponte and reversed his finding of eligibility. 57 Md. App. at 147-50, 469 A.2d at 472-73.
eligibility for an award and the degree of hardship must be determined by the single board member to which the case is assigned, before the full board can review the member's decision on either of those issues.\(^3\)

The court also generally discussed the process by which a single board member's initial decision can be reviewed by the full board. In particular, the court noted that the full board cannot hear additional evidence nor draw inferences from the available evidence contrary to those originally found.\(^3\) The court explained that, if additional evidence needs to be examined, the full board should remand the case to the single board member.\(^3\)

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\(^3\) 57 Md. App. at 153-54, 469 A.2d at 475. Under § 8 of the Act, a claim is first assigned to a single member of the three-member board; this member must investigate the validity of the claim and make a written report setting forth the reasons for either granting or denying the claim. Md. Ann. Code art. 26A, § 8 (1981). Section 9 allows the full board, upon application by the claimant or on its own motion, to "review the record and affirm or modify the decision of the Board member to whom the claim was assigned." \(Id\). § 9(b).

\(^3\) 57 Md. App. at 154-55, 469 A.2d at 475-76.

\(^3\) \(Id\). at 155, 469 A.2d at 476.
II. CIVIL PROCEDURE*

A. In Personam Jurisdiction — Minimum Contacts Analysis

Copiers Typewriters Calculators, Inc. v. Toshiba Corp.¹ arose from an alleged breach of contract by Toshiba, a Japanese manufacturer of photocopying machines.² Toshiba sold its copiers FOB Japan to a wholly owned New York subsidiary, which then sold copiers to Maryland dealers.³ The suit raised the question whether the exercise of in personam jurisdiction over Toshiba, the Japanese defendant, under subsection (b)(1) of the Maryland long arm statute⁴ comported with the requirements of due process. In resolving this question, the court relied on a formulation of minimum contacts analysis used by the Ninth Circuit.⁵

The court began by noting that the power of a federal court to assert in personam jurisdiction over an out-of-state defendant depends upon (1) whether the state long arm statute applies to the facts of the case, and (2) whether the exercise of in personam jurisdiction meets the requirements of due process.⁶ The court noted that the Maryland Court of Appeals had determined that the legislature intended the Maryland long arm statute to expand the exercise of personal jurisdiction to the limits of the due process clause, thus merging the statutory question into the due process analysis.⁷

¹ The most significant recent development in this area was the adoption of the new Maryland Rules of Civil Procedure by the Court of Appeals of Maryland on April 6, 1984. The new Rules have been extensively reviewed elsewhere. See P. Niemeyer, Maryland Rules Commentary (1984); Commentary on the New Maryland Rules of Civil Procedure, 43 Md. L. Rev. 669 (1984).
³ Id. at 315.
⁴ Id. at 316.
⁵ MD. CTS. & JUD. PROC. CODE ANN. § 6-103(b)(1) (1984) (“A court may exercise personal jurisdiction over a person, who directly or indirectly or by an agent . . . [t]ransacts any business or performs any character of work or service in the State . . .”).
⁶ See infra notes 11-12 and accompanying text.
⁸ 576 F. Supp. at 318 (citing Snyder, 521 F. Supp. at 136). See also Mohamed v. Michael, 279 Md. 653, 657, 370 A.2d 551, 553 (1977); Geelhoed v. Jensen, 277 Md. 220, 224, 352 A.2d 818, 821 (1976). Though subsection (b)(1) is coterminous with due process, subsections (b)(3) and (b)(4) are more restrictive. Beaty v. M.S. Steel Co., 401 F.2d
In setting forth the due process standard for in personam jurisdiction applicable to this case, the court began by citing the United States Supreme Court’s dictum in *World-Wide Volkswagen Corp. v. Woodson* that a defendant may have sufficient contacts with a forum to be subject to personal jurisdiction if it directly or indirectly serves a market in the forum state by placing its products in a stream of commerce expecting that they will be purchased by consumers in the forum state. The court noted that other courts have applied this dictum in asserting jurisdiction over alien manufacturers serving a United States market. As a general organizing principle for its due process analysis, the district court adopted the three-part test used by the Ninth Circuit in *Hedrick v. Daiko Shoji Co.* Under this Ninth Circuit test, federal courts may exercise their jurisdictional power when (1) the nonresident defendant avails itself of the benefits and protections of the forum’s laws, (2) the claim arises out of defendant’s forum-related activity, and (3) the exercise of jurisdiction is reasonable. With regard to the third part of the test, rea-
sonableness, the court looked to Insurance Co. of North America v. Marina Salina Cruz,13 in which the Ninth Circuit compiled a non-exhaustive list of relevant factors drawn from various Supreme Court cases:

(A) the extent of the purposeful interjection into the forum state, . . . (B) the burden on the defendant of defending in the forum, . . . (C) the extent of conflict with the sovereignty of defendant’s state, . . . (D) the forum state’s interest in adjudicating the dispute, . . . (E) the most efficient judicial resolution of the controversy, . . . (F) the importance of the forum to plaintiff’s interest in convenient and effective relief, . . . and (G) the existence of an alternative forum.14

Applying the Ninth Circuit tests to the case at hand, the district court determined that exercising in personam jurisdiction over Toshiba comported with due process. The court found that Toshiba had performed a forum-related act when it manufactured copiers, knowing they were destined for sale in the United States,15 and made direct product shipments to more than half of the United States, including Maryland.16 The court also found that the cause of action arose out of the alleged unsatisfactory performance of defendant’s copiers within the state.17 Moreover, according to the court, Toshiba’s marketing method evidenced an intent to serve the United States market and therefore Toshiba “should reasonably anticipate being haled into court in those states where sale of [its] goods ultimately causes damage.”18 Based on these facts, the court

13. 649 F.2d 1266 (9th Cir. 1981).
14. Id. at 1270 (citing World-Wide Volkswagen, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee, 355 U.S. 320 (1957); International Shoe, 326 U.S. 310 (1945)).
16. Id.
17. Id.
18. Id. at 320. The court stressed the World-Wide Volkswagen dictum stating that defendant need not directly serve the forum market in order to subject itself to jurisdiction. It suffices that defendant intended to serve a particular market, even though through a wholly owned subsidiary. Id. C.f. Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982) (jurisdiction asserted over a Japanese manufacturer who sold goods to K-Mart, knowing it to be a nationwide marketing company); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Proprietary Ltd., 647 F.2d 200 (D.C. Cir. 1981) (selling to separate, distinct importer did not insulate Australian manufacturer from jurisdiction); Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) (Japanese manufacturer’s sale to separate importer did not insulate manufacturer from jurisdiction.)
found that the first two elements of the Hedrick test were satisfied:
The cause of action had arisen out of Toshiba's forum-related activi-
ties, and Toshiba had purposely availed itself of the benefits and
protections of Maryland law.  

The court proceeded to analyze the reasonableness of asserting
jurisdiction over the defendant under the Ninth Circuit's seven-fac-
tor formula. First, the court reasoned Toshiba's purposeful inter-
jection of goods into the forum state was evidenced by (1) the
substantial volume of the allegedly defective copiers in the state; (2)
the fact that Toshiba did not totally abandon its products upon
sale, but expected further contact with them; (3) the limited war-
ranty on the copiers, which indicated that inquiry concerning the
warranty could be made to either the manufacturer or to a Toshiba
dealer; and (4) use of the manufacturer's trademark by its subsidiar-
ies, which demonstrated an expectation and hope by the manufac-
turer of customer identification and recognition of a Toshiba-
manufactured product. Second, defendant's burden of defending
in the forum, though not minimal, would be less than the burden on
plaintiff, a local Maryland dealer, of suing in Japan. Third,
Toshiba had not shown that any conflict with sovereign interests of
Japan would be involved if jurisdiction were exercised in this case.
Fourth, Maryland had an interest in proceeding with the cause in its
forum in order to protect its residents from economic injury caused
by nonresidents. Fifth, since the claim arose out of the sale of
copiers within Maryland, and many of the witnesses were in the fo-
rum, Maryland appeared to be the most convenient and effective
forum for resolving the dispute. Finally, although the court recog-
nized that a Japanese forum might be available, it decided that this
was not a practical alternative for the plaintiff. The court con-
cluded that a balancing of all of the above factors indicated that the

20. Id. at 320-21.
21. Id. at 320. Plaintiff received a half million dollars worth of defendant's goods.
22. Id.
23. Id. The court noted that Toshiba is represented by the same counsel as its
wholly owned New York subsidiary, that Toshiba is a corporation set up to do business
internationally, and finally that modern methods of transportation and communication
diminish the burden of defending a lawsuit in a distant forum. Id. at 320-21.
24. Id. at 321.
25. Id. (citing Kulko v. Superior Court, 436 U.S. 84, 92 (1978)).
26. Id.
27. Id.
exercise of jurisdiction over Toshiba was reasonable and proper.\textsuperscript{28}

28. \textit{Id.} Another aspect of the \textit{Toshiba} case relating to the due process standard for in personam jurisdiction involved the court's application of the fiduciary shield doctrine to Ronald Sid Reisch, an individually named defendant corporate officer. Under the fiduciary shield doctrine, the acts of a corporate officer or employee performed in his corporate capacity generally do not form the basis for jurisdiction over him in his individual capacity. Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981). The doctrine is an equitable one based on notions of fairness and is not to be applied mechanically. Marine Midland Bank, N.A., v. Miller, 664 F.2d 899, 903 (2d Cir. 1981). The doctrine is not a constitutional principle but is based upon judicial inference as to the intended scope of the state long arm statute. \textit{Id.} at 902 n.3. The doctrine has been applied in Maryland by the Court of Special Appeals in Umans v. PWP Serv., Inc., 50 Md. App. 414, 420, 439 A.2d 21, 25 (1982), wherein jurisdiction was asserted under subsections (b)(1), (3) and (4) of the Maryland long arm statute. \textit{MD. CTS. & JUD. PROC. CODE ANN.} § 6-103 (b)(1), (3), (4) (1984).

In a South Carolina case, Columbia Briargate Co. v. First Nat'l Bank, 713 F.2d 1052 (4th Cir. 1983), the Fourth Circuit formulated rules limiting the application of the fiduciary shield doctrine. The court was concerned about the anomaly noted in \textit{Marine Midland}, 664 F.2d at 902, that, under the doctrine, a corporate officer could shield himself from jurisdiction by contending that he had acted solely in his corporate capacity, even though that fact might not suffice to excuse him from substantive liability. 713 F.2d at 1064. To prevent such an anomaly, the court in \textit{Columbia Briargate} adopted the following rules: (1) The fiduciary shield doctrine does not apply, and therefore, the officer of the nonresident corporation is subject to personal jurisdiction, when he is sued for a tort committed in his corporate capacity in the forum state, and the forum's long arm statute is coextensive with due process. (2) The fiduciary shield doctrine applies, and therefore, defendant is not subject to personal jurisdiction, if his connection with the commission of the tort occurred outside the forum state. \textit{Id.} at 1064-65. The \textit{Columbia Briargate} test thus focuses on whether defendant committed the tort within or without the forum state.

The district court in \textit{Toshiba} misinterpreted the \textit{Columbia Briargate} rules by holding that the fiduciary shield doctrine applies if the state long arm statute does not extend to the limits of due process, and does not apply where the long arm statute is coterminous with due process. 576 F. Supp. at 328-29. The court thus elevated what in \textit{Columbia Briargate} had been merely a necessary condition to asserting jurisdiction (cotermination of the long arm statute with due process) to controlling status, and ignored the more crucial factor of place of commission. The court incorrectly reasoned that, since \textit{Columbia Briargate} required cotermination for the assertion of jurisdiction, the lack of cotermination would automatically support application of the fiduciary shield doctrine. \textit{Id.} at 329 ("Under a statute whose reach does not extend to the limits of Due Process . . . the fiduciary shield doctrine can be applied without contradiction to the conclusions reached by the Fourth Circuit in \textit{Columbia Briargate} . . . ").

Based on this reasoning, the court in \textit{Toshiba} applied the fiduciary shield doctrine to the assertion of jurisdiction over defendant Reisch under subsection (b)(3) of the Maryland long arm statute, \textit{MD. CTS. & JUD. PROC. CODE ANN.} § 6-103(b)(3) (1984) ("A court may exercise personal jurisdiction over a person, who directly or by an agent . . . causes tortious injury in the State by an act or omission in the State . . . "). The court reasoned that the doctrine should apply because this subsection has been interpreted as not extending to the limits of due process. 576 F. Supp. at 328-29 (citing Snyder v. Hampton Indus., Inc., 521 F. Supp. 130, 136 (D. Md. 1981)). On the other hand, the \textit{Toshiba} court rejected application of the doctrine to the assertion of jurisdiction over Reisch under subsection (b)(1), since this subsection extends to the limits of due process. \textit{Id.} at 329 (citing Carter v. Massey, 436 F. Supp. 29, 33 (D. Md. 1977)). Jurisdic-
B. Finality and Appealability of Judgments

1. Order Quashing Service of Process. — In Mooring v. Kaufman the Court of Appeals held that an order quashing service of process is a final judgment for purposes of appeal when the plaintiff “effectively” has no alternative means of prosecuting a case due to the practical impossibility of locating the defendant. After failing to achieve personal service in-state, plaintiff twice unsuccessfully attempted service by certified mail at an out-of-state address believed to belong to the defendant. Plaintiff then obtained an order authorizing substituted service under former Maryland Rule 107(a)(3) and delivered the appropriate papers to defendant’s last known address. However, the service was quashed upon objection by defendant’s insurer because the place at which service was made no longer had any apparent connection with the defendant.

30. Id. at 349, 466 A.2d at 875.
31. Id. at 344, 466 A.2d at 872-73. The parties were involved in an automobile collision that occurred in Maryland. Plaintiff brought suit for personal injuries alleged to have been sustained as the result of defendant’s negligence. Personal service was attempted at a Cecil County address listed on the accident report as that of the defendant. However, the writ was returned non est by the Cecil County sheriff, who reported that defendant had moved to an address in Florida. Suit papers sent by certified mail to that address under former Maryland Rule 107(a)(2) were returned with the notation “Moved.” The postal service subsequently advised plaintiff of a change of address to a second location in Florida. Papers sent to the latter address by certified mail were returned with the notation that the addressee had moved and left no forwarding address. Id. at 343-44, 466 A.2d at 872-73.

32. Former Maryland Rule 107(a)(3) dealt with service of process outside of Maryland by means other than personal delivery or registered mail, when a defendant has acted to evade service. It incorporated the manner of service outlined in former Maryland Rule 104(h)(1), which provided that service could be made “by mailing a copy of the summons together with a copy of the original pleading to the defendant at his last known residence,” and by “delivering a copy of each to a person of suitable age and discretion at the place of business, dwelling house or usual place of abode of the defendant.” Md. R.P. 104(h)(1) (1977). The language of new Maryland Rule 2-121(b) is identical in all relevant respects. See infra note 46.

33. 297 Md. at 344-47, 466 A.2d at 873-74. Plaintiff complied with the first requirement of former Maryland Rule 104(h)(1), incorporated in former rule 107(a)(3), by mailing the appropriate papers to defendant’s last known address in Florida (at which address service by certified mail had previously been attempted). Plaintiff then hired a private process server in Florida, who was informed by defendant’s former landlord that the defendant had been a tenant but had moved, leaving no forwarding address. Service was then made on the current resident at defendant’s former address, who accepted the papers (not knowing what else to do) but who apparently had no connection with the defendant. The circuit court quashed the service of process upon preliminary objection...
In ruling that because defendant's "trail" had "run out" the order quashing service was an appealable final order, the court looked to earlier Maryland decisions holding that an order is final if "[t]he effect of the court's ruling was to put the plaintiff out of court and deny her the means of further prosecuting her case . . . ." Previous cases have established that the test of finality is met if it is impossible to remedy the defect in service. In *Mooring*, however, perfection of service remained at least theoretically possible because the defendant still could conceivably be located. The effect of this decision, therefore, is to expand previous doctrine to the extent that practical impossibility is now regarded as sufficient evidence of finality for purposes of appeal.

Having determined that the order quashing service was appealable, the court addressed the particular facts of this case and found that the lower court had properly quashed service because by defendant's insurer, with whom plaintiff had established communications at some earlier point. The Court of Appeals granted certiorari sua sponte prior to consideration of plaintiff's appeal by the Court of Special Appeals. *Id.*

34. *Id.* at 349, 466 A.2d at 875.

35. *Id.* at 347, 466 A.2d at 874 (quoting McCormick v. St. Francis De Sales Church, 219 Md. 422, 426-27, 149 A.2d 768, 771 (1959)). See also Sharpless Separator Co. v. Brilhart, 129 Md. 82, 88, 98 A. 484, 487 (1916) ("[T]his Court has consistently entertained appeals from orders quashing writs of summons and the returns thereon, when the result of the rulings of the lower Court was to put the parties out of Court."). The court also relied on Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923) for the rule that such an order, "although in form an order to quash the summons and not a dismissal of the suit, is a final judgment . . . ." *Id.* at 517, quoted in 297 Md. at 348, 466 A.2d at 875.

36. *See, e.g.,* Hunt v. Tague, 205 Md. 369, 109 A.2d 80 (1954) (delivery to defendant's wife quashed because defendant died before attempt at service); State *ex rel.* Bickel v. Pennsylvania Steel Co., 123 Md. 212, 91 A. 136 (1914) (service on a Maryland corporation as agent of a foreign corporation allegedly doing business in Maryland quashed when court determined that the foreign corporation was not doing business in Maryland and that the local entity was not its agent); see also Hillyard Constr. Co. v. Lynch, 256 Md. 375, 379 n.1, 260 A.2d 316, 318 n.1 (1970) (dictum) (appeal will lie from an order quashing service of summons); cf. Davidson Transfer & Storage Co. v. Christian, 197 Md. 392, 79 A.2d 541 (1951) (appeal from the quashing of a writ of summons for want of venue is not premature). Similarly, the court on numerous occasions has implicitly recognized that orders quashing service on nonresident defendants for want of minimum contacts are final for purposes of appeal. *See, e.g.,* Mohamed v. Michael, 279 Md. 653, 370 A.2d 551 (1977); Geelhoed v. Jensen, 277 Md. 220, 352 A.2d 818 (1976); Harris v. Arlen Properties, Inc., 256 Md. 185, 260 A.2d 22 (1969).

37. Although new Md. R.P. 2-121(c) provides that, when substituted service under rule 2-121(b) is "impracticable, the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice," it is unlikely to displace the notion of practical impossibility as grounds for appeal, for the simple reason that if defendant's trail has truly "run out," no alternative means of service could be devised. *See supra* note 33.
plaintiff had not complied with a prescribed method of service and therefore the lower court did not acquire in personam jurisdiction over the defendant. The court held that substituted service is not accomplished by delivery at a location having no present connection with the defendant. Emphasizing that the delivery element of the rule is intended, in part, to fulfill a notice function, the court interpreted former Maryland Rule 107(a)(3) to require that the place of delivery be the defendant's "place of business, dwelling house or usual place of abode" at the time service is attempted, not merely the last address known to the plaintiff as a previous residence of the defendant. In reaching this conclusion, the court relied extensively on New York decisions interpreting New York Civil Practice Law Section 308, after which former Maryland Rule 107(a)(3) was

39. 297 Md. at 355, 466 A.2d at 878.
40. Id.
41. Id. at 354-55, 466 A.2d at 878.
42. See supra note 32.
43. 297 Md. at 349-55, 466 A.2d at 875-78.
44. Id. at 352-54, 466 A.2d at 876-78. At the time former Maryland Rule 107(a)(3) was adopted, N.Y. CIV. PRAc. LAw § 308 (McKinney 1963) provided, in relevant part, that substituted service may be accomplished by mailing the summons to the person to be served at his last known residence and either affixing the summons to the door of his place of business, dwelling house or usual place of abode within the state or delivering the summons within the state to a person of suitable age and discretion at the place of business, dwelling house or usual place of abode of the person to be served. Id.

The court observed that although the New York statute contained alternative methods of substituted service, known as "leave and mail" and "nail and mail," New York decisions have uniformly held that delivery in either form "must be made at a location which is in fact the place of business, dwelling house or usual place of abode of the defendant at the time service is attempted." 297 Md. at 352, 466 A.2d at 877 (citing Entwistle v. Stone, 53 Misc. 2d 227, 278 N.Y.S.2d 19 (1967) (delivery at a location which was both last known place of residence and last known place of business insufficient, even though plaintiff made diligent efforts to effect personal service); Polansky v. Paugh, 23 A.D.2d 643, 256 N.Y.S.2d 961 (1965) (whereabouts of defendant unknown but substituted service at former residence insufficient); Zelnick v. Bartlik, 46 Misc. 2d 1043, 261 N.Y.S.2d 573 (1965) (service on defendant's estranged wife at defendant's former residence insufficient); Jauk v. Mello, 45 Misc. 2d 307, 256 N.Y.S.2d 412 (1964) (delivery at premises where process server was advised defendant was no longer residing is insufficient)).

The court also noted that when the New York statute was revised in 1970, the word "actual" was added immediately preceding "place of business, dwelling place or usual place of abode" in both subsections in which that phrase appeared, id. at 353, 466 A.2d at 877, and that the Court of Appeals of New York has subsequently refused to abandon the distinction between "dwelling place" and "last known residence," on the grounds that the statute was intended to provide for actual notice to potential defendants, id. at 354, 466 A.2d at 878 (citing Feinstein v. Bergner, 48 N.Y.2d 234, 240, 397 N.E.2d 1161, 1164, 422 N.Y.S.2d 356, 359 (1979) (delivery at defendant's last known residence was insufficient even though actual notice was effected as a result of defendant's father's forwarding of the papers)).
modeled, and which provides a closely analogous form of substituted service.\textsuperscript{45} This holding remains significant despite the recent replacement of rule 107(a)(3) with the new rule 2-121(b), which is identical in all relevant respects.\textsuperscript{46}

2. In Banc Appeals. — Article IV, section 22 of the Maryland Constitution establishes an in banc appeals procedure for the circuit courts and provides that the decision of an in banc court is conclusive against the party who moved to reserve questions for the consideration of the in banc court and that further appeal by the moving party after decision by the in banc court on the points reserved is prohibited.\textsuperscript{47} The case law in Maryland indicates that the proscription against further appeal is applicable only where there

\textsuperscript{45} The court indicated that although \textit{Fed. R. Civ. P. 4(d)(1)} also served as a model for former \textit{Md. R.P. 107(a)(3)} (1977), cases interpreting the federal rule seem to turn on whether actual receipt is effected, rather than on a consistent interpretation of the phrase "dwelling house or usual place of abode" contained therein. The court did note, however, that none of the various meanings attached to that phrase in the federal rule could be applied to the facts of the present case. 297 Md. at 350-51, 466 A.2d at 876. The court gave more weight to the New York decisions because the federal rule, unlike the New York and Maryland rules, provides a method of personal service alternative to personal delivery to the defendant, rather than a form of substituted service permissible when attempts at personal service have proved unproductive. \textit{Id.} at 351, 466 A.2d at 876.

\textsuperscript{46} Md. R.P. 2-121(b) states:

When proof is made by affidavit that a defendant has acted to evade service, the court may order that service be made by mailing a copy of the summons, complaint, and all other papers filed with it to the defendant at defendant's last known residence and delivering a copy of each to a person of suitable age and discretion at the place of business, dwelling house, or usual place of abode of the defendant.

\textsuperscript{47} Where any Term is held, or trial conducted by less than the whole number of said Circuit Judges, upon the decision or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration of the three Judges of the Circuit, who shall constitute a court in banc for such purpose; and the motion for such reservation shall be entered of record, during the sitting, at which such decision may be made; and the several Circuit Courts shall regulate, by rules, the mode and manner of presenting such points, or questions to the Court in banc, and the decision of the said Court in banc shall be the effective decision in the premises, and conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in banc shall not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error to the Court of Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of the District Court, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law.
has been an actual decision by the in banc court on the points reserved. In *Merritts v. Merritts*, the Court of Appeals held that issues related to the subject matter decided by an in banc court but not themselves decided may be appealed to the Court of Special Appeals.

The Court of Appeals emphasized that the issues which it held were appealable to the Court of Special Appeals arose after, and partially as a result of, the decision by the in banc court, and thus could not have been the subject of in banc appeal. It is unclear whether the same result would obtain if the issues were such that they could have been raised before and decided by the in banc court. If such issues were appealable, a dual appeals process would

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50. Id. at 521, 474 A.2d at 895. The court in *Merritts* cited both *State Roads Comm'n* and *Washabaugh* for their conclusion that "generally there must be an in banc decision on the point reserved" before the proscription against further appeal by the moving party is triggered. Id. at 527, 474 A.2d at 897. It should be noted that these two cases do not go as far as *Merritts*. For example, in *State Roads Comm'n*, the appellant initiated an in banc appeal but abandoned the process before a decision was reached by the in banc court. In such a case, the moving party is not precluded from following the traditional appeals process. The court in *State Roads Comm'n* stated, "It is the decision of the Court in banc which is given conclusive effect by [art. IV, § 22] . . . ; the initiation of proceedings looking to such review is not stated to have any such effect." 224 Md. at 544, 168 A.2d at 708. In contrast, *Merritts* presented a situation in which the in banc court had rendered a decision on the points reserved and the appeal was based on related issues not decided by the in banc court. 299 Md. at 523, 474 A.2d at 895.

The Court of Special Appeals had dismissed the *Merritts* appeal after the in banc court's decision on the ground that

[w]hen appellant submits her grievances to the in banc court and that court assumes jurisdiction and acts, further appeal [to the Court of Special Appeals] on the same subject matter in the same proceeding is foreclosed to the party who moved to have the points or questions reserved for consideration of the court in banc. Md. Cts. & Jud. Proc. Code Ann. §12-302 (d).

*Merritts* cited both *State Roads Comm'n* and *Washabaugh* for their conclusion that the decision of the Court in banc which is given conclusive effect by [art. IV, § 22] . . . ; the initiation of proceedings looking to such review is not stated to have any such effect." 224 Md. at 544, 168 A.2d at 708. In contrast, *Merritts* presented a situation in which the in banc court had rendered a decision on the points reserved and the appeal was based on related issues not decided by the in banc court. 299 Md. at 523, 474 A.2d at 895.

The Court of Special Appeals expressly stated that the issue of whether the proscription against further appeals by the moving party in an in banc appeal applied to a later "peripheral proceeding not the subject matter of the in banc appeal" was not before it. Id. at 205, 461 A.2d at 57.

51. 299 Md. at 526-27, 474 A.2d at 897-98. The case arose from a divorce decree entered by the circuit court for Prince George's County. Id. at 523, 474 A.2d at 895. Appellant reserved ten points for consideration by the in banc court:

1) Was it an error for the Court to designate the property located at 509 A Street, S.E. in Washington, D.C., as Marital Property?

2) Was the Court in error in determining that the parties (a) each had equal ownership in the property in Washington, D.C., known as 509 A Street,
exist, rendering the proscription against further appeal by the mov-
ing party a virtual nullity. This would contravene the principle of
judicial economy by allowing two appeals on the same subject mat-
ter. Once the in banc court assumes jurisdiction, it is more efficient
to allow the in banc court to handle all issues arising out of the sub-
ject matter of the initial appeal.

3. Interlocutory Orders for the Payment of Money. — In Anthony
Plumbing v. Attorney General, the Court of Appeals held that section
12-303(c)(5) of the Courts and Judicial Proceedings Article, which

S.E. and (b) that the Plaintiff and Counter-Defendant was not required to par-
ticipate in the mortgage payments on said premises?

3) Was the Court in error in finding from the evidence presented that
two-thirds of the value of the St. Mary's property was not Marital Property?

4) Was it an error for the Court to fail to make a finding as to present
value of the civil service annuity based upon the testimony of an expert when
there is no testimony to controvert such testimony because the Court did not
agree with the expert's finding and because the Court did not think the expert
witness went about it the right way?

5) Was it an error for the Court not to grant a monetary award to the
Defendant and Counter-Plaintiff based upon the amount of entitlement she
would have in the civil service annuity and a judgment based upon that amount
pending the date the Plaintiff and Counter-Defendant retires?

6) Was it error for the Court to (a) award no more than $650 per month
alimony and (b) reduce the alimony payment after two years to $450 per month
with no evidence that she would need less alimony in two years?

7) Was it error for the Court to order the alimony award to be termi-
nated when the Defendant and Counter-Plaintiff commenced receiving a 38.86
percent share of the monthly U.S. Civil Service annuity payments of the Plain-
tiff and Counter-Defendant.

8) Was it error for the Court to order the Plaintiff and Counter-Defend-
ant to pay the three medical bills?

9) Was it error for the Court to refuse to permit the Plaintiff and
Counter-Defendant to give testimony concerning the marriage relationship
prior to the most recent events? (Withdrawn)

10) Was it error for the Court to deny the Defendant and Counter-
Plaintiff's motion for reasonable costs under Rule 421, § a through e of the
Maryland Rules?

Id. at 524-25, n.2, 474 A.2d at 896 n.2. Appellant sought to raise two issues before the
Court of Special Appeals:

(1) Did the Chancellor err in denying out of hand the request for coun-
sel fees and transcript expenses; and

(2) Did the Chancellor err in holding that the order of November 23,
1981 was final and thus could not be modified with regard to the credits to be
considered in determining the monetary award.

Id. at 527, 474 A.2d at 897. The Court of Appeals found that "neither of these points
could have been the subject of in banc review, simply because the issues were generated
after the in banc order." Id.

52. 298 Md. 11, 467 A.2d 504 (1983).

authorizes an appeal from an interlocutory order "for the . . . payment of money . . . unless the . . . payment is directed to be made to a receiver appointed by the court," only applies in equity. The court derived this construction from the history of the statute. Based on its interpretation of Section 12-303(c)(5), the court held that no appeal would lie from an interlocutory order for civil penalties, award of costs, and deposit of money with the clerk for costs associated with master's proceedings, since these items are not equitable in nature. The court traced the history of Section 12-303(c)(5) back to Chapter 11 of the Acts of 1841, which authorized an appeal from certain interlocutory orders in equity, including an order for "the payment of money." It was not until 1962 that an appeal was authorized from an interlocutory order of a court of law, and even then appeals could not be taken from an order concerning the payment of money. The 1973 enactment of Section 12-303 combined into one section the existing code provisions regarding interlocutory appeals. According to the Revisor's Note, the change rendered by Section 12-303 was merely intended to recognize that certain types of traditional equity orders, such as injunctions, could also be issued by a court of law. Thus, there was no intent to make substantive alterations in the kinds of interlocutory orders that were

54. Id.
55. 298 Md. at 20, 467 A.2d at 509. This holding remains significant despite the adoption of Maryland Rule 2-301, which abolishes the distinction between law and equity in pleading. Md. R.P. 2-301. The Rules Committee indicated that the substantive and procedural differences between law and equity would remain unaffected. Minutes, Mar. 7-8, 1980, at 33. See generally Commentary on the New Maryland Rules of Civil Procedure, 43 Md. L. Rev. 669, 742-43 (1984).
56. 298 Md. at 18-20, 467 A.2d at 507-08.
57. Id. at 21-23, 467 A.2d at 509-10. The court also held, in accordance with prior cases, that an order referring matters to a master is not appealable. Id. at 16, 467 A.2d at 506 (citing Waters v. Smith, 277 Md. 189, 194-95, 352 A.2d 793, 796 (1976); Matter of Anderson, 272 Md. 85, 102-03, 321 A.2d 516, 525-26 (1974) (master's findings do not finally dispose of litigation; the findings are not binding until confirmed by a trial court), appeal dismissed, 419 U.S. 809 (1974), cert. denied, 421 U.S. 1000 (1975)).
61. See id.
63. See Act of Aug. 22, 1973, ch. 2, § 1 (1st Sp. Sess.), 1973 Md. Laws 4 ("Although most of the actions mentioned are in equity, some relief, like an injunction, may also be obtained at law; hence no distinction is made between law and equity.").
appealable prior to final judgment.  

Having thus construed section 12-303(c)(5), the court went on to hold that no interlocutory appeal would lie from the order in this case for payment of civil penalties, costs of the action, and costs of master's proceedings, because these items are legal rather than equitable in nature. The court stated that an order that assesses civil penalties merely creates a debt recoverable at law, whereas an equitable order for payment of money is immediately enforceable against an individual. The court held that the award of costs is also legal in nature since it is analogous to civil damages. Finally, the court held that the direction to pay money into court to cover the cost of a master's proceeding is also legal in nature because it is essentially an award of costs.

4. Law of the Case. — In Loveday v. State, a criminal case involving plea bargaining issues, the Court of Appeals held that a

64. 298 Md. at 20, 467 A.2d at 508. See also Della Ratta, 47 Md. App. at 284, 422 A.2d at 416 (where orders "had been immediately appealable for more than a century—it should make no difference whether they emanated from a law court or an equity court").  
65. 298 Md. at 21-23, 467 A.2d at 509-10.  
66. Id. at 21, 467 A.2d at 509 (citing Ordway v. Central Nat'l Bank, 47 Md. 217, 242 (1877)).  
67. Id. at 20, 467 A.2d at 508-09. The court cited examples of orders for the "payment of money" that had traditionally been rendered in equity and from which interlocutory appeals had been allowed, including orders for alimony and child support. See id., 467 A.2d at 508 (citing Pappas v. Pappas, 287 Md. 455, 413 A.2d 549 (1980); Chappell v. Chappell, 86 Md. 532, 39 A. 984 (1898); Hofmann v. Hofmann, 50 Md. App. 240, 437 A.2d 247 (1981); Della Ratta, 47 Md. App. 270, 422 A.2d 409 (1980)). The court noted that a traditional equity order for the payment of money is an order for a specific sum of money, which "proceeds directly to the person," for which that individual is "directly and personally answerable to the court in the event of noncompliance" (emphasis in original). Id. (quoting Della Ratta, 47 Md. App. at 285, 422 A.2d at 417). Contrasting an equity order with a typical judgment at law for the payment of money, the court stated that the latter is "not immediately enforceable" and "does not purport to order anyone to do anything." Id., 467 A.2d at 508-09 (quoting Della Ratta, 47 Md. App. at 285-86, 422 A.2d at 417).  
68. Id. at 22, 467 A.2d at 510, (citing Reese v. Mandel, 244 Md. 121, 130, 167 A.2d 111, 116 (1961)).  
69. Id. at 23, 467 A.2d at 510. The money remains to be apportioned at the close of the proceedings. Id. An order of an equity court directing money to be paid into court pending further disposition of an action has been held not to be appealable under Md. Cts. & Jud. Proc. Code Ann. § 12-303(c)(5) (1984), or as a final order, id. (citing Dillon v. Connecticut Mut. Life Ins. Co., 44 Md. 386, 394-96 (1876)).  
71. Harry Loveday was found guilty of robbery and related offenses by a jury after he had rejected initial plea bargaining. The State had offered to make no recommendation concerning sentencing if Loveday would plead guilty to robbery. Defense counsel ad-
litigant's failure to petition for writ of certiorari after the first of two decisions by the Court of Special Appeals in the same case does not preclude the Court of Appeals, upon granting the writ after the Court of Special Appeals' second decision, from reviewing the entire record of the case. The Court of Appeals thought that to hold otherwise "would thwart the purpose of . . . § 12-201 of the Courts and Judicial Proceedings Article which grants power to [the Court of Appeals] to review judgments of the Court of Special Appeals." In limiting the application of the law of the case doctrine in Maryland to courts of coordinate jurisdiction, the Court of Appeals may have impaired the efficiency of Maryland's appellate procedure. Now a litigant may choose to wait until the Court of Special Appeals issues a decision without a remand order before petitioning to the Court of Appeals.

On appeal by the State, the Court of Special Appeals vacated the sentence and held that the provisions of art. 27, § 643B(c) were mandatory and that Loveday's due process rights under the fourteenth amendment were not violated by the State's failure to give Loveday notice of its intent to seek the mandatory sentence. Id. at 228-29, 462 A.2d at 59. The Court of Special Appeals remanded the case for further proceedings consistent with its opinion. Loveday did not petition the Court of Appeals for certiorari. On remand, the trial court imposed the twenty-five year sentence. Loveday appealed to the Court of Special Appeals, claiming that imposing the mandatory sentence under the facts of his case violated his due process rights under the Maryland Constitution. The Court of Special Appeals affirmed the lower court sentencing and rejected Loveday's argument. They concluded that the argument "'was essentially the same argument previously raised in State v. Loveday . . . '; and that 'Appellant's attempt to circumvent the "law of the case" as it was declared in State v. Loveday, by relying on the due process provisions . . . of the Maryland Declaration of Rights, rather than the due process clause of the Fourteenth Amendment' was without merit." Id. at 229, 462 A.2d at 59. Loveday petitioned for certiorari to the Court of Appeals and the writ was granted. Id.

72. 296 Md. at 234, 462 A.2d at 61-62.
73. Id., 462 A.2d at 61 (citation and footnote omitted) (citing Md. Cts. & JUD. PROC. CODE ANN. § 12-201 (1984)).
74. See Note, supra note 70, at 204. Addressing the merits of the case, the court held that Loveday's state and federal due process rights had not been violated by imposing the mandatory sentence following the collapse of plea negotiations. 296 Md. at 241, 462 A.2d at 65. Loveday had argued that fairness required the State to notify him during plea bargaining of its intent to seek the mandatory sentence, and that seeking the mandatory sentence after collapse of negotiations constituted prosecutorial vindictiveness and denial of due process. Id. at 236, 462 A.2d at 62. The court cited Graham v. West Virginia, 224 U.S. 616 (1912), that the State is not constitutionally required to
5. Partial Summary Judgment. — The case of Robert v. Robert\textsuperscript{75} required the Court of Special Appeals to interpret and apply former Maryland Rule 605(a),\textsuperscript{76} the predecessor to rule 2-602,\textsuperscript{77} which provides for the entry of a final, appealable judgment on fewer than all the claims involved in a multiple claim action. The action was a shareholder’s derivative suit in which plaintiff prayed for various types of relief, including an order requiring defendant to allow inspection of its books and records.\textsuperscript{78} In response to plaintiff’s mo-

inform the defendant that it intends to seek the mandatory sentence. 296 Md. at 238-39, 462 A.2d at 64 (citing 224 U.S. at 627). The court also held there was not evidence in the record to suggest that the State was improperly motivated in seeking the mandatory sentence. Id. at 240, 462 A.2d at 65. The court noted that “the Supreme Court has made it clear that ‘a mere opportunity for vindictiveness is insufficient to justify the prophylactic rule’ of presuming all increased sentences as violative of a defendant’s constitutional rights.” Id. at 239, 462 A.2d at 64, (quoting U.S. v. Goodwin, 457 U.S. 368, 384 (1982)).

\textsuperscript{75} 56 Md. App. 317, 467 A.2d 798 (1983).
\textsuperscript{76} Where more than one claim for relief is presented in an action, . . . the court may direct the entry of final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order . . . which adjudicates less than all the claims shall not terminate the action as to any of the claims . . . .


\textsuperscript{77} Md. R.P. 2-602 now provides that:

When more than one claim for relief is presented in an action, including a consolidated action, whether by original claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, or when partial judgment is sought pursuant to Rule 2-501 (e) [Motion for Summary Judgment — Entry of Judgment], the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only if the court expressly determines that there is no just reason for delay and expressly directs the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and is subject to revision at any time before the entry of judgment that adjudicates all the claims and the rights and liabilities of all the parties.

The language of Md. R.P. 2-602 is nearly identical to that of former rule 605(a), with the addition of express references to multiple parties, consolidated actions, and partial summary judgments. For further discussion of former rule 605(a) and rule 2-602, see Commentary on the New Maryland Rules of Civil Procedure, supra note 55, at 820-22.

\textsuperscript{78} Plaintiff alleged, inter alia, misappropriation of corporate funds, illegal withholding of earned compensation, and wasting of corporate assets. 56 Md. App. at 320, 467 A.2d at 799.

In addition to requesting the inspection order, plaintiff prayed the court to 1) immediately and temporarily enjoin further transfer of defendant’s company’s property and assets, 2) order an accounting, 3) order defendant to reimburse the corporation for the value of all misappropriated corporate assets and to pay punitive and exemplary damages, 4) declare null and void the purported issuance of 31,000 shares to defendant
tion for partial summary judgment, the court ordered defendant to make its books available for plaintiff's inspection. The last line of the order read as follows: "This is certified as a final order pursuant to Maryland Rule 605(a)." Defendant appealed the inspection order. Because the order for inspection disposed of only one of at least six specific prayers for relief, all of which were direct rather than ancillary parts of the claim, the partial summary judgment could only be final and appealable by virtue of rule 605(a).

The court declared that rule 605(a) "carefully and precisely explicates the procedure that must be followed" in appealing from a partial summary judgment: "Not only must the direction for entry of judgment be explicit, but also the determination that there is no just reason for delay must be explicit." The circuit court had merely certified the order as final pursuant to rule 605(a) without making the express determination. The Court of Special Appeals concluded that "[t]he use of [this] short form adaptation of the rule is not acceptable." This conclusion is in keeping with the Court of Appeals' interpretation of the rule. The same construction should be applicable to current rule 2-602 as well.

The Court of Special Appeals went on to consider whether the order in this case could have been made final and appealable assuming the circuit court had made an express determination and direc-

in May 1981, 5) order full payment to all former employees of all compensation and bonuses, 6) order the reimbursement to plaintiff of cost and attorneys' fees, and 7) grant "such other and further relief as the court deems just and proper." Id. at 320, 467 A.2d at 799-800.

79. Id. at 321, 467 A.2d at 800. The order was made pursuant to Md. CORPS. & ASS'NS CODE ANN. § 2-512 (1975) (stockholder's right of inspection) and id. § 2-513 (additional right of inspection for stockholders of 5% of stock).

80. 56 Md. App. at 321, 467 A.2d at 800.


82. 56 Md. App. at 321-22, 467 A.2d at 800.

83. Id. at 322, 467 A.2d at 800.

84. Id. at 321, 467 A.2d at 800.

85. Id. at 322, 467 A.2d at 800.

86. See Shpak v. Oletsky, 280 Md. 355, 359-60, 373 A.2d 1234, 1237-38 (1977) ("No finding under Maryland Rule 605a was made that there was 'no just reason for delay' and there was no 'express direction for the entry of judgment.' ")); Parish v. Maryland & Virginia Milk Producers Ass'n, 250 Md. 24, 97-98, 242 A.2d 512, 553 (1967), cert. denied, 404 U.S. 940 (1971). ("[I]t is required by Rule 605a that the trial court may direct a final judgment upon one or less than all the claims, but only upon (a) an express determination that there is no just reason for delay and (b) upon an express direction for the entry of judgment.").

87. Both rules call for an express determination of no just reason for delay and an express direction for the entering of judgment. See Md. R.P. 605(a) (1977); Md. R.P. 2-602, supra notes 76-77, respectively.
tion. The Court of Special Appeals noted that the rule only applies to the disposition of a single, separate claim in a multiple claim suit and not to the disposition of just part of a single claim.\(^8\) The court concluded that Robert contained only one claim comprised of several elements of damage.\(^8\) It reasoned that, although the shareholder’s right to inspection is a separate statutory right,\(^9\) in this case it was used to discover support for other allegations.\(^9\) The court likened the inspection order to one for discovery,\(^9\) which would not be appealable.\(^9\) Since the order did not dispose of a separate claim in a multiple claim suit, the Court of Special Appeals held that the circuit court had no authority to make its decision final and appealable under rule 605(a).\(^9\) The effect of Robert is to prevent appeals from inspection orders in shareholder’s derivative suits, at least when the

88. 56 Md. App. at 323, 467 A.2d at 801. “Where more than one claim for relief is presented in an action, . . . the court may direct the entry of final judgment upon one or more but less than all the claims . . . .” Md. R.P. 605(a) (1977). See also Diener Enters. v. Miller, 266 Md. 551, 554-55, 295 A.2d 470, 473 (1972) (interpreting former rule 605(a) based on federal cases interpreting Fed. R. Civ. P. 54(b), upon which rule 605(a) was modelled). The Court of Appeals has variously defined a “claim” within the context of rule 605(a) as a set of facts “upon which there can be but a single recovery,” Diener Enters., 266 Md. at 556, 295 A.2d at 474, and as a “substantive cause of action,” Suitland Dev. Corp. v. Merchants Mortgage Co., 254 Md. 43, 54, 254 A.2d 359, 365 (1969). The Court of Appeals has held that a number of legal theories based upon the same facts or transaction leading to but a single recovery constitute a single claim, not multiple claims. Diener Enters., 266 Md. at 556, 295 A.2d at 473.

89. 56 Md. App. at 324, 467 A.2d at 801. This conclusion makes sense in light of the Court of Appeals’ definition of “claim” as a number of legal theories based on the same facts leading to but a single recovery, Biro v. Schombert, 285 Md. 290, 295, 402 A.2d 71, 74 (1979), because all plaintiff’s claims were based upon the same facts concerning defendant’s breach of his fiduciary duties to the corporation and to plaintiff, a minority shareholder.

90. See supra note 79.

91. 56 Md. App. at 323-24, 467 A.2d at 801. The court said that the purpose of inspection “must have been in the nature of discovering support for the other allegations and relief sought in the Bill of Complaint. Such purpose was apparent to the judge who delayed the order’s effect until the other pending suit had been concluded.” Id.

92. Id. at 323, 467 A.2d at 801.


94. 56 Md. App. at 324, 467 A.2d at 802.

Another case relating to finality and appealability of judgments was Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A.2d 483 (1983), in which the Court of Appeals held that an order denying a motion to quash a subpoena duces tecum in a pending case is ordinarily not an appealable final order. 297 Md. at 475, 467 A.2d at 490. Debra Braun, a defendant in a criminal trespass case, had served a subpoena duces tecum on Sigma Reproductive Health Center (Sigma) seeking production of records relating to abortions performed at Sigma. Id. at 662-63, 467 A.2d at 484. Sigma appealed the denial of its motion to quash, arguing that the order of denial was appealable under the collateral order doctrine established in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). 297 Md. at 667, 467 A.2d at 486. The court held that this case did not meet the three requirements of the doctrine as enunciated in United States
apparent purpose of the inspection is to discover support for other allegations in the same case.

C. Trial Court Powers Pending Appeal

It is the rule in Maryland that an interlocutory injunction is dissolved by operation of law upon entry of a final, appealable judgment on the merits (or its equivalent).\textsuperscript{95} In General Motors Corp. v. Miller Buick, Inc.,\textsuperscript{96} the Court of Special Appeals applied this rule even though the injunction in question, as interpreted by the trial court, purported to extend beyond entry of judgment.\textsuperscript{97} In reaching this result, the court relied on the definition of "interlocutory

\textsuperscript{95} See Salisbury Beauty Schools v. State Bd., 268 Md. 32, 67-68, 300 A.2d 367, 388 (1973); Musgrave v. Staylor, 36 Md. 123, 128 (1872). The rationale behind the rule is that the only purpose of an interlocutory injunction is to maintain the status quo until a court has addressed the merits of the case. Musgrave, 36 Md. at 128 (1872) (The purpose of an interlocutory injunction is to prevent disposition "which would defeat or embarrass the passage of a final decree under which the complainant's right could be effectively secured and enforced. It [serves] its whole office and purpose by being obeyed until final decree.").

\textsuperscript{96} 56 Md. App. 374, 467 A.2d 1064 (1983).

\textsuperscript{97} Id. at 390, 467 A.2d at 1072. The interlocutory injunction was to expire "at such time as the issues joined [had] been fully and finally adjudicated." Id. at 381, 467 A.2d at 1067. The trial court interpreted this language to extend the injunction beyond a final, appealable judgment:

Now that, of course, is a pretty broad statement as to what is meant by fully and finally adjudicated. . . . I don't know whether that means by a Court at the trial level or subsequent to a finding on appeal.

I would think at least it would encompass the passage of thirty day[s'] time following which an appeal had not been entered, I think that would probably be a final adjudication, at least as to that issue.

Id. at 382, 467 A.2d at 1068. The Court of Special Appeals agreed with this interpretation, holding that, by its terms at least, the interlocutory injunction did not expire for at
In dicta, the court suggested that the trial court is not without power to prolong injunctive relief, but indicated that the correct procedure for doing so is to issue a new injunction. The court said the standard, drawn from federal cases, for issuing this new injunction should be a "strong showing [that the applicant] is likely to prevail on the merits of its appeal." The court would be required to weigh the factors relevant to granting an injunction as of that point in time when an applicant notifies the court of an intention to appeal. The necessity for this new determination is what renders a

least thirty days after entry of judgment absolute in the event of an appeal. Id. at 384-85, 467 A.2d at 1068.

98. Id. at 386, 467 A.2d at 1070. An interlocutory injunction is one granted "after an adversary hearing on the propriety thereof, but before a determination on the merits of the action" (emphasis added). Md. R.P. BB70(c). The court reasoned that since an interlocutory injunction cannot be granted after a determination on the merits of an action, neither can it be continued, "that being the office of a 'final injunction.'" 56 Md. App. at 386, 467 A.2d at 1070.

99. 56 Md. App. at 386, 467 A.2d at 1070 (citing Salisbury Beauty Schools v. State Bd., 268 Md. 32, 300 A.2d 367 (1973); Diedel v. Diedel, 133 Md. 286, 215 A. 271 (1918); Wagoner v. Wagoner, 77 Md. 189, 26 A. 284 (1893); Musgrave v. Staylor, 36 Md. 123 (1872); Keerl v. Keerl, 28 Md. 189 (1868)). Appellee pointed out that these cases were in equity, but the court found this irrelevant. Id. at 387, 467 A.2d at 1070.

100. Id. The Court of Special Appeals asserted that the trial court possessed the power to issue a new injunction based on analogy to the federal courts, citing Fed. R. Civ. P. 62:

When an appeal is taken from an interlocutory injunction or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed. R. Civ. P. 62(c). Though Maryland does not have a counterpart to this rule, the court said that the federal rule is a "manifestation of the inherent and 'long established right of the trial court, after an appeal, to make orders appropriate to preserve the status quo while the case is pending in the appellate court.'" 56 Md. App. at 389, 467 A.2d at 1071-72 (citing Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962); United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 79 (9th Cir. 1951); Lang v. Caterton, 267 Md. 268, 282, 297 A.2d 735, 743 (1972); Bullock v. Director of Patuxent Inst., 231 Md. 629, 633, 190 A.2d 789, 792 (1963)).


102. 56 Md. App. at 390, 467 A.2d at 1072. The four factors to be considered in ruling on a motion for an interlocutory injunction are (1) "the likelihood that the [applicant] will succeed on the merits," (2) "the balance of convenience," (3) "irreparable injury," and (4) "the public interest." Id. at 380, 467 A.2d at 1067. See also Federal Leasing, Inc. v. Underwriters at Lloyds, 650 F.2d 495, 499 n.4 (4th Cir. 1981) (finding
mere continuance of the interlocutory injunction inadequate.\textsuperscript{103}

\section*{D. Statutes of Limitations}

In \textit{Johnson v. Nadwodny}\textsuperscript{104} the Court of Special Appeals strongly suggested, in dictum, that after \textit{Poffenberger v. Risser}\textsuperscript{105} (which adopted the "discovery" rule for determining when a cause of action accrues)\textsuperscript{106} the accrual date of a cause of action should be considered a question of fact, evidence of which must be viewed in the light most favorable to the plaintiff, upon a motion for directed verdict.\textsuperscript{107} Decisions prior to \textit{Poffenberger} expressly stated that the appli-

\begin{itemize}
\item that the test under Maryland and federal law is essentially the same); State Dep't of Health & Mental Hygiene v. Baltimore County, 281 Md. 548, 554, 383 A.2d 51, 55 (1977); Rowe v. Chesapeake & Potomac Tel. Co., 56 Md. App. 23, 30, 466 A.2d 538, 542 (1983).
\item 290 Md. 631, 431 A.2d 677 (1981).
\item 106. \textit{id.} at 636, 431 A.2d at 680. \textit{See generally Note, Poffenberger v. Risser — The Discovery Principle is the Rule, Not the Exception, 41 Md. L. Rev. 451 (1982).}
\item 107. 55 Md. App. at 230-33, 461 A.2d at 69-70 (dictum). In \textit{Johnson} a directed verdict had been granted for the defendants on the ground that the action was not commenced within the statutory three-year limitations period. However, on appeal it was not necessary to decide whether the accrual date of a cause of action is a question of law or a
\end{itemize}
cation of limitations constitutes a purely legal question, and that the relevant facts must be judicially determined. Furthermore, these cases noted that the "most favorable light" test does not apply to legal questions such as limitations of actions. However, the court in Johnson v. Nadwodny suggested that these decisions were predicated on the pre-Poffenberger rule that, for purposes of limitations, a cause of action accrues upon the occurrence of the alleged wrong and not its discovery.

In Poffenberger, the "discovery" rule was substituted for the occurrence-of-the-wrong rule in all actions, and consequently a cause of action now accrues when the claimant in fact knew, or reasonably should have known, of the wrong. The Court of Special Appeals suggested that, after Poffenberger, the accrual date should be considered a question of fact, and therefore viewed in the light most favorable to the plaintiff, on motion for directed verdict. The court reasoned that, since the "discovery" rule looks to whether plaintiff had knowledge of circumstances "which ought to have put a person of ordinary prudence on inquiry," the rule "brings into play all of the insights required of and reserved for a factfinder." In support, the court drew on an analogy between the "discovery" rule and the equitable principle embodied in section 5-203 of the Maryland Courts and Judicial Proceedings Code: "If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." The court suggested that "[t]he statutory test of 'ordinary diligence' parallels the Poffenberger implied knowledge test of 'ordinary prudence,'" and noted that in cases properly falling under the statute, the question of due diligence was

question of fact because the court found that plaintiff had admitted discovery, leaving no question of fact. Id. at 233, 461 A.2d at 71.


109. See Decker, 47 Md. App. at 211, 422 A.2d at 394; Moy, 46 Md. App. at 369-70, 416 A.2d at 294.

110. 55 Md. App. at 231, 461 A.2d at 70.

111. Poffenberger, 290 Md. at 634, 636, 431 A.2d at 679, 680.

112. Id. at 636, 431 A.2d at 680.


114. Poffenberger, 290 Md. at 637, 431 A.2d at 681.

115. 55 Md. App. at 232, 461 A.2d at 70.


117. 55 Md. App. at 232, 461 A.2d at 70.
ordinarily left to the trier of fact.\textsuperscript{118}

The court's conclusion is reasonable and should be adopted when a proper case arises. While the occurrence-of-the-wrong rule required a court to make only minimal findings of fact, the "discovery" rule involves a more complex inquiry. The factors involved in determining when discovery occurred, or should have occurred, include the nature and cause of the injury, whether the plaintiff had knowledge of the essential elements of the cause of action, the point at which damages were substantial enough to constitute a cause of action, and the level of the plaintiff's skill in ascertaining the injury.\textsuperscript{119} Inquiries such as these are more appropriately viewed as questions of fact.\textsuperscript{120}

\textbf{E. Jury Prejudice—Exposure to Extraneous Matter}

In \textit{Wernsing v. General Motors Corp.},\textsuperscript{121} the Court of Appeals adopted a new rule concerning the effect of exposure of the jury to potentially prejudicial extraneous matter. A personal injury action had been submitted to the jury on special interrogatories, the core of the jury's function being to determine proximate cause on several liability issues.\textsuperscript{122} When verdicts were returned for the plaintiffs, the defendants moved for a new trial, alleging juror misconduct on the ground that a dictionary had been utilized during deliberations.\textsuperscript{123} More specifically, defendants claimed that the jury had

\begin{enumerate}
\item \textit{Id.} (citing Herring v. Offutt, 266 Md. 593, 295 A.2d 876 (1972)).
\item See Note, supra note 106, at 461-62 n.71.
\item The court also held that, when the moving party fails to bring a pending motion to the attention of the court for ruling prior to the conclusion of trial, that party is regarded as having waived the point, and the motion will not be reconsidered on appeal. In effect, the appellate court will not assume a "de facto" overruling in the absence of a "de jure" overruling by the trial court. 55 Md. App. at 238, 461 A.2d at 73. In so holding, the court relied on \textit{White v. State}, 23 Md. App. 151, 156, 326 A.2d 219, 222 (1974). However, it should be noted that the ruling in \textit{White} was at least partly in response to appellant's extreme negligence in failing to resubmit a pending motion despite numerous opportunities to do so. \textit{Id.} at 158, 326 A.2d at 223-24. Johnson would seem to extend this rule to far less extreme cases of neglect.
\item \textit{Id.} at 409, 470 A.2d at 803-04.
\item \textit{Id.} at 408, 470 A.2d at 803. Evidence in support of this allegation consisted of: (1) jurors' affidavits stating that the foreman had obtained a dictionary and read aloud from it, causing at least one juror to change his vote; (2) the affidavit of a bystander describing a conversation between jury members after the verdict had been returned; (3) testimony of the court bailiff that he had provided the jury foreman with a dictionary; and (4) certain writings made during the jury's deliberations, including a note to the judge requesting clarification of the term "proximate," a note to the bailiff requesting a dictionary, and a definition of the term "legal cause" copied from the dictionary provided by the bailiff. \textit{Id.} at 410-11, 413-14, 470 A.2d at 804-06. The Court of Appeals
transposed a misleading dictionary definition of the word "legal" to the term "legal cause," which was used by the judge in explaining the concept of proximate cause.124

Although it is the "near universal consensus" in other states that the mere use of a dictionary during jury deliberations is not automatic grounds for a new trial, but rather that a further determination of prejudice to the complaining party is required,125 the courts differ on their approach to that determination.126 Some courts require that the complaining party essentially prove prejudice in fact. Absent such proof, the new trial is denied.127 Other courts have presumed prejudice under these circumstances, with the burden on the party opposing a new trial to rebut. Under the latter decisions, the court may award a new trial without proof of the purpose for which the dictionary was consulted.128 The Court of Ap-

124. The definition allegedly used by the jury equated "legal cause" with the notion of "having a formal status derived from law often without basis in actual fact." 298 Md. at 414, 470 A.2d at 806. As a result, the jury apparently decided that "proximate cause" meant "could it be possible." Id. at 411 n.1, 470 A.2d at 804 n.1.

125. 298 Md. at 414-15, 470 A.2d at 806. See cases cited infra notes 127-28.

126. 298 Md. at 415, 420 A.2d at 806.

127. Id. (citing Dulaney v. Burns, 218 Ala. 493, 119 So. 21 (1928); Lane v. Mathews, 74 Ariz. 201, 245 P.2d 1025, rev'd on other grounds on reheg, 75 Ariz. 1, 251 P.2d 303 (1952); People v. Jedlicka, 84 Ill. App. 3d 483, 405 N.E.2d 844 (1980); In re Estate of Cory, 169 N.W.2d 837 (Iowa 1969); State v. Duncan, 3 Kan. App. 2d 271, 593 P.2d 427 (1979); Kaufman v. Miller, 405 S.W.2d 820 (Tex. Civ. App. 1966), rev'd on other grounds, 414 S.W.2d 164 (Tex. 1967); Wright v. Clark, 50 Vt. 130 (1877); Rocky Mountain Trucking Co. v. Taylor, 79 Wyo. 461, 335 P.2d 448 (1959)).

peals rejected both of these approaches for the reason that it would rarely be possible either to prove prejudice in fact or to rebut a presumption of prejudice under the stringently applied Maryland rule prohibiting the use of juror affidavits to impeach a verdict.\textsuperscript{129}

The court characterized the problem in \textit{Wernsing} as one of balancing "the right to a fair trial with the policy prohibiting impeachment by a juror of a verdict,"\textsuperscript{130} holding that:

Where, as here, the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not permitted, a sound balance is struck by a rule which looks to the probability of prejudice from the face of the extraneous matter in relation to the circumstances of the particular case.\textsuperscript{131}

In formulating this rule, the court looked to decisions of other states which also prohibit impeachment of a verdict by a juror and found that they have employed similar tests.\textsuperscript{132}

\textsuperscript{129} Id. at 416-18, 470 A.2d at 807-08; \textit{see supra} note 123. The court also noted that although some courts permit the use of juror affidavits for the purpose of sustaining a verdict, this is not an acceptable solution since it would then require, as a matter of fairness, that the opposing party be provided an opportunity to cross-examine or introduce countervailing juror affidavits. 298 Md. at 416, 470 A.2d at 807.

\textsuperscript{130} 298 Md. at 419, 470 A.2d at 809.

\textsuperscript{131} Id. at 419-20, 470 A.2d at 809.

\textsuperscript{132} Id. at 418-19, 470 A.2d at 808-09. In \textit{Gertz v. Bass}, 59 Ill. App. 2d 180, 208 N.E.2d 113 (1965), for example, comparison of key terms contained in instructions to the jury with the same terms as defined in a dictionary requested during deliberations showed substantial differences, and therefore, potential for abuse. The court remanded for a new trial, holding that "[i]t is reasonable to infer from the fact that the jury specifically requested the dictionary, that they made use of the volume in determining the meaning of the crucial terms and were influenced thereby to the prejudice of the plaintiffs." \textit{Id.} at 185, 208 N.E.2d at 116. Similarly, in \textit{State v. Ott}, 111 Wis. 2d 691, 331 N.W.2d 629 (Wis. App. 1983), the court remanded for a new trial when the jury considered a dictionary definition which was determined to be considerably broader than that contained in the court's charge, because "the probable effect upon a hypothetical average jury would be prejudicial." \textit{Id.} at 696, 331 N.W.2d at 632. \textit{Ott} presented an unusual variation on the problem because the exact dictionary definition used could not be ascertained from the record. The court therefore looked to the definitions contained in a number of standard dictionaries before reaching the conclusion that the "probable effect" was prejudicial. \textit{Id.} at 696, 331 N.W.2d at 632.

Perhaps the clearest statement of this type of approach to evaluating potential prejudice where juror impeachment of a verdict is prohibited is that of then New Jersey Superior Court Judge William Brennan, in \textit{Palestroni v. Jacobs}, 10 N.J. Super. 266, 77 A.2d 183 (1950), stating that:

[T]he test whether a new trial will be granted is whether the extraneous matter could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the extraneous matter had that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect.
The court concluded that, when ruling on a motion for a new trial, the trial court should evaluate the degree of probable prejudice from the face of the extraneous matter and determine whether it justifies a new trial. Absent an abuse of discretion the decision of the trial court should not be disturbed. In the present case, however, the court found that, if the jury had in fact utilized the misleading dictionary definition in reaching its conclusions, all other evidence presented at trial would have been disregarded. The court held, therefore, that the degree of probable prejudice to the defendants was so great that the denial of a new trial was an abuse of discretion.

The rule adopted by the Court of Appeals in *Wernsing* is the most reasonable solution to the problem of jury exposure to extraneous material where introduction of direct evidence of the effect of exposure upon deliberations is prohibited. To require proof of prejudice is to place an unreasonable burden on the complaining party, and represents the elevation of one fundamental policy—the privacy of the jury room—to a position of priority over the equally fundamental guarantee of a fair trial. On the other hand, a

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*Id.* at 271, 77 A.2d at 185.

In contrast, the Court of Appeals distinguished *Rocky Mountain Trucking Co. v. Taylor*, 79 Wyo. 461, 335 P.2d 448 (1959), in which the Wyoming Supreme Court, despite a general prohibition against the use of juror affidavits to impeach a verdict, applied a rule requiring proof of prejudice in fact for the award of a new trial when the jury had been furnished with a dictionary. In that case there was no proof that the dictionary had actually been used during deliberations, whereas in *Wernsing* and the three cases cited above, there was admissible evidence that the jury had relied on a dictionary in reaching its verdict. 298 Md. at 415, 470 A.2d at 806-07.

133. 298 Md. at 420, 470 A.2d at 809.
134. *Id.*
135. *Id.*
136. *Id.*
137. The rationale of this policy was explained by the Court of Appeals in *Brinsfield v. Howeth*, 110 Md. 520, 73 A. 289 (1909):

> Such evidence is forbidden by public policy, since it would disclose the secrets of the jury room and afford an opportunity for fraud and perjury. It would open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure; and therefore, the law has wisely guarded against all such testimony and has considered it unworthy of notice. It would be a most pernicious practice, and in its consequences dangerous to this much valued mode of trial, to permit a verdict, openly and solemnly declared in the Court, to be subverted by going behind it and inquiring into the secrets of the jury room. *Id.* at 530-31, 73 A. at 294. See also *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982) (in a medical malpractice action the rule against juror impeachment would not be relaxed even when there was evidence of jury misconduct that was independent of the jurors themselves); *Williams v. State*, 204 Md. 55, 102 A.2d 714 (1954) (reviewing authorities in Maryland and other jurisdictions on the issue of juror impeachment of a verdict).
presumption of prejudice in such cases would be both an inefficient use of judicial resources, since such verdicts would be routinely overturned due to the practical impossibility of rebutting the presumption, and an unreasonable burden on the resisting party. The approach adopted in Wernsing, however, avoids the excesses of these alternatives. By directing that a court look to the face of the extraneous matter in order to assess the probability of prejudice to the complaining party, the Court of Appeals has preserved the confidentiality of jury deliberations, while assuring that possible jury prejudice will be assessed objectively.

F. Class Actions

In Kirkpatrick v. Gilchrist,138 plaintiffs sought class status in an action to enjoin the conversion of an apartment complex into condominiums.139 Before ruling on the motion for class certification, however, the lower court dismissed for failure to join certain necessary parties.140 The Court of Special Appeals remanded, holding that the lower court should have ruled on the question of class certification prior to, or concurrently with, its ruling on necessary parties.141 The court reasoned that "[a] party clearly has the right to expect the determination of any pending motions which may affect the outcome of the case prior to a decision."142

The court stressed that class certification should be granted

139. Plaintiffs were tenants of the apartment complex subject to conversion. They sought a judgment in the Circuit Court for Montgomery County declaring that the County Executive had improperly approved an incomplete property report in connection with the condominium conversion, and an order enjoining conversion, at least until proper approval of the complete report was obtained. Plaintiffs also sought class action status pursuant to former Md. R.P. 209 (1977) (now replaced by Md. R.P. 2-231). A demurrer to the original bill was sustained, striking the tenants' association as a party plaintiff. The circuit court expressly found it unnecessary at that time to decide whether the action was properly a class action. Plaintiffs filed an amended bill and again raised the question of class status. 56 Md. App. at 245-46, 467 A.2d at 564.
140. 56 Md. App. at 246, 467 A.2d at 564. The action was dismissed with prejudice, upon preliminary motion, for want of interested parties pursuant to Md. Cts. & Jud. Proc. Code Ann. § 3-405(a) (1984). Id. The necessary parties cited by the lower court numbered over 500, and included contract purchasers of the apartment units and those with a mortgage interest in the condominium regime. Id. at 250, 467 A.2d at 566. The circuit court noted that no effort had been made to join those parties. There was no indication in the record that the court addressed plaintiffs' motion for class certification. Id. at 246, 467 A.2d at 564.
141. 56 Md. App. at 250, 467 A.2d at 566.
142. Id. The court relied on Bender v. Secretary, Dep't of Personnel, 290 Md. 345, 430 A.2d 66 (1981), in which the Court of Appeals held that the 350 persons with an interest in a declaratory judgment action were necessary parties to the action, but re-
only when appropriate, but suggested that if such were the finding of the lower court on remand, plaintiffs' timely and repeated requests for certification would alleviate their failure to join all members of the "class." If, on the other hand, class certification were found inappropriate, the court suggested that the failure of the lower court to rule on the pending motion might similarly suffice to excuse plaintiffs' neglect, and that the missing parties might be added by amendment.

The court's conclusion that the trial court must rule on all pending motions that might affect the outcome of a case prior to rendering a decision is particularly appropriate with respect to requests for class certification because the primary purpose of the Maryland rule governing class actions is to provide an alternative to "overtly cumbersome joinder requirements" in cases in which formal joinder is impracticable. This purpose would be frustrated if the trial court were permitted to dismiss an action for want of interested parties without first ruling on a pending motion for class certification. Moreover, as the class action is essentially a procedural amelioration of the impracticalities of joinder, mere failure to choose the correct method of proceeding does not warrant dismissal.

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manded "with instructions to permit either an amendment adding the necessary parties, or, if appropriate, a class action under Md. Rule 209." Id. at 356, 430 A.2d at 72-73.

The court in Kirkpatrick noted that, in the absence of a ruling on a pending motion, the parties may not assume that it was implicitly granted, as plaintiffs had argued on appeal. 56 Md. App. at 250 n.5, 467 A.2d at 566 n.5.

143. 56 Md. App. at 250, 467 A.2d at 566-67.
144. Id. at 250-51, 467 A.2d at 567.
145. Id. at 251, 467 A.2d at 567.
146. Id. at 249, 467 A.2d at 566. Former Md. R.P. 209(a) provided that:

When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interest of all may sue or be sued on behalf of all (emphasis added).


Current Md. R.P. 2-231(a), which is derived from Fed. R. Civ. P. 23(a) and former rule 209(a), is very similar:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class (emphasis added).

Md. R.P. 2-231(a).

147. In the course of reviewing the Maryland class action rule, the court concluded that, despite "[i]ts popularity as a public interest device," the rule is "by its very nature procedural." 56 Md. App. at 248, 467 A.2d at 565.
with prejudice. In *Kirkpatrick*, were class action status for some reason inappropriate, plaintiffs should have been granted the opportunity to include the necessary parties prior to dismissal and thereby proceed with their claim on the merits.

G. Standing

In *National Electrical Industry Fund v. Bethlehem Steel Corp.*, the Court of Appeals held that various trusts, created to receive funds from employers for the benefit of union members, had standing to assert mechanics' liens on behalf of individual union members under the Maryland Mechanics' Liens Statute against a contractor who failed to remit payments to the trusts pursuant to a contract of employment. The court reasoned that the trusts op-

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149. The trusts involved in this consolidated action were the National Employees Benefit Board, the Maryland Electrical Industry Health & Welfare Fund, the Maryland Electrical Industry Pension Fund, the Maryland Electrical Industry Severance & Annuity Fund, the National Electrical Contractors Association Local and International Brotherhood of Electrical Workers Union Joint Apprenticeship and Training Trust fund, and the International Brotherhood of Electrical Workers Union Vacation and Holiday Fund. Id. at 543-44, 463 A.2d at 859.
151. 296 Md. at 552, 463 A.2d at 863. In the contract of employment, the contractor had bound itself to comply with the collective bargaining agreement entered into between the National Electrical Contractors Association and Local Union No. 24 of the International Brotherhood of Electrical Workers. Appellants contended that they were "subcontractors" under the collective bargaining agreement, and therefore entitled to assert mechanics' liens. The court rejected this contention, finding that the collective bargaining agreement was not a "contract" for purposes of imposing a lien under Md. REAL PROP. CODE ANN. § 9-102(a) (1981), which requires that such contracts be for doing work "for or about a building." 296 Md. at 545-46, 463 A.2d 860. However, the court determined that the individual workers, having individual contracts with the principal contractor to perform work at a designated site, were "subcontractors" within the meaning of the act. Id. at 546-48, 463 A.2d at 860-61 (citing Diener v. Cubbage, 259 Md. 555, 270 A.2d 471 (1970) (holding that a statutory predecessor to the Act included individuals who rendered labor only)). Whether these contracts involved work "for or about a building" was not an issue on appeal. 296 Md. at 545 n.1, 463 A.2d at 860 n.1.
The court also held that the Union had standing to assert a claim for recovery of union dues payments withheld by the contractor. 296 Md. at 552, 463 A.2d 863. This ruling was mandated by the fact that the union was an assignee of the employees under 29 U.S.C. § 186(c)(4), which "permits payments by an employer to a labor organization of monies deducted from employees' wages in payment of membership dues, subject to the proviso that 'the employer has received from each employee, on whose account such deductions are made, a written assignment . . . .'" (quoting 29 U.S.C. § 186(c)(4) (1982)).
The National Electrical Industry Fund also sought to assert a mechanics' lien on behalf of the employees for unpaid contributions, alleging that members of the Union were participants in and beneficiaries of the fund. In light of these allegations, the court held that the petition of the Industry Fund was sufficient to withstand demurrer and, for
erated for the benefit of the employees, and that payments by the contractor to the trust funds are recognized as beneficial to the employees under federal labor law.\textsuperscript{152} The court described the relationship between the trustees and the employees as analogous to that of assignment.\textsuperscript{153} Although this holding is a significant expansion of the law in Maryland, the court found support in numerous federal and out-of-state decisions.\textsuperscript{154}

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\begin{quote}
purposes of pleading, should be treated similarly to those of the trusts. \textit{Id.} at 553, 463 A.2d at 864. However, the court noted that final determination of the standing of the Industry Fund would have to await further factual development in the trial court. \textit{Id.} The court’s hesitation with respect to the Industry Fund was prompted by questions raised in the course of antitrust litigation pending in the federal courts regarding whether the Industry Fund was in fact operated for the benefit of the employees. \textit{Id.} at 552-53, 463 A.2d at 863-64 (citing National Constructors Ass’n v. National Electrical Contractors Ass’n, 498 F. Supp. 510 (D. Md. 1980), aff’d as modified, 678 F.2d 492 (4th Cir. 1982), \textit{petition for cert. filed}, 51 U.S.L.W. 3535 (U.S. Jan. 18, 1983)).

152. 296 Md. at 552, 463 A.2d at 863 (citing 29 U.S.C. § 86(a) (1982)).

153. \textit{Id.} at 548-50, 463 A.2d at 861-62. The court relied on United States v. Carter, 353 U.S. 210 (1957) as holding that such trustees have standing to sue on the rationale that:

\begin{quote}
the trustees’ relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assign-ment [and] . . . Moreover, the trustees of the fund have an even better right to sue . . . than does the usual assignee since they are not seeking to recover on their own account [but] for the sole benefit of the beneficiaries of the fund.
\end{quote}


The court distinguished Ridge Erection Co. v. Mountain States Tel. & Tel. Co., 37 Colo. App. 477, 549 P.2d 408 (1976) on the grounds that the Colorado mechanics’ lien statute contained an exhaustive list of persons entitled to claim a lien that did not include trustees claiming for unpaid contributions to employee trusts. 296 Md. at 550-51, 463 A.2d at 862.

The court also discussed the formalities necessary in filing a notice of intent to claim a mechanics’ lien. Although the general rule is that notice “should definitely state the intention of the claimant to claim the lien, and also fully and specifically state the particulars of the claim and the nature and kind of work done or materials furnished, the
time when done or furnished, and the amount of the claim," Himelfarb v. B & M Welding & Iron Works, 254 Md. 37, 41, 253 A.2d 842, 844 (1969), the court noted that this rule was developed in cases in which the party claiming the lien did so in his own right as the person who had furnished materials or labor. 296 Md. at 554, 463 A.2d at 864. The court held that notices were sufficiently specific if they identified each individual employee and stated the total debt claimed as payable to each claimant. Id. The court reasoned that it was not necessary to require separate calculations for individual employees, because payment would not be made to the employees individually, and that specification of the time the work was performed was necessary only insofar as the act requires 90-day notice. Id. at 554-55, 463 A.2d at 864-65.
III. COMMERCIAL LAW

A. Arbitration

In *Gold Coast Mall v. Lamar Corp.*, the Court of Appeals articulated the legislative policy favoring arbitration agreements by holding that an arbitrator, rather than a court, should initially determine whether the subject matter of a dispute is within the scope of an arbitration agreement. The court also held that the party against whom a claim is asserted and who is not seeking relief does not waive the right to arbitrate by failing to initiate arbitration.

The Court of Appeals outlined the scope of a court's powers to determine when issues are arbitrable by referring to the Maryland Uniform Arbitration Act. The court has previously construed this Act to embody a legislative policy favoring the enforcement of arbitration agreements. In light of this policy, in a suit to compel arbitration, the court will only decide whether the arbitration agreement encompasses the subject matter of the particular dispute. The court, though, has never articulated a test for determining when a matter is arbitrable. Rather, when it is clear from the language of the arbitration agreement that the dispute is within the scope of the agreement, the court will compel arbitration. When it is clear from the language of the agreement that the dispute is outside the scope of the agreement, the court will not compel arbitration.

The *Gold Coast* court addressed itself to the issue of who should determine whether an issue is within the scope of an arbitration agreement when the answer is not clear from the language of the agreement. The *Gold Coast* court held that this issue is initially for the arbitrator to decide. This holding is consistent with prior Maryland law, and finds strong support in decisions of several

2. *Id.* at 107, 468 A.2d at 97.
3. *Id.* at 114, 468 A.2d at 100.
6. *Id.* at 103-04, 468 A.2d at 95.
7. *Id.* at 104, 468 A.2d at 95.
8. *Id.*
9. *Id.* at 107, 468 A.2d at 97.
other jurisdictions. The rationale underlying these holdings appears to lie in the legislative policy favoring arbitration and the philosophy that "the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity."  

The *Gold Coast* court also determined that a party against whom a claim is being asserted and who is not seeking relief does not waive the right to arbitrate by failing to initiate arbitration within the time constraints of the agreement. The court found support for this holding in the law of other jurisdictions and in the general rules governing arbitration. Absent express language in the agreement, the party asserting the claim is responsible for initiating arbitration. A party who sues instead of seeking arbitration "is in essence refusing to arbitrate and is itself in default of the arbitration agreement." Since the party against whom a claim is asserted is not required to initiate arbitration, that party is also not deemed to have waived the right to arbitration by failing to do so.  

In *Wilson v. McGrow, Pridgeon & Co.*, the Court of Appeals construed the Maryland Uniform Arbitration Act's exclusion of arbitration agreements between employers and employees to apply only to collective bargaining agreements. An arbitration agreement between an employer and an individual employee, therefore, is

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11. See cases cited in 298 Md. at 105-06, 468 A.2d at 96.  
12. Id. at 107, 468 A.2d at 97.  
13. Id. at 114, 468 A.2d at 100. Earlier in this decision, the court held that an arbitration clause, like any other clause in a contract, can be waived if the intent to waive is clearly established. Id. at 109, 468 A.2d at 98.  
14. Id. at 109-13, 468 A.2d at 98-100.  
15. Id. See also cases cited in id. at 109-10, 468 A.2d at 98-99.  
16. Id. at 114, 468 A.2d at 100.  
17. The Court of Appeals noted, however, that a party against whom a claim is asserted may waive the right to arbitrate by participating in a judicial proceeding without making a motion to compel arbitration. Id. n.5 (citing Charles J. Frank Inc. v. Associated Jewish Charities of Baltimore, Inc., 294 Md. 443, 450, 450 A.2d 1304, 1307 (1982) (party against whom a claim was asserted had waived its right to arbitrate those issues raised and decided in a previous court proceeding in which that party had not filed a motion to compel arbitration)).  
20. Id. § 3-206(b) states: "This subtitle does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply."  

The court's references to § 3-206(b) in the *Wilson* decision as an "exclusion" of arbitration agreements between employers and employees from the provisions of the Maryland Uniform Arbitration Act are a bit misleading. It would be more accurate to refer to the section as an exclusion only if the arbitration agreement does not expressly provide that the Act will apply.
enforceable under the Act.\textsuperscript{21}

The legal status of arbitration agreements has undergone a dramatic shift in recent times. Under the common law, an agreement to submit future disputes to arbitration was generally unenforceable.\textsuperscript{22} The Uniform Arbitration Act altered this rule by allowing a party to an arbitration agreement to petition a court to order arbitration.\textsuperscript{23} Maryland's version of the Act, however, does not apply to agreements between employers and employees unless expressly provided in the agreement.\textsuperscript{24}

The Court of Appeals referred to linguistic, historical, and policy arguments in holding that the exclusion does not cover individuals' employment agreements. First, the court found significance in the statute's plural usage, "employers and employees," thereby reasoning that this section was only intended to exclude collective bargaining agreements.\textsuperscript{25} Acknowledging, however, that the language was ambiguous on this point,\textsuperscript{26} the court then referred to legislative history, which indicated that Maryland had altered the uniform version of the Act in this regard because of opposition from labor

\begin{itemize}
  \item \textsuperscript{21} See 298 Md. at 78, 467 A.2d at 1031.
  \item \textsuperscript{22} See, e.g., Tomlinson v. Dille, 147 Md. 161, 127 A. 746 (1925). This rule was based on the idea that such agreements ousted the courts of jurisdiction and were therefore contrary to public policy. See, e.g., Stephenson v. Piscataqua Fire & Marine Ins., 54 Md. 55, 70 (1866). For a discussion of Maryland's treatment of specific types of arbitration prior to the Uniform Arbitration Act, see generally Mullen, \textit{Arbitration Under Maryland Law}, 2 Md. L. Rev. 326 (1938).
  \item \textsuperscript{24} Md. CTS. & JUD. PROC. CODE ANN. § 3-206(b) (1984). See supra note 20. The uniform version provides the opposite: namely, that the Act applies to employment agreements unless the agreement states otherwise. See UNIF. ARBITRATION ACT § 1, 7 U.L.A. 4 (1978 & Supp. 1984). Of the 22 states that have adopted the Act, ten have excluded labor agreements to varying degrees. See generally 7 U.L.A. 5-6 (describing states' non-uniform amendments to this section). Some of these statutes explicitly refer to collective bargaining agreements. See, e.g., MASS. GEN. LAWS ANN. ch. 251, § 1 (West 1959 & Supp. 1984). Others use language similar to the language of the Maryland statute. See, e.g., N.C. GEN. STAT. § 1-567.2 (1983). But a comparison between the Maryland version and that of other states yields no clear inferences. Jurisdictions with provisions similar to Maryland's have not yet dealt with the scope of the exclusion.
  \item \textsuperscript{25} 298 Md. at 69-71, 467 A.2d at 1026-27.
  \item \textsuperscript{26} Id.
\end{itemize}
Moreover, the Court of Appeals asserted that a contrary construction would violate the policy expressed in the Act's uniformity clause. The court characterized a broad reading of the exclusion as "enlarg[ing] the conflict between the Uniform Arbitration Act and section 3-206(b) of the Maryland version" since it would exclude all employer-employee agreements, not just collective bargaining agreements, from the Act. The court held that the Act's uniformity clause required that differences between Maryland's version and the uniform version be construed as narrowly as possible. Finally, the court noted that, prior to the adoption of the Act, there had been a statute allowing for enforcement of certain employer-employee arbitration agreements. The Court of Appeals asserted that this statute could not have applied to collective bargaining agreements, since unions were illegal at the time of its adoption. Though the statute was repealed by the Uniform Arbitration Act, the court concluded that the statute expressed a legislative policy that disputes between an employer and an individual employee be arbitrable; the court refused to construe the Act as reversing this policy. Despite the somewhat tortuous arguments advanced by the court in this case, the holding appears sound in light of the Act's legislative history.

B. Attachments

In *Hoffman Chevrolet, Inc. v. Washington County National Savings*

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27. See the committee report referring to § 3-206(b) as "an exclusion for labor disputes," *Legislative Council of Maryland, Report to the Gen. Assembly of 1965*, at 920 (1964), and stating that the section was included "at the specific request of labor union representatives," *id.* at 1, cited in *298 Md. at 73-74, 467 A.2d at 1028-29*. Apparently unions felt that the Act's procedures were not sufficiently flexible for labor negotiations. *See* *298 Md. at 73-74, 467 A.2d at 1028-29*.


29. *298 Md. at 72, 467 A.2d at 1028*.

30. *Id.* This argument is questionable. The uniformity clause merely directs the court to construe the Act's provisions in a manner consistent with the judicial decisions of other jurisdictions regarding the same provisions. It does not apply to provisions where the legislature has clearly chosen a different policy than that of the uniform version.

31. *Id.* at 77, 467 A.2d at 1030. *See Act of Apr. 1, 1878, ch. 379, 1878 Md. Laws 584*.

32. *298 Md. at 77, 467 A.2d at 1030*. Unions were made legal by *Act of Apr. 8, 1884, ch. 266, 1884 Md. Laws 366*.


34. *298 Md. at 77-78, 467 A.2d at 1031*. The court offered no support for this conclusion.
the Court of Appeals held that a check payable to a debtor from a retirement trust but still in the possession of the debtor's employer was not subject to attachment by a judgment creditor of the debtor, under Maryland garnishment law. Attachment would extend, however, to undrawn commissions owed to a debtor by his former employer, the garnishee.

Washington County National Savings Bank was a holder of two promissory notes issued by McSherry, a former employee of Hoffman Chevrolet. Upon McSherry's default, the bank entered confessed judgments on the notes, and caused an attachment to be issued on all credits of McSherry that were in the hands of Hoffman Chevrolet. At the time, Hoffman held some unpaid commissions owed McSherry, as well as a retirement trust check payable to McSherry. Hoffman refused to surrender the commissions and pension check, claiming that McSherry was indebted to Hoffman in an amount in excess of the funds held.

Under Maryland law, a court may issue an attachment against a debtor's property or credit. The court first defined "credit" as a monetary obligation that a garnishee owes to a debtor. Under that definition, the commission owed to the debtor by Hoffman was clearly an attachable "credit". The pension check, on the other hand, was not an attachable "credit" because it did not represent an obligation that the garnishee, Hoffman, owed to the debtor. Rather, the check was an obligation owed to the debtor, McSherry, by the retirement trust.

In addition, the court concluded that the retirement check was

35. 297 Md. 691, 467 A.2d 758 (1983).
36. Id. at 702, 467 A.2d at 764.
37. Id. at 697, 467 A.2d at 762.
38. Id. at 694, 467 A.2d at 760.
39. Id. The writ commanded Hoffman to "attach, seize, take and safekeep, the lands, tenements, goods, chattels, and credits" of McSherry. Id.
40. Id. at 695, 467 A.2d at 760.
41. Id. at 694, 467 A.2d at 760.
42. "An attachment may be issued against any property or credit, matured or unmatured, which belong to a debtor." Md. CTS. & JUD. PROC. CODE ANN. § 3-305 (1984).
43. 297 Md. at 697-98, 467 A.2d at 761-62. In deriving this definition, the court examined other cases in which the attachment of credits had been discussed. See, e.g., Northwestern Nat'l Ins. Co. v. Wetherall, Inc., 267 Md. 378, 298 A.2d 1 (1972).
44. 297 Md. at 697, 467 A.2d at 762.
45. Id.
46. Id. at 697-98, 467 A.2d at 762. The court cited Morse v. Stevens, 95 Vt. 465, 115 A. 697 (1922) and Hancock v. Colyer, 99 Mass. 187 (1868) as support for its conclusion. 297 Md. at 698, 467 A.2d at 762.
not attachable as "property" of the debtor.\textsuperscript{47} Although a check, a type of chose in action,\textsuperscript{48} is considered property under Maryland attachment law,\textsuperscript{49} the court noted that a check cannot be considered property of the person in question until it has been actually or constructively delivered to that person.\textsuperscript{50} Accordingly, since the retirement check was still in Hoffman's possession, it was not yet "property" of McSherry and could not, therefore, be attached by the bank.

The court also held that the check was not attachable because it was issued from a spendthrift trust that prohibited the asserted attachment.\textsuperscript{51} Since Maryland generally recognizes the validity of spendthrift trust provisions,\textsuperscript{52} the court determined that the trust could legally insulate the retirement benefits from attachment.\textsuperscript{53} The court held that the retirement check could not be subject to the bank's claim until it was actually in McSherry's hands.\textsuperscript{54}

After apparently deciding the case according to Maryland law,

\textsuperscript{47} 297 Md. at 702, 467 A.2d at 764.
\textsuperscript{48} Id. at 700, 467 A.2d at 763. Although Maryland law had not previously defined checks as among tangible choses in action, this finding is consistent with the law in other jurisdictions. See, e.g., Tarrant Am. Savs. Bank v. Smokeless Fuel Co., 233 Ala. 507, 172 So. 603 (1937); State v. Taushcer, 227 Or. 1, 360 P.2d 764 (1961); 63 AM. JUR. 2D Property § 27 (1972 & Supp. 1983); 10 C.J.S. Bills & Notes § 5 (1938 & Supp. 1984).
\textsuperscript{49} 297 Md. at 701, 467 A.2d at 764. See Newcomer v. Orem, 2 Md. 297 (1852).
\textsuperscript{50} 297 Md. at 700, 467 A.2d at 764. See Morgenthau v. Fidelity & Deposit Co., 94 F.2d 692 (D.C. Cir. 1937) (check not property until received); City Nat'l Bank v. Wernick, 368 So. 2d 934 (Fla. Dist. Ct. App. 1979) (payee acquires no rights in a negotiable instrument prior to its delivery); Caviness v. Andes & Roberts Bros. Constr. Co., 508 S.W.2d 253 (Mo. Ct. App. 1974) (delivery to payee's estranged wife constituted delivery to payor's own agent and not delivery and acceptance by payee).
\textsuperscript{51} See 297 Md. at 705, 467 A.2d at 766 for the spendthrift trust provision affording such protection.
\textsuperscript{52} Id. at 706, 467 A.2d at 766 (citing Safe Deposit & Trust Co. v. Robertson, 192 Md. 653, 65 A.2d 292 (1949); Safe Deposit & Trust Co. v. Independent Brewing Assoc., 127 Md. 463, 96 A. 617 (1916); Smith v. Towers, 69 Md. 77, 14 A. 497 (1888)). The court decided that the rules announced in these cases logically support a spendthrift trust's protection of retirement benefits. Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 707, 467 A.2d at 767. See also Hildreth Press Employees Fed. Credit Union v. Connecticut Gen. Life Ins. Co., 30 Conn. Supp. 513, 295 A.2d 54, cert. denied, 163 Conn. 643, 295 A.2d 669 (1972). Maryland law does recognize the dry or passive trust theory. A trust whose purpose has ceased and whose trustees have no function left to perform cannot continue to afford the protection afforded by its provisions. See Burnham v. Gas & Electric Co., 217 Md. 507, 144 A.2d 80 (1958); Owens v. Crow, 62 Md. 491 (1884). The court concluded, however, that the retirement trust in question would not become dry or passive until the benefits were actually received by the beneficiary. Therefore, Maryland law provided the full protection afforded by the spendthrift provision. 297 Md. at 708, 467 A.2d at 767.
the court then considered the effect of ERISA, noting that the legislative history and provisions of ERISA mandate that it shall supersede conflicting state law. ERISA section 1056(d)(1) indicates that benefits provided under a qualified pension plan may not be "assigned or alienated." There is a split of authority whether this provision precludes garnishment and other involuntary executions, but the court followed those decisions holding that the provision does preclude involuntary as well as voluntary assignments and alienations of qualified pension plans. Therefore, even if Maryland law did permit attaching the pension plan benefits, the provisions of ERISA would preclude such an attachment.

C. Banks and Banking

In Rezapolvi v. First National Bank, the Court of Appeals held that a bank could not dishonor its cashier's check simply because the check used to purchase it lacked an authorized signature. Although the court expressly rejected the suggestion that a bank may never dishonor its cashier's check, its decision effectively limited the nature of such an exception.

The court noted policy reasons which support the general rule that a bank cannot dishonor its own cashier's check. A cashier's check circulates as the equivalent of cash in the business

56. 297 Md. at 711, 467 A.2d at 769. 29 U.S.C. § 1144(a) (1976), which the court cited, provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title."
59. The pension plan must specifically provide that the benefits may not be assigned or alienated. See 29 U.S.C. § 1056(d) (1982).
60. 297 Md. at 710-11, 467 A.2d at 768-69.
62. Rezapolvi obtained a check from Columbia Marketing, which was signed by an unauthorized person. He then sought to cash the check at First National Bank where Columbia Marketing had an account. Under an agreement between the bank and Columbia Marketing, the bank could only accept checks which contained an "authorized signature" as indicated on a signature card. Although First National accepted the check and issued Rezapolvi a cashier's check, it later stopped payment on the cashier's check upon discovering the original check was unauthorized. Id. at 3-5, 459 A.2d at 184-86.
environment. It "'stands on its own foundation as an independent, unconditional and primary obligation of the Bank.'"  

Despite this vital role in the economy, the court recognized that a bank may dishonor its cashier's check "under very limited circumstances." These "limited conditions" are where "the holder has dealt with the bank in connection with the transaction or is not a holder in due course, and where the cashier's check was obtained by fraud upon the bank, or under certain circumstances, where there was no consideration for the instrument."  

The court rejected First National's argument that the unauthorized signature on the check rendered it "not properly payable" and consequently offered no consideration for the cashier's check. First, the court found that the signature was authorized under section 1-201(43) of the Maryland Uniform Commercial Code.  

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63. Id. at 7-9, 459 A.2d at 187.
64. Id. at 8, 459 A.2d at 187 (quoting Pennsylvania v. Curtiss Nat'l Bank, 427 F.2d 395, 400 (5th Cir. 1970)).
65. Id. at 10-11 n.7, 459 A.2d at 188-89 n.7. Several courts, however, have suggested that a bank has no defense when it refuses to pay on its cashier's check. See, e.g., Munson v. American Nat'l Bank & Trust Co., 484 F.2d 620 (7th Cir. 1973); Kaufman v. Chase Manhattan Bank, 370 F. Supp. 276 (S.D.N.Y. 1973); Able & Assoc., Inc. v. Orchard Hill Farms, 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1979); Moon Over the Mountain, Ltd. v. Marine Midland Bank, 87 Misc. 2d 918, 386 N.Y.S.2d 974 (Cir. Ct. 1976). To justify this result, some courts have held that, since a cashier's check serves as an acceptance when issued, a stop payment order comes too late to suspend the bank's duty to pay once the cashier's check has been issued. Munson, 484 F.2d at 623-24; Kaufman, 370 F. Supp. at 278. In addition, these courts have relied on U.C.C. § 4-303 to hold that a stop order is ineffective if it is received after the bank has accepted or certified the item. Kaufman, 370 F. Supp. at 278; Able & Assoc., 77 Ill. App. 3d at 381-82, 395 N.E.2d at 1142; Moon Over the Mountain, 87 Misc. 2d at 920, 386 N.Y.S.2d at 975.

64. Id. at 8, 459 A.2d at 187 (quoting Pennsylvania v. Curtiss Nat'l Bank, 427 F.2d 395, 400 (5th Cir. 1970)).
65. Id. at 10-11 n.7, 459 A.2d at 188-89 n.7. Several courts, however, have suggested that a bank has no defense when it refuses to pay on its cashier's check. See, e.g., Munson v. American Nat'l Bank & Trust Co., 484 F.2d 620 (7th Cir. 1973); Kaufman v. Chase Manhattan Bank, 370 F. Supp. 276 (S.D.N.Y. 1973); Able & Assoc., Inc. v. Orchard Hill Farms, 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1979); Moon Over the Mountain, Ltd. v. Marine Midland Bank, 87 Misc. 2d 918, 386 N.Y.S.2d 974 (Cir. Ct. 1976). To justify this result, some courts have held that, since a cashier's check serves as an acceptance when issued, a stop payment order comes too late to suspend the bank's duty to pay once the cashier's check has been issued. Munson, 484 F.2d at 623-24; Kaufman, 370 F. Supp. at 278. In addition, these courts have relied on U.C.C. § 4-303 to hold that a stop order is ineffective if it is received after the bank has accepted or certified the item. Kaufman, 370 F. Supp. at 278; Able & Assoc., 77 Ill. App. 3d at 381-82, 395 N.E.2d at 1142; Moon Over the Mountain, 87 Misc. 2d at 920, 386 N.Y.S.2d at 975.

66. 296 Md. at 11, 459 A.2d at 189. Other courts have expressed the same view. See, e.g., Goldstein v. McLean Bank, 552 F.2d 1072, 1078 n.5 (4th Cir. 1977); TPO, 487 F.2d at 136; Pennsylvania v. Curtiss Nat'l Bank, 427 F.2d 395, 399 (5th Cir. 1970); Banco Ganadero y Agricola v. Society Nat'l Bank, 418 F. Supp. 520, 523-24 (N.D. Ohio 1976); Wilmington Trust Co. v. Delaware Auto Sales, 271 A.2d 41, 42 (Del. 1970). See also 9 C.J.S. Banks and Banking § 173, at 382-83 (1938).

67. 296 Md. at 11, 459 A.2d at 189 (emphasis in original). In addition, the court noted that the bank may only use its own defenses to justify its refusal; it may not rely on any third party defenses. Id. at 12, 459 A.2d at 189.
68. Id.
69. Id., 459 A.2d at 190. An "'[u]nauthorized signature or endorsement' means one made without actual, implied or apparent authority and includes a forgery." Md. COM. LAw CODE ANN. § 1-201(43) (1984) (emphasis in original). Another Maryland case, citing § 1-201(43), acknowledged that a signature is not unauthorized when authority to sign is
Second, even if the signature was initially unauthorized, section 3-404 permits it to become operative if an authorized person subsequently ratifies it.70 Finally, under the rule of Price v. Neal71 as codified by section 3-417(1)(b),72 First National could not assert lack of consideration, even if the signature had not been ratified.73 This final analysis severely restricts the consideration exception since "'a drawee of a draft is presumed to know the signature of his customer, the drawer,"'74 and if the bearer of the drawer's note acts in good faith, the bank has no defense for withholding payment.

In Wright v. Commercial & Savings Bank,75 the Court of Appeals held that a bank's removal of a wife's name from a joint checking account at the direction of her husband constituted a breach of contract by the bank, even though the contract allowed the husband to withdraw all funds and establish a new account.76 Writing for a

expressly given or implied based on apparent authority. See Taylor v. Equitable Trust Co., 269 Md. 149, 156, 304 A.2d 838, 842 (1973). In Rezapolvi, evidence revealed that the Columbia Marketing check was signed by an individual expressly authorized to sign, despite the fact that his name did not appear on the bank's signature card.

70. Md. Com. Law Code Ann., § 3-404 (1975) provides:
(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
(2) Any unauthorized signature may be ratified for all purposes of this title. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

Evidence indicated that an authorized individual from Columbia Marketing ratified the signature. This individual admitted he had ordered the employee to sign the check and stated that he fully intended to put the employee's name onto the signature card. 296 Md. at 5, 459 A.2d at 185.

71. 3 Burr. 1354 (1762).

72. Section 3-417 provides:
(1) Any person who obtains payment or acceptance . . . warrants to a person who in good faith pays or accepts that . . .
(b) He has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith
(i) To a maker with respect to the maker's own signature; or
(ii) To a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
(iii) To an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized . . . .


73. 296 Md. at 14, 459 A.2d at 190-91.
74. Id. (quoting Md. Com. Law Code Ann. § 3-417 comment 4 (1975)).
76. Id. at 156-57, 464 A.2d at 1085. In addition, the court held that the bank's refusal to give the wife an instrument (in this case, a counter check) was not wrongful
divided court,77 Judge Cole stated, "[A] depositor has no reason to believe that the bank . . . will delete his name from the account. . . . When the bank so favors one of its depositors, it breaches its contract with the other."78

The decision may be criticized on several grounds. First, as the dissent pointed out, the court cited no authority for its holding,79 indeed, Maryland appears to be the only jurisdiction to adopt this position.80 Second, the court takes an unnecessarily formalistic approach to this banking transaction. The husband's right to withdraw all funds effectively included the right to delete his wife's name from the account.81 The difference between these two procedures is a technicality that does not affect any of the genuine expectations of the parties. This formalism seems all the more anomalous in light of the bank's contention that plaintiff's damages on this claim were probably minimal.82

D. Bankruptcy

In Maryland National Bank v. Mayor & City Council of Baltimore,83 the Court of Appeals for the Fourth Circuit held that a trustee in bankruptcy may not avoid state and local tax liens that accrue subsequent to the filing of a debtor's petition in bankruptcy, as long as the tax liens arise prior to distribution of the foreclosure sale pro-

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77. The court was divided 4-3. Chief Judge Murphy and Judge Rodowsky concurred in Judge Smith's dissenting opinion. See id. at 164, 464 A.2d at 1088 (Smith, J., dissenting).

78. Id. at 156-57, 464 A.2d at 1085.

79. Id. at 161, 464 A.2d at 1087 (Smith, J., dissenting). Both the majority and the dissent agreed that no Maryland cases were on point. See id. at 156, 464 A.2d at 1085; id. at 160, 464 A.2d at 1086-87 (Smith, J., dissenting).

80. Compare McEntire v. McEntire, 267 Ark. 169, 590 S.W.2d 241 (1979) (bank may permit removal of co-owner's name from checking account, since other co-owner could withdraw all funds); Bealert v. Mitchell, 585 S.W.2d 417 (Ky. Ct. App. 1979) (same, for a savings account) with Wright, 297 Md. 148, 464 A.2d 1080. Note, however, that these cases did not involve the bank's liability for breach of contract, but the co-owner's claim to the funds in the account as against the estate of the deceased co-owner.

81. This was the holding of the Court of Special Appeals. See Wright v. Commercial & Savs. Bank, 51 Md. App. 398, 407, 445 A.2d 30, 35 (1982). The dissent advanced a similar, though more formalistic, argument: namely, that the husband's written order to the bank was essentially a check withdrawing all funds. 297 Md. at 159-64, 464 A.2d at 1086-88 (Smith, J., dissenting).

82. 297 Md. at 157, 464 A.2d at 1085. The bank contended that the wife suffered no damages, since the husband could and would have withdrawn the funds anyway. See Brief for Appellee at 13, id.

83. 723 F.2d 1138 (4th Cir. 1983).
ceeds.\textsuperscript{84} The court concluded that such a tax lien takes priority over a mortgagee’s prior perfected security interest.\textsuperscript{85}

Maryland National Bank (the “Bank”) held a six million dollar security interest in the real property of a corporation (the “debtor”).\textsuperscript{86} This interest was evidenced by two deeds of trust, which were dated October 20, 1978, and recorded on October 26, 1978.\textsuperscript{87} The debtor filed a petition in bankruptcy on October 31, 1979.\textsuperscript{88} On June 18, 1981, a foreclosure sale brought in $2.5 million.\textsuperscript{89}

At the time of the petition, Baltimore City taxes for 1979-1980 were due and in arrears.\textsuperscript{90} The bank conceded the superiority of these taxes\textsuperscript{91} and paid those obligations that were perfected before the date of the petition.\textsuperscript{92} The Bank, however, contested the City’s claim for payment of the debtor’s real estate taxes for 1980-1981.\textsuperscript{93} These taxes did not become due and payable until July 1, 1980, eight months after the bankruptcy petition was filed.\textsuperscript{94} The Bank denied liability, relying upon section 545 of the Bankruptcy Code, which permits a trustee to avoid a statutory lien that is “not perfected or enforceable on the date of filing of the petition.”\textsuperscript{95}

The court discarded this argument\textsuperscript{96} by instead looking to

\textsuperscript{84} Id. at 1142-43.
\textsuperscript{85} Id. at 1141-43.
\textsuperscript{86} Id. at 1140.
\textsuperscript{87} Id.
\textsuperscript{89} 723 F.2d at 1140. The sale was delayed due to an automatic stay under 11 U.S.C. § 362(a) (1982), which had delayed foreclosure since October 31, 1979. The stay was lifted on February 23, 1981. 723 F.2d at 1140.
\textsuperscript{90} 723 F.2d at 1140.
\textsuperscript{91} Id. at 1141. See Md. Ann. Code art. 81, §§ 48(c), 70(a) (1980) (paramount lien attaches on day taxes are due).
\textsuperscript{92} 723 F.2d at 1141.
\textsuperscript{93} At issue were state and city real estate taxes totalling $75,200.59, as well as $86,914.88 for water rents, sewer charges and fire protection. Id. at 1140. Since the debtor’s estate apparently would not suffice to meet these taxes, the issue in effect was not from whom the City would recover, but whether it would at all. See id. at 1141 n.2.
\textsuperscript{94} Id. at 1140. The trustee initiated an adversary proceeding to resolve this matter. Id. at 1140-41. An order from the Bankruptcy Court directed the trustee to sell the property “free and clear of liens” and to establish an escrow account from the proceeds. Id. In accordance with this order, the City of Baltimore transferred its interest in the real property to the escrow account. Id. at 1141. The district court reversed the bankruptcy court order and held the 1980-81 tax lien was not “perfected or enforceable” on October 31, 1979. Id.
\textsuperscript{96} Writing for the court, Judge Murnaghan wrote:
section 546(b), which subjects the avoidance powers of section 545 "to any generally applicable law that permits perfection of an interest in property to be effective . . . before the date of such perfection.”97

The court found this “generally applicable law” in two sections of article 81 of the Maryland Annotated Code. Section 202(b)98 was held to provide that when a trustee sells the property “the proceeds must be applied in satisfaction of any taxes due and payable by a corporate owner at the time distribution is made.”99 Thus, under Maryland law, as long as the taxes are due and payable when distribution occurs, it does not matter if the taxes were not due at the time of foreclosure or sale.100 The decision also noted section 70, which provides that unpaid taxes that accrued before the date of sale constitute a lien on the property which a purchaser of real property cannot avoid.101 Viewing these two sections together, the court found that the state retained “first application” right to receive payment for taxes due and payable from the proceeds.102 This right

One may admire the beautiful simplicity of the Bank’s position. The secured lien status of the mortgage came into being prior to the filing of the bankruptcy petition. The lien under Maryland law of the City and the State for 1980-81 taxes imposed on the real property which was the mortgage security only arose later, on July 1, 1980, after the bankruptcy petition had been filed, according to Md. Ann. Code art. 81, § 70. The post-petition lien under Article 81 § 70 was “not perfected or enforceable on the date of the filing of the petition . . .,” and so could be avoided pursuant to 11 U.S.C. § 545. Q.E.D., the mortgagee need contribute none of the foreclosure proceeds to satisfaction of the bill for 1980-81 real estate taxes.

It all sounds logical as far as it goes. However, it entirely overlooks a matter of controlling importance. The avoidance powers of a trustee in bankruptcy are subject to the provisions of § 546(b) of the Bankruptcy Code. 763 F.2d at 1143 (citations omitted).

99. 723 F.2d at 1142. Section 202(b) provides:
Whenever a sale of either real or personal property of a corporation, from which State taxes, are due and payable, shall be made by any sheriff, constable, trustee, receiver or other ministerial officer, under judicial process or otherwise, all sums due and in arrears for State taxes from the corporation whose property is sold shall be first paid and satisfied, after the necessary expenses incident to the sale; and the officer or person selling said property shall pay the same to the person whose duty it is to collect or receive said taxes, under the laws of this State.


100. 723 F.2d at 1142. See also Vermont Fed. Savs. & Loan Ass’n v. Wicomico County, 263 Md. 178, 186-87, 283 A.2d 384, 389 (1971) (same result in case involving corporate, personal, and real property taxes). In the present case, the Fourth Circuit noted that it dealt only with taxes on property subject to the mortgage and not with, e.g., personal property taxes. 723 F.2d at 1142 n.9.

102. 723 F.2d at 1142.
was "immediately perfected, if not enforceable until the sale actually occurs, at the very moment an interest in the real estate — such as the Bank’s mortgage . . . arises." 103

E. Commercial Torts

The Court of Special Appeals recently applied an interesting twist in determining the time of conversion. In Kalb v. Vega, 104 the court held that subsequent wrongful acts after the initial conversion may constitute additional conversions for which the plaintiff may bring suit.

Kalb v. Vega involved a sale of stock between two corporate directors. The defendant, Vega, misrepresented the stock’s value and succeeded in obtaining the stock for less than its true value. 105 Upon learning of this fraud, the plaintiff, Kalb, demanded return of the stock and, when the defendant refused, Kalb sued for rescission of the contract. 106 The defendant sold the disputed stock for $59,000 to a bona fide purchaser before the trial commenced. 107

The trial court concluded that conversion occurred at the time of the misrepresentation. 108 Kalb was awarded only nominal damages because he failed to prove the stock’s value at the time of misrepresentation. 109

The Court of Special Appeals affirmed the finding of misrepresentation 110 but reversed the award of nominal damages. 111 The court concluded that the defendant’s actions constituted three separate conversions, instead of only one. 112 These three conversions occurred upon the fraudulent acquisition of the stock, upon the refusal to return the stock, and also upon the subsequent sale to the bona fide purchaser. 113 The plaintiff was permitted to sue for the

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103. Id.
105. Id. at 659-60, 468 A.2d at 679-80.
106. Id. at 664, 468 A.2d at 682.
107. Id. at 656, 468 A.2d at 678.
108. Id.
109. Id.
110. Id. at 663, 468 A.2d at 681.
111. Id. at 667, 468 A.2d at 683.
112. Id. at 666, 468 A.2d at 683. Conversion is "not necessarily the manner of acquisition of the property by the defendant but rather his wrongful exercise of dominion over it." Id. (citations omitted). This "wrongful exercise of dominion" has been found to occur not only when property is withheld from its rightful owner but also when the person in possession destroys, changes, or sells the property. Id. See also Saunders v. Mullinex, 195 Md. 235, 239, 72 A.2d 720, 722 (1950).
113. 56 Md. App. at 666, 468 A.2d at 683.
final conversion, even though he may have been able to treat the first two acts as actionable conversions. 114 Thus, by allowing the plaintiff to sue on the final conversion, which occurred when the stock was sold to the bona fide purchaser, the stock's value was readily ascertained. 115

Although the court did not indicate how it arrived at this conclusion, there is some old case law which supports the result. 116 The court apparently overlooked a more appropriate theory provided by Maryland law. In the 1932 case of Fisher v. Dinneen, 117 the Court of Appeals explicitly adopted a fluctuating value rule to determine damages in stock conversion cases. 118 The court applied the "New York rule" 119 which held that the measure of damages should be "the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of it." 120 Use of this precedent could have produced the same result reached in Kalb without resort to the continuing or repeated conversion theories.

In Rite Aid Corp. v. Lake Shore Investors, 121 the Court of Appeals defined the types of damages which may be recovered for the torts

114. Id.
115. The $59,000 value was the stock's contract price when sold by Vega to the bona fide purchaser. Damages were fixed in this case by subtracting the $6,000 paid by Vega to Kalb at the first conversion. Id. at 666-67, 468 A.2d at 683.
116. See Loeb & Brother v. Flash Bros., 65 Ala. 526 (1880) (every moment chattel is detained is itself a conversion, thus giving flexibility in fixing the precise point of conversion); see also R. Bowers, The Law of Conversion, § 327 (1917) (acknowledging that two conversions occur when defendant takes property and then refuses to return it upon demand).

A similar theory holds that a conversion continues while the plaintiff is deprived of possession. The plaintiff's cause of action is of a continuing nature, he is not required to sue for the initial conversion; he may sue for a subsequent conversion. See De Vries v. Brumback, 53 Cal. 2d 643, 349 P.2d 532 (1960) (conversion is a continuing tort and does not end when original wrongdoer transfers property to another wrongdoer); Final v. Baskus, 18 Mich. 218 (1869) (treat entire period of wrongful possession as "period of conversion" and plaintiff may elect the precise time of conversion accordingly); see generally 1 F. Harper & F. James, The Law of Torts § 2.34 (1956) (discussion on continued or repeated conversion); 18 Am. Jur. 2d Conversion § 89 (1959) (discussion of conversion as affected by retention or disposal of property).
117. 161 Md. 605, 158 A. 9 (1932).
118. This case involved a conversion which resulted when a broker sold his client's stock without permission. The court determined that the normal measure of damages (value of property at time of conversion) was an inadequate remedy where property of fluctuating value is involved. Id. at 612-14, 158 A. at 11-12.
119. This rule was first applied by the New York courts to remedy the situation where a stock's value rose after conversion. See Mayer v. Monzo, 221 N.Y. 442, 117 N.E. 948 (1917).
120. 161 Md. at 613-14, 158 A. at 12.
of interference with contract and slander of title.\textsuperscript{122} Though these
torts have long been recognized as actionable in Maryland,\textsuperscript{123} the
precise issue of the measure of damages was a question of first
impression.

Expressly adopting section 774A of Restatement (Second) of
Torts,\textsuperscript{124} the court held that, in an action for interference with con-
tract, a plaintiff may recover benefit-of-the-bargain damages, prox-
imate consequential damages, and punitive damages, if the tort is
committed with actual malice.\textsuperscript{125} The court noted three lines of
cases on this issue.\textsuperscript{126} The first line follows a contract measure of
damages, so that damages are limited to the lost benefit of the bar-
gain made under the contract.\textsuperscript{127} The second line of cases applies
what may be called a negligent tort standard, awarding damages
which are "the direct and proximate result of the wrongful act."\textsuperscript{128}
These decisions disallow the more remote or speculative kinds of
damages, such as mental suffering or harm to reputation. The third

\textsuperscript{122} The Court of Appeals' review of this case was limited to determining the proper
measure of damages. See 297 Md. 318, 465 A.2d 1161 (1983) (granting certiorari). The
court below defined interference with contract as a wrongful, unjustified interference
with a contract between two or more parties, to the detriment of one or more of the
parties. Lake Shore Investors v. Rite Aid Corp., 55 Md. App. 171, 181, 461 A.2d 725,

The Court of Special Appeals did not discuss the slander of title claim, but the
tort has been defined as "publication of matter derogatory to the plaintiff's title to his
property, or its quality, or to his business in general . . . of a kind calculated to prevent
others from dealing with him, or otherwise to interfere with his relations with others to
his disadvantage." Beane v. McMullen, 265 Md. 585, 607-08, 291 A.2d 37, 49 (1972)
1971)). The tort is increasingly becoming known as "injurious falsehood." See W. Pross-
ser, \textit{supra}, at 915.

\textsuperscript{123} See, e.g., Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 69 A. 405
(1908) (tort of interference recognized); Gent v. Lynch, 23 Md. 58 (1865) (tort of slan-
der of title recognized).

\textsuperscript{124} 298 Md. at 621, 471 A.2d at 740. See \textit{Restatement (Second) of Torts} § 774A

\textsuperscript{125} The court stated:

"[S]uch damages as would reasonably flow from a tortious contractual inter-
ference" may include the pecuniary loss of the benefits of the contract, conse-
quential losses for which the tortious act is the legal cause, emotional distress
and actual harm to reputation, if they are reasonably to be expected to result
from the tortious act, and, in appropriate circumstances, punitive damages.

\textsuperscript{126} 298 Md. at 621-22, 471 A.2d at 740 (quoting \textit{Lake Shore}, 55 Md. App. at 182, 461 A.2d at
(discussion of punitive damages and malice in Maryland law).

\textsuperscript{127} See, e.g., McNutt Oil & Refining Co. v. D'Ascoli, 79 Ariz. 28, 281 P.2d 966 (1955);

line applies an intentional tort standard, allowing these more remote damages, and even punitive damages. Arguments in favor of the contract measure generally point out the anomaly of holding the interfering party liable for more than the party who is in breach of the contract. Moreover, it is said that a contrary rule would discourage efficient breach. The court, however, reasoned that interference with contract is an intentional tort, and therefore the most liberal measure of damages should be allowed.

The court also held that, in an action for slander of title, damages may include impairment of value of the property, cost of counteracting the slander (e.g., litigation), and, depending upon the character of the defamation and the facts of the case, other pecuniary losses, resulting "directly and immediately" from defendant's actions. Punitive damages also may be obtained in appropriate circumstances. The court, however, specifically excluded nonpecuniary losses such as emotional distress. This exclusion may be criticized as unfairly limiting plaintiff's recovery. For example, a homeowner who is unable to sell his house because his title has been slandered may suffer severe, genuine emotional distress. Nonetheless, there appears to be unanimous authority in support of


131. W. Prosser & W. Keeton, supra note 130. "Efficient breach" refers to situations in which it is economically reasonable for a contracting party to "buy out" of the contract by paying full damages.

132. 298 Md. at 620, 471 A.2d at 739-40. See also W. Prosser, supra note 122, at 949; Restatement (Second) of Torts § 774A comments a, d (1977); D. Dobbs, supra note 130, at 462-63 (relied on heavily by the court). The recent edition of Prosser and Keeton on Torts has partially abandoned this position, favoring instead the contract measure where the law would allow the party to the contract to commit efficient breach; i.e., where the contract need not be specifically performed, the party could "buy out" of contract by paying damages. See W. Prosser & W. Keeton, supra note 130, at 1004.

133. The impairment would only be temporary, and, therefore, this type of damages could only be established where the plaintiff sold the contested property to a third party at a demonstrably depressed figure (i.e., compared to the price offered by a prospective buyer before the slander of title occurred). Otherwise, the impairment in value would presumably be terminated by successful litigation.

134. 298 Md. at 625, 471 A.2d at 742. Accord Restatement (Second) of Torts § 633 (1977).

135. 298 Md. at 626, 471 A.2d at 742. The court adopted the same standard for punitive damages as in interference with contract, see supra note 125 and accompanying text, except that nominal damages will not suffice, since proof of special damages is an element of this tort.

136. 298 Md. at 625-26, 471 A.2d at 742.
the limitation of damages to actual pecuniary loss.\textsuperscript{137}

\section*{F. Consumer Protection Laws}

\subsection*{1. Installment Contracts.} In \textit{State v. Action TV Rentals, Inc.},\textsuperscript{138} the Court of Appeals held that the Retail Installment Sales Act (RISA)\textsuperscript{139} does not cover rental agreements containing purchase options for consumer goods if the consumer has an option to terminate the agreement shortly after its inception.\textsuperscript{140}

The State of Maryland filed suit pursuant to the Consumer Protection Act against Action TV Rentals, Inc., a retailer that regularly rented appliances to consumers on a week-to-week or month-to-month basis.\textsuperscript{141} Although the consumer was not obligated to rent the goods past the first month, title would pass to him if the rental continued and a certain number of payments had been made.\textsuperscript{142} Action's rental forms, however, did not disclose the total number of payments and the amount required to be paid before the consumer would obtain title to the rented property.\textsuperscript{143} The State alleged that Action's failure to disclose this information violated the provisions of the RISA and the Consumer Protection Act (CPA).\textsuperscript{144} The State argued that the Action rental agreements were disguised installment sales and, thus, subject to RISA.\textsuperscript{145}

\textsuperscript{137} See Restatement (Second) of Torts § 633 comment j (1977); W. Prosser & W. Keeton, supra note 130, at 976; D. Dobbs, supra note 130, at 504; 50 Am. Jur. 2d Libel & Slander § 550 (1970). Despite the great weight of this authority, neither the commentators nor the cases provide much explanation of the reasoning behind this rule. It may be suggested, though, that the rule serves to protect potential claimants to property from the threat of excessive, speculative, or open-ended damages in a slander of title action. The exclusion of damages for mental suffering also appears to be in conformity with the fundamental nature of slander of title actions: a remedy to protect property interests, rather than personal tranquility.

\textsuperscript{138} 297 Md. 531, 467 A.2d 1000 (1983).


\textsuperscript{140} 297 Md. at 555, 467 A.2d at 1012.

\textsuperscript{141} Id. at 534, 467 A.2d at 1001. The State contended that violations of certain provisions under RISA also constitute violations of the Consumer Protection Act, Md. Com. Law Code Ann. §§ 13-101 to -501 (1983 & Supp. 1984). Therefore, the State, through this claimed nexus and the standing conferred by the CPA on the Consumer Protection Division, could assert in its name rights conferred on third parties by RISA. The court accepted the State's assertion for the purpose of considering whether RISA governed the transactions under discussion. 297 Md. at 539-40, 467 A.2d at 1004.

\textsuperscript{142} 297 Md. at 539-40, 467 A.2d at 1004.

\textsuperscript{143} Id. at 536, 467 A.2d at 1003.

\textsuperscript{144} Id. at 539, 467 A.2d at 1004.

\textsuperscript{145} Id. at 541, 467 A.2d at 1005. According to the court, the State's contention rested upon a 1975 revision to the code, in which the definition of a security interest in RISA, Md. Com. Law Code Ann. § 12-601 (n) (1985), was derived from § 1-201(37) of the Maryland Uniform Commercial Code (U.C.C.). Although this U.C.C. definition...
The Court of Appeals held that Action's rental leases were not governed by RISA. First, the leases were found not to come within the two-part definition of an installment sale agreement in section 12-601(1). The court interpreted the requirement in section 12-601(1) that "[p]art of all of the price is payable in one or more payments after the making of the contract" to mean that the buyer must be obligated to make such payments under the agreement.

The Action lessees had no obligation to make payments toward the purchase price after the first month of the agreements. Further, the court found that Action's retention of title as owner-lessee did not secure payment of the entire purchase price, but was intended to facilitate repossession for default in rental payments. Accordingly, the agreements failed the second half of the definition—that the seller must keep a "security interest" in the goods.

Finally, the court concluded that the Action leases were not installment sale agreements within the meaning of section 12-601(l)(2). This subsection includes three other types of transactions as installment sale agreements. The third inclusion, dealing specifically with the leasing of goods, covers agreements under which the lessee contracts to pay an amount equal to or greater than the value of the goods. The court stated that "[e]ach of the three inclusions operates to enlarge the basic definition in section 12-

146. See 297 Md. at 534, 467 A.2d at 1001. For Action's rental leases to be governed by RISA, the contract must be an "installment sale agreement" as defined in Md. Com. Law Code Ann. § 12-601(l)(1)(i) (1983):

(1) "Installment sale agreement" means a contract for the retail sale of goods, negotiated or entered into in this State, under which:

(i) Part or all of the price is payable in one or more payments after making of the contract; and

(ii) The seller takes collateral security or keeps a security interest in the goods sold.


148. 297 Md. at 543, 467 A.2d at 1006.

149. Id. at 547, 467 A.2d at 1008.

150. Id. at 543, 467 A.2d at 1006.

151. Md. Com. Law Code Ann. § 12-601(l)(2) provides:

(2) "Installment sale agreement" includes:

(i) A prospective installment sale agreement;

(ii) A purchase money security agreement; and

(iii) A contract for the bailment or leasing of goods under which the bailee or lessee contracts to pay as compensation a sum that is substantially equal to or is more than the value of the goods.

152. Id. at § 12-601(l)(2)(iii).
Despite this statement, the court used the third inclusion to narrow the application of section 12-601(l), finding that it did not apply to the instant case. The court averred that, although the two-part definition of section 12-601(l)(1) arguably covered Action's rental leases, the language of section 12-601(l)(2) concerning leases should have been given greater weight because only in this inclusion did the legislature "directly and specifically address the problem" under discussion. As it had done in interpreting section 12-601(l)(1), the court interpreted the language in section 12-601(l)(2) to mean that the buyer must be obligated to pay that sum. Accordingly, the rental leases did not fall within RISA.

Although the court is correct that a consideration of the entire statutory framework requires an obligation on a consumer to pay the total purchase price for coverage under RISA, the court's interpretive approach was unnecessarily facile. The court's technical reading of RISA failed to include any authentic examination of the legislative purpose in enacting the statute, and whether the definition should be applied in light of this purpose in the face of inconclusive statutory language.

After disposing of the State's claim under RISA, the court provided a degree of protection to consumers by upholding one of the State's contentions under the CPA. The court concluded that Action was engaged in "unfair or deceptive trade practices" and ordered Action to disclose in its contracts the total cash price of all goods under its rental purchase plans. As a result, consumers will be able to ascertain easily the total amount payable under the plan, and will no longer assume that the total cost approximates the amount charged for an ordinary credit sale.

153. 297 Md. at 545, 467 A.2d at 1007.
154. Id. at 551, 467 A.2d at 1010.
156. 297 Md. at 555, 467 A.2d at 1012.
157. Id. at 557, 467 A.2d at 1013. Section 13-301(1) of the CPA reads: "Unfair or deceptive trade practices include any: (1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." Md. Com. Law Code Ann. § 13-301(1) (1983).
158. 297 Md. at 558, 467 A.2d at 1014.
2. Usury. — In *Kramer v. McCormick*, the Court of Special Appeals held that a borrower’s contention of usury was a cognizable exception to ratification of a foreclosure sale. The appellee in *Kramer* had given the appellants a second mortgage on his home in exchange for a $15,000 loan. The appellants required the appellee to sign an affidavit indicating that the money would be used for commercial purposes, thereby allowing them to charge interest without limit. Appellants knew, however, that the loan would not be used for commercial purposes. When the appellee’s home was sold as a result of a subsequent default on the loan payments, appellee filed exceptions to the ratification of the foreclosure sale. He alleged that appellant’s loan violated the lending laws, subjecting them to civil penalties which amounted to more than the debt owed them by the appellee.

The Court of Special Appeals agreed with the lower court’s findings that the appellants had knowingly violated Maryland usury law by having procured a false and misleading statement that the loan was for commercial purposes and that the civil penalties for this violation more than exceeded the debt owed by the appellee. The court held that usury should be allowed as an exception to ratification of a foreclosure sale when offsetting penalties due the debtor for lending violations exceed the amount of the debt itself. In such a situation, “it would be absurd as well as inequitable to permit a homeowner to lose his home for a debt that was not

160. Id. at 203, 474 A.2d at 1351. Previous Maryland cases have held that usury is not a ground for setting aside a mortgage foreclosure sale since it affects only the accounting and distribution of proceeds after ratification of the sale and not the sale itself. Id. at 201, 474 A.2d at 1350 (citing Warfield v. Ross, 38 Md. 85 (1873); Powell v. Hopkins, 38 Md. 1 (1873)).
161. Md. Com. Law Code Ann. § 12-103(c)(1) (1983) sets the legal rate of interest on second mortgages at 18% per annum, but under § 12-103(e) loans to corporations, or to those borrowing over $5,000 for commercial purposes, may provide for interest at any rate. In *Kramer*, appellants had charged the appellee 27% monthly interest for the 12-month term of the loan. 59 Md. App. at 202, 474 A.2d at 1350.
162. 59 Md. App. at 198-99, 474 A.2d at 1349.
163. Id. at 200-01, 474 A.2d at 1350.
164. See *id.* The court implied that both § 12-106.1, relating to false representations that a loan is for a commercial purpose, and § 12-413 of the Commercial Law Article, relating to usurious interest rates, had been violated. The penalties for both violations are three times the excess interest extracted. See Md. Com. Law Code Ann. §§ 12-106.1, -413 (1983). Section 12-106.1 assesses a treble excess interest penalty against any person who willfully requires a borrower to make a false or misleading statement that a loan is commercial or who willfully procures such statement.
165. 59 Md. App. at 202, 474 A.2d at 1351. The court found it significant that all the Maryland cases holding that usury is not a cognizable exception to ratification of a
due."  

In *Duckworth v. Bernstein*, the Court of Special Appeals analyzed for the first time the civil penalties available under Maryland's Secondary Mortgage Loan Law. In *Duckworth*, a lender allegedly disguised a secondary mortgage loan as a commercial loan, and proceeded to charge usurious interest. The court held that, if the loan is found to be a secondary mortgage loan, the lender may recover only the principal amount, irrespective of his knowledge of the violations.

The court came to this conclusion because only the treble damages portion of the civil penalties section expressly imposes a knowledge requirement. The court implied that, if the legislature had intended for knowledge to be a prerequisite to recovery under the entire section, such a requirement would have been written into the statute. Moreover, the court found its interpretation to be consistent with the protective purpose of the statute: "to guard the foolish or unsophisticated borrower . . . from his own improvidence." The court's literal interpretation of this statute is

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foreclosure sale were decided before civil penalties for usury and other lending violations could exceed the amount of the loan. *Id.* at 202, 474 A.2d at 1350.

166. 59 Md. App. at 202, 474 A.2d at 1351.

> Except for a *bona fide* error of computation, if a lender *violates* any provision of this subtitle he may collect only the principal amount of the loan and may not collect any interest, costs, or other charges with respect to the loan. In addition, a lender who *knowingly* violates any provision of this subtitle also shall forfeit to the borrower three times the amount of interest and charges collected in excess of that authorized by law.


169. The court remanded this case for a factual determination of whether the loan was a secondary mortgage loan or a commercial loan which is not protected by the Secondary Mortgage Loan Law. 55 Md. App. at 726-27, 466 A.2d at 525-26.

170. Under the Secondary Mortgage Loan Law a lender may charge a maximum annual interest rate of 16% on the principal, and is limited to charging 2% of the net proceeds of the loan for any additional fee or commission. Md. Com. Law Code Ann. §§ 12-404(b), -405(a) (1983). The loan at issue in *Duckworth* was for $9,000 at 22.5% interest with $3,900 of additional charges. 55 Md. App. at 715-16, 466 A.2d at 520.

171. 55 Md. App. at 724-25, 466 A.2d at 524-25.
172. *Id.* at 724, 466 A.2d at 524. In addition, the court reaffirmed the well-established principle that an agent's knowledge may be imputed to the principal, Plitt v. Kellman, 222 Md. 383, 390-91, 160 A.2d 615, 619-20 (1960), and noted that this would permit a borrower to recover treble damages against a lender who had no actual knowledge. 55 Md. App. at 722-23, 466 A.2d at 523-24.

173. 55 Md. App. at 724, 466 A.2d at 524.
174. *Id.*
consistent with prior case law and with Maryland's strong policy against usury.175

3. Repossessions.—In Diodomenico v. First National Bank,176 the Court of Special Appeals held that default and repossession notices sent to a debtor by a secured party, which indicated that the debtor's right to redeem the repossessed collateral would terminate fifteen days after receipt of the repossession notice, did not amount to "reasonable notification" as required under the Maryland Commercial Code.177 The court based its decision upon the interrelation between code provisions regarding a debtor's right to receive reasonable notice178 and his right to redeem the collateral,179 as espoused by the Maryland Court of Appeals in Maryland National Bank v. Wathen.180

In Diodomenico, the debtor had entered into a purchase money security agreement with the bank in which he authorized repossession of the collateral, a mobile home, in the event of default.181 Upon falling behind in payments, the debtor received a notice of default.182 Subsequently he received a notice of repossession which stated:

[Y]ou are entitled to redeem the said goods provided that

175. See Plitt v. Kaufman, 188 Md. 606, 53 A.2d 673 (1946). No device of a lender will be permitted to shield him in taking more than legal interest on a loan, but once an obligation has become affected with usury, the "taint of illegality follows the indebtedness as long as it may be traced." Id. at 612, 53 A.2d at 676.
178. Section 9-504 states:

Unless the collateral is perishable or threatens to decline speedily in value or is of the type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . . .


At any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 9-504 or before the obligation has been discharged under § 9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party . . . .

181. 57 Md. App. at 64, 468 A.2d at 1047.
182. The notice of default provided that in the event of repossession, "... your right to this vehicle will be terminated fifteen days from the date . . . . our notice of repossession is delivered to you . . . ." but that "[p]rior to the expiration of the fifteen day interval you may redeem the vehicle . . . ."

Id. at 66, 468 A.2d at 1048.
within fifteen days from the date of delivery of this notice you pay . . . $650.39 [the amount then due] . . . . If you do not redeem as aforesaid, the goods will thereafter be sold at a private sale and if a deficiency arises, you will be liable . . . .

Seventy-five days later, the bank sold the home. Thereafter, it brought the action at issue to recover the deficiency. The debtor counterclaimed, seeking damages, contending that he had not received "reasonable notice" as required by section 9-504 because the default and repossession notices were misleading and discouraged him from attempting to redeem the mobile home pursuant to section 9-506.

Citing the Wathen case and its "interrelation of the provisions" rule, the court held that the default and repossession notices were not "reasonable" under section 9-504 because the debtor was not informed that he could redeem the collateral at any time prior to its disposal by tendering fulfillment of all obligations. The court’s reliance on Wathen is somewhat misplaced, however, since in that case no notice was given the debtor prior to sale. All that the court in Wathen held was that the failure to notify the debtor of the time and place of the sale of the collateral as required by section 9-504(3) may effectively preclude the debtor from exercising his section 9-506 right of redemption.

DiDomenico leaves unclear exactly what a secured party’s obligation is regarding the notice and redemption requirements. The court did not indicate whether a secured party has an affirmative obligation to notify a debtor of his right of redemption under

183. Id.
184. Id. at 65, 468 A.2d at 1047.
If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this subtitle.
186. 57 Md. App. at 66, 468 A.2d at 1048.
187. The court in Wathen noted that there is an interrelation of the provisions of the code which were apparently drafted so that the debtor is afforded a reasonable opportunity to protect his interests. Section 9-506 of the U.C.C. expressly bestows upon the debtor the opportunity to redeem the collateral by tendering payment of the balance due. It is manifest that the debtor without notice of the sale can be effectively prevented from exercising his right of redemption.
288 Md. at 122, 414 A.2d at 1263 (footnote omitted).
188. 57 Md. App. at 67, 468 A.2d at 1048.
189. 288 Md. at 122, 414 A.2d at 1263.
section 9-506,\textsuperscript{190} or merely an obligation not to mislead the debtor as to his right of redemption if the section 9-504(3) notice given to the debtor discusses this right.\textsuperscript{191}

G. Contracts

1. Insurance. — In Interstate Fire & Casualty v. Pacific Indemnity Co.,\textsuperscript{192} the United States District Court for the District of Maryland held that as a matter of law,\textsuperscript{193} the term "injury" in a medical malpractice insurance policy includes economic as well as personal injuries.\textsuperscript{194} Although Maryland courts have construed the words "bodily injury" in an insurance policy,\textsuperscript{195} they have not previously defined the word "injury" when unmodified by other terms.\textsuperscript{196}

The dispute in Interstate was between a primary and excess malpractice insurance carrier. A family filed a claim against the insured doctor who had delivered the family's brain-damaged child.\textsuperscript{197} The claim included $350,000 for physical injury to the infant and $200,000 for economic injury to the father.\textsuperscript{198} In its policy the primary insurer had agreed to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: . . . injury arising out of the rendering or failure to render during the period, professional services by the individual insured."\textsuperscript{199} The primary insurer maintained that injury meant "personal injury" which limited its liability to the claims of the infant.\textsuperscript{200} The excess insurance carrier argued that injury also included economic or financial injury which made the primary insurer liable for the father's claim as well.\textsuperscript{201}

Finding no Maryland law on point,\textsuperscript{202} the Interstate court looked

\begin{itemize}
  \item \textsuperscript{190} Indeed, nowhere does the code expressly require a creditor to notify the debtor of his redemption rights.
  \item \textsuperscript{191} This seems to be the better interpretation of the court's holding.
  \item \textsuperscript{192} 568 F. Supp. 633 (D. Md. 1983).
  \item \textsuperscript{193} It is well-settled Maryland law that unless the language of an insurance contract is ambiguous, construction of the contract is a matter of law for the court. \textit{Id.} at 637 (citing Government Employees' Ins. Co. v. DeJames, 256 Md. 717, 720, 261 A.2d 747, 749 (1970)).
  \item \textsuperscript{194} 568 F. Supp. at 639.
  \item \textsuperscript{195} \textit{Id.} at 638. \textit{See also} Travellers Indem. Co. v. Cornellson, 272 Md. 48, 321 A.2d 149 (1974) (loss of consortium is not a bodily injury sustained by a person).
  \item \textsuperscript{196} \textit{See} 568 F. Supp. at 636-38.
  \item \textsuperscript{197} \textit{Id.} at 634.
  \item \textsuperscript{198} \textit{Id.}
  \item \textsuperscript{199} \textit{Id.} at 635.
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{Id.} at 636.
  \item \textsuperscript{202} \textit{See supra} notes 195-96 and accompanying text.
\end{itemize}
to other jurisdictions and found a general trend to construe the term “injury” broadly. For example, “injury” has been construed to include a claim for slander, and “personal injury” has been construed to include claims for bodily injury, as well as medical expenses, and loss of consortium. Following this trend, the court found that “injury” is a broader term than “bodily injury” or “personal injury,” and thus also includes economic injury.

Although the holding in Interstate is limited to economic injury, the court’s logic could be used as support for the proposition that any type of injury, including physical, economic, or emotional, is covered under a medical malpractice insurance policy in which the term “injury” is not modified. Thus, if a policy is meant to be limited to specific types of injuries, the language of the policy should so specify.

In DeJarnette v. Federal Kemper Insurance Co., the Court of Appeals determined that the term “use of a motorcycle” contained in an automobile liability policy exclusion clause pertains to a passenger as well as to the actual driver. In addition, the court held that an additional insured may not receive more benefits than the named insured.

The case arose when DeJarnette was injured while riding as a passenger on a motorcycle. The motorcycle was owned and operated by one Smith (not a party to the suit). Smith’s insurance did not provide personal injury protection. DeJarnette, therefore,

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205. 568 F. Supp. at 638. The district court also rejected the primary insurance company’s argument that the father’s claim was derivative from that of the infant and that therefore both claims combined were limited to the policy’s $200,000 limit per claim. The court found that, in Maryland, a parent’s cause of action is not derivative from the child’s cause of action when the parent sues to recover for medical expenses incurred because of negligent injuries to the child. Id. (citing Hudson v. Hudson, 226 Md. 521, 529-30, 174 A.2d 339, 343 (1961)).
207. Id. at 721-22, 475 A.2d at 461.
208. The additional insured is a person “covered by [the insurance] policy in addition to the named insured.” BLACK'S LAW DICTIONARY 36 (5th ed. 1979). In this case, DeJarnette was covered under his father-in-law’s policy because he was a member of his household. 299 Md. at 713, 475 A.2d at 456.
209. 299 Md. at 723, 475 A.2d at 462. The named insured is “the person specifically designated in the [insurance] policy as the one protected.” BLACK'S LAW DICTIONARY 922 (5th ed. 1979).
210. 299 Md. at 713, 475 A.2d at 456.
sought to recover under his father-in-law’s automobile liability policy. 211 The policy, however, excluded coverage for injuries “arising out of the ownership, maintenance or use of a motorcycle.” 212 DeJarnette argued that, as a passenger, he was not using the motorcycle within the policy’s meaning. 213 The court, after dealing with DeJarnette’s various arguments, 214 concluded that “the term ‘use’ usually is construed to include all proper uses of an automobile. . . . Riding a motorcycle is a proper use of a motor vehicle.” 215

In response to DeJarnette’s argument, the court also adopted the rule that “the additional insured [DeJarnette] is subject to the same policy limitations and exceptions and his rights can be no greater than the rights of the named insured.” 216 Thus, since the father-in-law could not have recovered under the policy if he had been injured while using a motorcycle, 217 DeJarnette could not recover either.

211. Id.

212. Id. at 713 n.1, 475 A.2d at 457 n.1.

213. Id. at 714, 475 A.2d at 457.

214. DeJarnette argued that the natural meaning of “use” is limited by Md. Ann. Code art. 48, § 539(a) (1979 & Supp. 1983) which describes the general insurance coverage required under Maryland law. The Court of Appeals acknowledged that the statute distinguished between “occupying the insured vehicle as a guest or passenger [and] using it with . . . permission.” Md. Ann. Code art. 48, § 539 (1979 & Supp. 1983). However, the court concluded that the statutory language pertained only to the insured vehicle. 299 Md. at 717, 475 A.2d at 458. In this case, DeJarnette had not been using the insured vehicle when the accident occurred.

Furthermore, since neither “use” nor “occupy” is defined within the statute, the terms must be given their “‘ordinary and natural meaning.’” 218 Id. at 717, 475 A.2d at 459 (quoting Brown v. State, 285 Md. 469, 474, 403 A.2d 788, 791 (1979); Mauzy v. Hornbeck, 285 Md. 84, 92-93, 400 A.2d 1091, 1096 (1979)).

The court also noted that, while § 539(a) provides only general coverage requirements, § 545 deals specifically with exclusions permitted under the law. “[I]t is a cardinal rule of statutory construction that specific terms prevail over the general language of a statute.” 219 Id. at 718, 475 A.2d at 459. Section 545 does not require specific language to create exclusions and the court found that the wording is left for the insurance company to determine. 220 Id. at 718-19, 475 A.2d at 459.

215. 299 Md. at 721-22, 475 A.2d at 461.


217. The policy’s exclusion clause stated: “This insurance does not apply: (a) to bodily injury sustained by any person . . . (4) arising out of ownership, maintenance, or use of a motorcycle or motorbike, by such person . . . .” 222 Id. at 713 n.1, 475 A.2d at 457 n.1.
2. **Franchising.**—The Court of Special Appeals has construed the Maryland Franchise Registration Act\(^{218}\) to render contracts made in violation thereof voidable, rather than void ab initio.\(^{219}\) Therefore, the right to rescind the contract may be waived by failure to exercise the right in a timely manner.\(^{220}\)

In *Bagel Enterprises v. Baskin & Sears*,\(^{221}\) a national franchisor of bagel restaurants\(^{222}\) failed to register with Maryland’s Securities Commissioner, as required by the Act, before selling area franchise rights to a subfranchisor.\(^{223}\) The court held that the franchise agreement was voidable, not void;\(^{224}\) therefore the subfranchisor was required to take timely action to exercise its right to rescind.\(^{225}\) Since the subfranchisor, upon learning of the franchisor’s failure to comply with the law, instead tried repeatedly to extract additional concessions from the franchisor, the court held that it had waived its right and ratified the contract.\(^{226}\)

The court’s rationale in determining that the agreement was voidable, however, was somewhat unclear. The court seemed to accept, without discussion, the trial court’s distinction between contracts with an illegal subject matter, which are void, and illegal conduct by one party in entering into a contract, which renders the contract voidable.\(^{227}\) This distinction may be criticized as ignoring

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\(^{219}\) See *Bagel Enter. v. Baskin & Sears*, 56 Md. App. 184, 467 A.2d 533, cert. denied, 299 Md. 136, 472 A.2d 999 (1984). This aspect of the case was actually a side issue to a malpractice claim against the subfranchisor’s original attorneys.

\(^{220}\) Id. at 200, 467 A.2d at 541.


\(^{222}\) See generally id. at 188 n.1, 467 A.2d at 535 n.1 (Judge Liss’ guide to the perplexed on the subject of bagels and “noshing”).


\(^{224}\) 56 Md. App. at 198-200, 467 A.2d at 540-41; id. at 201 n.5, 467 A.2d at 542 n.5.

\(^{225}\) See id. at 197, 467 A.2d at 540. For other Maryland cases holding that voidable contracts must be rescinded in a timely manner, see Billmyre v. Sacred Heart Hosp. of Sisters of Charity, Inc., 273 Md. 638, 331 A.2d 313 (1975); Michael v. Towers, 253 Md. 114, 251 A.2d 878 (1969); Coopersmith v. Isherwood, 219 Md. 455, 150 A.2d 243 (1959).

\(^{226}\) 56 Md. App. at 200, 467 A.2d at 541. Indeed, the subfranchisor pursued this course of action even after Maryland’s Franchise Administrator advised the subfranchisor of its right to rescind and encouraged it to do so. Id. at 192, 467 A.2d at 537.

\(^{227}\) Id. at 196, 467 A.2d at 539. The rule does not appear to be supported by any Maryland cases. Cases cited by the court, see *supra* note 225, establish that the right to
the fundamental question: do public policy and the statutory purpose permit the protected party to waive his right to rescind?\textsuperscript{228}

Absent from the opinion was any discussion of an amendment to the Act, adopted after this action was filed, but before the appellate decision was rendered, which prohibits a franchisor from requiring a franchisee to assent to a waiver releasing the franchisor from liability as a condition for the sale of the franchise.\textsuperscript{229} Though this provision does not expressly apply to waivers or ratifications by post-contractual conduct, and does not apply retroactively, it is arguable that it reflects a legislative intent that franchisees be unable to waive their rights under the Act. Therefore, the court may have to deal with this issue anew in future litigation.

3. Government Contracts. — In Foster \& Kleiser \textit{v.} Baltimore County,\textsuperscript{230} the Court of Special Appeals held that Baltimore County was not bound by a contract that was subject to approval by the County Council, until such approval was received.\textsuperscript{231} In reaching its decision, the court reaffirmed the rule that an agreement subject to approval by a third party is not binding until that approval is received,\textsuperscript{232} and for the first time applied the rule to a county government.

Foster \& Kleiser, the appellant, maintained advertising signs on a parcel of land.\textsuperscript{233} Baltimore County entered into a contract with the landowner for the purchase of that land.\textsuperscript{234} The contract stated that "[i]n the event that this Agreement is not approved by the Baltimore County Council, this Agreement shall become null and void . . . ."\textsuperscript{235} The landowner executed the agreement on February 6, 1981, and then lawfully terminated appellant's agreement, effective April 12, 1981.\textsuperscript{236} The Baltimore County Council approved the

rescind a voidable contract must be exercised or waived; they do not determine when an illegal contract will be treated as voidable rather than void.

228. \textit{Cf.} 17 \textit{Am. Jur. 2d Contracts} § 173 (1964) ("The question whether the protection of a statute may be waived by agreement depends largely upon the nature of the statute. Generally, parties may agree to waive statutory rights unless a question of public policy is involved.").


231. \textit{Id.} at 538, 470 A.2d at 1326.


233. \textit{Id.} at 533, 470 A.2d 1323.

234. \textit{Id.}

235. \textit{Id.}

236. \textit{Id.} at 533-34, 470 A.2d at 1324.
contract eight days later.\textsuperscript{237}

Appellant maintained that it was entitled to compensation by the County pursuant to section 12-208 of the Real Property Article.\textsuperscript{238} Section 12-208 requires public agencies to compensate anyone having structures on land in which the public agency acquires an interest.\textsuperscript{239} The court, however, found that Baltimore County did not acquire an interest in the land until the contract was approved by its county council, an event which occurred after the appellant's right to maintain signs had been terminated.\textsuperscript{240} Thus, the appellant had no cause of action against the County.

The court's holding is consistent with the general contract principle recognized in Maryland\textsuperscript{241} and other jurisdictions,\textsuperscript{242} that a contract subject to approval by a third party is not binding unless and until the approval has been received.\textsuperscript{243}

4. Quantum meruit.—In First National Bank v. Burton, Parsons & Co.,\textsuperscript{244} the Court of Special Appeals denied quantum meruit relief\textsuperscript{245} to an inventor who had an unenforceable "royalty agreement" as part of his employment contract.\textsuperscript{246} The court ruled that the

\begin{itemize}
\item \textsuperscript{237} Id. at 534, 470 A.2d at 1324.
\item \textsuperscript{238} Id. at 533, 470 A.2d at 1323.
\item \textsuperscript{239} MD. REAL PROP. CODE ANN. § 12-208 (1981).
\item \textsuperscript{240} 57 Md. App. at 539, 470 A.2d at 1324.
\item \textsuperscript{241} See Maryland Supreme Corp. v. The Blake Co., 279 Md. 531, 369 A.2d 1017 (1977).
\item \textsuperscript{242} See, e.g., Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572 (S.D. Ala. 1976), aff'd in part and rev'd in part on other grounds, 597 F.2d 556 (5th Cir. 1979).
\item \textsuperscript{243} See generally I CORBIN ON CONTRACTS § 22 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 26 (1979).
\item \textsuperscript{244} 57 Md. App. 437, 470 A.2d 822, cert. denied, 300 Md. 88, 475 A.2d 1200 (1984).
\item \textsuperscript{245} Quantum meruit relief means awarding the plaintiff "as much as he deserved" in return for services performed for the defendant. The relief arises from an implied duty to pay, rather than from an express agreement between the parties. "Unjust enrichment" (or "restitution") is similar in theory, but the measure of damages is the value of the benefit received by the defendant, not the value of the services which have been performed. The term "quasi-contract" is more general than quantum meruit: it includes all implied-in-law contracts, and may be used to refer to unjust enrichment as well. See generally Mass Transit Admin. v. Granite Constr. Co., 57 Md. App. 766, 773-76, 471 A.2d 1121, 1125-26 (1984) (describing the historical development of quasi-contractual doctrines).
\item \textsuperscript{246} The court held that the royalty clause, which provided that, in addition to a minimal salary, the employee would be paid for the rights to his inventions according to "factors presently incapable of accurate appraisal," 57 Md. App. at 442, 470 A.2d at 825, was merely an "agreement to negotiate." Id. at 448, 470 A.2d at 828. Although the employee did recover unpaid royalties on certain agreements which had been successfully negotiated, id. at 458, 470 A.2d at 833, he could not use this "agreement to negotiate" as a basis for claiming royalties on other inventions. As the court stated, "A factfinder would be required in the instant case to write the royalty agreement before
existence of the employment contract precluded recovery under quantum meruit.247

It has long been recognized that there can be no implied contract between two parties when there is also an express contract covering the same subject.248 In the instant case, the court reasoned that the compensation for the inventions was covered by the general employment contract; therefore the employee’s recovery was limited to salary and royalty agreements that had already been successfully negotiated.249 As the court stated, “[The employee] may not have received as much compensation as he deserved, but he received that for which he contracted. He cannot use quantum meruit to obtain more.”250

The Court of Special Appeals denied another quasi-contractual claim in Mass Transit Administration v. Granite Construction Co.251 The case involved a contractor who submitted a low bid on some subway work, based on a city official’s incorrect opinion that the job did not include certain gas line relocation. The contractor tried to recover in unjust enrichment for the value of this extra gas line work.252 After a scholarly discussion outlining the development of unjust enrichment, restitution, quantum meruit, and related doctrines,253 the court held that there was no unjust enrichment because the contractor had not been justified in relying on the official’s opinions.254 The court also suggested that the existence of an express contract between Baltimore City and the contractor pre-

determining damage for its breach.” Id. at 448, 470 A.2d at 828. The court added that, in light of the multiple factors on which these negotiations would be based, “[s]uch a task requires more than a mere factfinder; it requires a Houdini or a soothsayer.” Id. at 450, 470 A.2d at 829.

In a somewhat unrelated context, however, the court recently held that the term “good faith settlement negotiations” was not an ambiguous term. The court applied a “labor law definition of good faith,” i.e., genuine participation in negotiations. See Helferstay v. Creamer, 58 Md. App. 263, 275, 473 A.2d 47, 53 (1984).

247. 57 Md. App. at 451, 470 A.2d at 829.


250. Id. at 452, 470 A.2d at 830.


252. Id. at 771-72, 471 A.2d at 1124.

253. See supra note 245.

254. 57 Md. App. at 779, 471 A.2d at 1128. The official had no authority to make such representations. Moreover, he told the contractor that he was not sure about the gas line work; he only ventured the opinion because the contractor pressed him for an immediate answer. Id. at 771-72, 471 A.2d at 1124. The court also held that sovereign immunity would bar the action, since the state has only waived immunity with respect to claims based on written contracts. Id. at 780, 471 A.2d at 1128. See Md. ANN. CODE art. 21, § 7-101 (1981).
cluded quasi-contractual relief.255

5. Implied Contracts. —In Lerner v. Ammerman,256 the Court of Special Appeals considered whether the terms of a written agreement continued beyond formal expiration of the agreement, where a partner provided management services to his partnership pursuant to a five-year contract.257 The court held that the terms of the agreement did continue beyond the date of formal expiration since the partner continued to perform the same services and received the same compensation he had received under the contract’s terms.258

The court’s finding is consistent with prior Maryland decisions holding that, when performance and acceptance of services continue after expiration of an express contract, there is a presumption that the contract continues.259 This presumption may be rebutted by evidence showing that a change in contract terms was intended,260 but

255. 57 Md. App. at 781, 471 A.2d at 1129. The rule seems more appropriate in this case than in First Nat’l Bank v. Burton, Parsons & Co. See supra notes 244-50 and accompanying text. In First National, quantum meruit relief was denied, even though it was clear that neither party, employee or employer, considered the contract as fixing the entire amount of the employee’s compensation. Both parties understood that the employee was entitled to additional payments for his inventions. In contrast, both parties in Mass Transit understood the contract as fixing all the rights and duties of each party with regard to the subway work. The contractor’s mistake as to its duties under the contract did not entitle it to compensation beyond the contract price.


257. The partner, Lerner, continued to provide management services after expiration of the five-year contract and received identical compensation. The partnership subsequently decided to terminate the management agreement with Lerner and substitute another firm. Id. at 137-40, 467 A.2d at 189-90.

Lerner also alleged that this action was a breach of the partner’s fiduciary duty owed to him since it threatened his partnership investment. The court, however, denied his request for injunctive relief since he failed to allege any present or future harm to his partnership interest. Id. at 145-46, 467 A.2d at 193. Actual harm is not an essential requirement, but it must be plain that the acts about to be done constitute a grievous nuisance resulting in irreparable injury. Leatherbury v. Peters, 24 Md. App. 410, 332 A.2d 41, aff’d, 276 Md. 367, 347 A.2d 82 (1975); Hamilton Corp. v. Julian, 130 Md. 597, 101 A. 558 (1917). This showing must be especially strong in disputes involving the internal management of a partnership or corporation. 56 Md. App. at 146, 467 A.2d at 193. See McQuillen v. National Cash Register Co., 112 F.2d 877 (4th Cir. 1940) (applying Maryland law); Parish v. Maryland & Virginia Milk Producers Assoc., 250 Md. 24, 242 A.2d 512 (1968); Eisler v. Eastern States Corp., 182 Md. 329, 35 A.2d 118 (1943).

258. 56 Md. App. at 141, 143, 467 A.2d at 191-92.

259. See Brandenburg v. S.F. & G. Co., 207 Md. 413, 114 A.2d 604 (1955); Travelers’ Ins. Co. v. Parker, 92 Md. 22, 47 A. 1042 (1900); Lister’s Agricultural Chem. Works v. Pender, 74 Md. 15, 21 A. 686 (1891); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A. 176 (1887). This holding is also consistent with the general rule in other jurisdictions. See Annot., 53 A.L.R.2d 384 (1957 & Supp. 1984).

260. Brandenburg, 207 Md. at 419, 114 A.2d at 607 (quoting McCullough Iron, 67 Md. at 560, 11 A. at 179).
since no such evidence was presented, the court found that the contract remained in effect as written.261

H. Corporations

The Maryland Court of Special Appeals recently followed the Court of Appeals' decision in Cummings v. United Artists Theatre Circuit, Inc.262 In Mountain Manor Realty v. Buccheri,263 the court rejected the argument that directors of a corporation acted in derogation of the principle of "majority rule"264 because they executed a stock transfer to preserve their control of the corporation.265 The court noted that Maryland law, as set forth in Cummings, provides that a transaction authorized by corporate directors which has a legitimate corporate purpose, is not necessarily invalid simply because one of the motives involved may be manipulative.266

In Mountain Manor Realty, Buccheri initiated a corporate takeover by purchasing shares from two of three shareholders/directors.267 These directors resigned their positions and Buccheri notified the remaining shareholder/director, Conway, of the transaction and requested a special shareholders' meeting.268 "In an effort to retain control of the corporation,"269 Conway called a special directors' meeting without notice to Buccheri or the resigned directors.270 At the meeting, Conway appointed two new directors and proposed that the new board authorize the issuance of new shares to be purchased.271 The board approved the offer and Conway obtained a majority of shares necessary to thwart the takeover.272 At the shareholders' meeting, both Buccheri and Conway nominated a slate of directors. The final vote and ultimate control

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261. 56 Md. App. at 143, 467 A.2d at 192.
262. 237 Md. 1, 204 A.2d 795 (1964).
264. Id. at 195, 461 A.2d at 51.
265. Id. at 198-99, 461 A.2d at 53.
267. 55 Md. App. at 188, 461 A.2d at 48.
268. Id.
269. Id. use of this expression indicates the court's awareness that Conway's machinations were performed to maintain control.
270. Id.
271. Id. at 189, 461 A.2d at 48.
272. Id.
rested upon the validity of the stock issuance.\textsuperscript{273}

The court held that if a "legitimate business purpose" can be found for the transaction, it will then look to see whether this purpose was primary or whether the main purpose was to manipulate control.\textsuperscript{274} Even if the court determines that manipulation was the principal motivation for the action, the transaction would not automatically be void. Instead, the court stated only that "the transaction may be invalid."\textsuperscript{275}

In this case, the court clearly realized Conway's efforts were performed solely to retain corporate control.\textsuperscript{276} The court stated, however, that "it seems fairly clear that in Maryland stock issuances which have the effect of consolidating or perpetuating management control are not necessarily invalid."\textsuperscript{277} Consideration must be given to the collateral benefits flowing to the corporation.\textsuperscript{278} If a legitimate corporate purpose for the action can be found, it appears that the action will be held valid.

In effect, this decision by the Maryland Court of Appeals gives incumbent directors far-reaching authority to thwart a takeover attempt as long as the directors are imaginative enough to find an acceptable excuse.

\textit{I. Covenants Not to Compete}

In \textit{Simko, Inc. v. Graymar Co.},\textsuperscript{279} the Court of Special Appeals held that a covenant not to compete,\textsuperscript{280} extracted from an employee under threat of discharge, is supported by valid consideration when

\begin{itemize}
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Id. at 198, 461 A.2d at 53.
\item \textsuperscript{275} Id. at 197, 461 A.2d at 52 (quoting Cummings, 237 Md. at 21, 204 A.2d at 805) (emphasis added).
\item \textsuperscript{276} See supra note 269 and accompanying text.
\item \textsuperscript{277} 55 Md. App. at 198, 461 A.2d at 53.
\item \textsuperscript{278} Id. at 198 n.7, 461 A.2d at 53 n.7.
\item \textsuperscript{279} 55 Md. App. 561, 464 A.2d 1104, cert. denied, 298 Md. 243, 469 A.2d 452 (1983).
\item \textsuperscript{280} The general rule in Maryland as to the enforceability of restrictive employment covenants states:

If . . . supported by adequate consideration and . . . ancillary to the employment contract, an employee's agreement not to compete with his employer . . . will be upheld "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection . . . of the employer and do not impose undue hardship on the employee or disregard the interests of the public."

the employment continues for a "substantial period" after the agreement.\textsuperscript{281} This holding accords with the majority rule, which finds consideration for the covenant either in the employer's implicit promise not to fire or in the actual continuation of employment.\textsuperscript{282}

Though the case presented a question of first impression in Maryland, the court sought guidance from \textit{Dahl v. Brunswick Corp.},\textsuperscript{283} in which the Court of Appeals held that an employer's severance pay policy becomes a contractual obligation "when, with knowledge of [the policy's] existence, employees start or continue to work for the employer."\textsuperscript{284} The court in \textit{Simko} reasoned that, if an at-will employee's continued service could be consideration for the addition of a severance pay provision to the employment contract, then the employer's consent not to terminate could support the addition of a covenant not to compete.\textsuperscript{285}

The court noted the objection of the minority viewpoint\textsuperscript{286} that such a rule would allow the employer to force the employee to sign a restrictive covenant, and then fire him as soon as "the ink is dry upon the signature."\textsuperscript{287} That is, such a covenant does not bind the employer to do anything; therefore the consideration is illusory.\textsuperscript{288} But the court responded that such bad-faith use of restrictive covenants could be handled according to the facts and circumstances of each case. Thus, an immediate discharge of the employee without

\begin{itemize}
\item \textsuperscript{281} 55 Md. App. at 567, 464 A.2d at 1107.
\item \textsuperscript{283} 277 Md. 471, 356 A.2d 221 (1976).
\item \textsuperscript{284} Id. at 476, 356 A.2d at 224, quoted in 55 Md. App. at 565, 464 A.2d at 1106.
\item \textsuperscript{285} 55 Md. App. at 565, 464 A.2d at 1106.
\item \textsuperscript{286} See Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944); Maintenance Specialties v. Gottus, 455 Pa. 327, 314 A.2d 279 (1974).
\item \textsuperscript{287} 55 Md. App. at 566, 464 A.2d at 1107 (quoting Kadis v. Britt, 224 N.C. 154, 163, 29 S.E.2d 543, 548 (1944)).
\item \textsuperscript{288} See generally Benjamin v. Bruce, 87 Md. 240, 39 A. 810 (1898) (necessity of "mutuality of obligation"); RESTATEMENT (SECOND) OF CONTRACTS § 77 (1979) (defining an "illusory promise"); 17 AM. JUR. 2D Contracts § 105 (1964) (necessity of "mutuality of obligation"). Clearly the employees' promise of continued service in \textit{Dahl} was not an illusory consideration, for they did not have the option of quitting and still claiming severance pay.
\end{itemize}
cause would be treated as a failure of consideration. Conversely, if the employment continued "for a substantial period beyond the threat of discharge," it would serve as sufficient consideration for the covenant.

Although the court held that the ten years of continued employment in the instant case clearly constituted a substantial period, the court provided no other guidance of how long the employment must continue before the covenant is enforceable. To a certain extent, the answer depends on whether the agreement is viewed as a unilateral or bilateral contract. Under the first view, the covenant does not become binding on the employee until the employer "performs" by continuing to employ him for a substantial period. Since the consideration is the continuation of employment, the bottom line in defining the substantial period would be the actual duration of the employment. Under a bilateral analysis, on the other hand, the crucial factor would be the good faith of the employer's promise not to fire the employee. The unilateral analysis seems preferable, for it would require that the employee receive at least some benefit before a restrictive covenant may be imposed on him. Nevertheless, when employment continues for less than ten years, the requisite extent of that benefit remains unclear.

Another unresolved issue is whether an employer must expressly threaten to fire the employee if he refuses to sign the covenant. The court's language, "a substantial period beyond the threat of discharge" suggests that such a threat is necessary if the continued employment is to be treated as a consideration for the covenant. On the other hand, the court quoted approvingly from

289. 55 Md. App. at 567, 464 A.2d at 1107.
290. Id.
291. Id., 464 A.2d at 1108.
292. See id., 464 A.2d at 1107. Without voicing a preference, the court found that the facts satisfied the consideration requirement under either of the two accepted tests: promise not to fire or continuation of employment. See supra note 282 and accompanying text.
293. Note that the doctrine of mutuality of obligation does not apply to unilateral contracts. See 17 AM. JUR. 2D Contracts § 105 (1964).
295. This approach is reflected in the court's statement: "Were an employer to discharge an employee without cause in an unconscionably short length of time after extracting . . . a restrictive covenant . . . there would be a failure of consideration. An employer who bargains in bad faith would be unable to enforce the restrictive covenant." 55 Md. App. at 567, 464 A.2d at 1107.
296. Id.
In *Hogan v. Bergen Brunswig Corp.*,\(^{297}\) in which the employer's mere request for a restrictive covenant was said to imply a threat of discharge. Moreover, in the instant case the court sought to avoid an approach which "would merely exalt form over substance."\(^{298}\)

In *National Micrographics Systems v. OCE-Industries*,\(^{299}\) the Court of Special Appeals held that, when a manufacturer breached a covenant not to compete with an area distributor, a record of the manufacturer's direct sales in the area was sufficient evidence for a jury to determine lost profits.\(^{300}\) The court also held that, upon showing implied malice, one may recover punitive damages for fraud in the inducement to enter into a contract "even if the parties had a prior contractual relationship."\(^{301}\)

The case concerned a micrographic equipment manufacturer that breached its agreements with a Baltimore-Washington area distributor by selling directly to area customers.\(^{302}\) As proof of damages, the distributor introduced a record of all the manufacturer's direct sales in the area during the period of the agreements.\(^{303}\) The jury, in a special verdict, found for the distributor.\(^{304}\) The trial court, however, entered judgment n.o.v. because the distributor failed to show that it would have sold to those customers had the manufacturer not done so; therefore, the distributor had failed to prove damages.\(^{305}\)

The Court of Special Appeals held that such certainty was not required. To recover lost profits in a contract action, a plaintiff must prove that the breach of contract caused the loss, that the loss was foreseeable, and that the amount of lost profits may be measured with reasonable certainty.\(^{306}\) In the instant case, it is clear that

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298. 55 Md. App. at 567, 464 A.2d at 1108. The distinction would merely be formal, so long as the employee perceived the implicit threat. But even under the *Hogan* rule, the employee could argue as a factual matter that the threat could not have been inferred from conduct.
300. *Id.* at 537, 465 A.2d at 869.
301. *Id.* at 543, 465 A.2d at 872.
302. A special verdict found that an initial oral agreement prohibited the manufacturer from selling to any customers in the area, whereas a subsequent written agreement prohibited sales to customers with whom the distributor already had commercial relations. *Id.* at 534, 465 A.2d at 868.
303. *Id.* at 530, 465 A.2d 866.
304. *See supra* note 302.
305. 55 Md. at 534, 465 A.2d at 868.
306. *Id.* at 532, 465 A.2d at 867. *See also* Macke Co. v. Pizza of Gaithersburg, Inc., 259 Md. 479, 488-89, 270 A.2d 645, 650 (1970). Four factors have been suggested in
the manufacturer's direct sales deprived the distributor of customers; but it would be impossible to determine with reasonable certainty the number of sales that the distributor would have made if the manufacturer had not sold to customers directly. Nevertheless, the court held, "In a case where the principal has wrongfully terminated a sales agent's contract and made sales directly to customers, it is permissible to use the principal's sales to estimate the agent's lost profits." 307

The court rejected the Fourth Circuit's view on this area of Maryland law, as stated in *Universal Lite Distributors v. Northwest Industries*. 308 In that case, the Fourth Circuit held that a distributor of fluorescent lamp ballasts, whose distributorship agreement had been breached by the manufacturer, had failed to prove lost profits, since it produced no substantial evidence showing that customers would have bought from the distributor but for the manufacturer's sales. 309 The Maryland Court of Special Appeals found the per curiam decision unpersuasive and lacking in citation of authority. 310 The Maryland court reasoned that the imposition of such a burden of proof on the plaintiff would defeat the contract law principle of putting the non-breaching party in the position he would be in if no determining whether lost profits may be proved with reasonable certainty: (1) whether the contract provides for such damages; (2) certainty of causation between the breach and the loss; (3) whether inherent difficulties make calculation of the amount too speculative; and (4) whether a more satisfactory standard of compensation is available. 22 Am. Jur. 2d Damages § 174 (1964). These "tests" do little, however, to clarify the problem in the instant case.

307. 55 Md. App. at 537, 465 A.2d 869. Cf. John B. Robeson Assoc. v. Gardens of Faith, Inc., 226 Md. 215, 172 A.2d 529 (1960) (same rule applied, but breach completely prevented innocent party from making sales). The opinion also states that the manufacturer, by its wrongful conduct, was estopped to deny that the distributor would have made the sales. 55 Md. App. at 538, 465 A.2d at 869-70. It is doubtful, though, that the court meant to imply that this question should be determined as a matter of law, for immediately prior to the estoppel argument the opinion states "[a] jury could find that . . . NMS would have made the sales . . . ." 55 Md. App. at 538, 465 A.2d at 869. Because of the jury's finding that the written agreement only prevented the manufacturer from selling to existing customers of the distributor, see supra note 302, the Court of Special Appeals held that the award could be based on all of the manufacturer's sales during the period of the oral contract, but only on the manufacturer's sales to the distributor's prior customers during the period of the written contract. 55 Md. at 539, 465 A.2d at 870.

308. 602 F.2d 1173 (4th Cir. 1979) (per curiam).
309. Id. at 1175-76.
310. 55 Md. App. at 539, 465 A.2d at 870. *Universal Lite* cited only one Maryland case, Macke Co. v. Pizza of Gaithersburg, Inc., 259 Md. 479, 270 A.2d 645 (1970), which held that lost profits must be proved with reasonable certainty. Id. at 488-89, 270 A.2d at 650. But *Macke* also stated that a defendant's earnings may be used to estimate a plaintiff's lost profits. Id. at 492, 270 A.2d at 652.
breach had occurred.\textsuperscript{311}

The fraud count was based on the allegation that, during the period that the parties were operating under an oral agreement, the manufacturer induced the distributor to enter into a written dealership agreement by promising to continue the noncompetition covenant, which it in fact intended to keep violating.\textsuperscript{312} The court distinguished between fraud arising out of a contractual relationship, which requires proof of actual malice, i.e., "ill will," to support punitive damages, and fraud in the inducement to enter into a contract, which only requires implied malice, i.e., "reckless disregard for another's interest."\textsuperscript{313} The court held that the manufacturer's actions could constitute fraud in the inducement "even if the parties had a prior contractual relationship that is not the subject of the fraud claim."\textsuperscript{314} Therefore the distributor need only prove implied malice.\textsuperscript{315}

\textbf{J. Real Property}

\textit{I. Guaranty Fund}.—In 1971, the Maryland General Assembly established a Real Estate Guaranty Fund (the "Fund") to be administered by the Real Estate Commission of Maryland.\textsuperscript{316} The purpose of the Fund is to compensate individuals who suffer a financial loss "arising out of a real estate transaction" because of the unlawful acts of a licensed real estate broker or salesperson.\textsuperscript{317} In \textit{Shepard v. Bay County Realty, Inc.},\textsuperscript{318} the Court of Appeals held that a licensee's loss-causing conduct may be the basis of a claim against the Fund only if the conduct arose out of a transaction which

\begin{itemize}
\item \textsuperscript{311} 55 Md. App. at 538-39, 465 A.2d at 869-70.
\item \textsuperscript{312} Id. at 539, 465 A.2d at 870.
\item \textsuperscript{313} Id. at 540-44, 465 A.2d at 870-72. Accord \textit{Wedeman v. City Chevrolet Co.}, 278 Md. 524, 366 A.2d 7 (1976); H & R Block, Inc. v. Testerman, 275 Md. 36, 338 A.2d 48 (1975); Aeropesca, Ltd. v. Butler Aviation, 44 Md. App. 610, 411 A.2d 1055 (1980); cf. General Motors Corp. v. Piskor, 281 Md. 627, 381 A.2d 16 (1977) (defining a tort "arising out of a contract" as one where there is a "direct nexus" between the tort and the breach of contract).
\item \textsuperscript{314} 55 Md. App. at 543, 465 A.2d at 872.
\item \textsuperscript{315} Id.
\item \textsuperscript{316} Act of May 24, 1971, ch. 648, 1971 Md. Laws 1361 (codified at \textit{MD. ANN. CODE} art. 56, § 217A (1983)).
\item \textsuperscript{317} The requirement that the action must arise out of a real estate transaction was added to the statute by Act of May 4, 1976, ch. 309, 1976 Md. Laws 872 (codified at \textit{MD. ANN. CODE} art. 56, § 217A(a) (1983)). The Fund compensates individuals for actual losses caused by theft, forgery, fraud, misrepresentation, deceit or violation of the provisions on real estate licensing on the part of the real estate licensee. \textit{MD. ANN. CODE} art. 56, § 217A(a) (1983).
\item \textsuperscript{318} 297 Md. 88, 465 A.2d 857 (1983).
\end{itemize}
requires a real estate license.\textsuperscript{319}

In \textit{Sheppard}, a licensed real estate broker sold interests to the appellants in two limited partnerships formed to develop real estate.\textsuperscript{320} The broker promised to repurchase the investors' interests upon request.\textsuperscript{321} Both projects ultimately failed.\textsuperscript{322} Although the broker acknowledged his promise to repurchase the interests, he claimed that he was financially unable to do so.\textsuperscript{323} Appellants claimed that the broker misrepresented the investment, and made a claim to the Real Estate Commission for compensation for their losses from the Fund.\textsuperscript{324}

The court held that the Fund could not be used to recover losses arising out of such a transaction.\textsuperscript{325} The court reached its holding by analyzing the statute's requirement that a claim against the Fund must "arise out of a real estate transaction."\textsuperscript{326} The court reasoned that the Fund was intended to cover transactions which arise out of the real estate business, and that the real estate business is one in which the person transacting it is acting in a professional capacity.\textsuperscript{327} The court found that a person is acting in a professional capacity when conducting a transaction for which a real estate license is required.\textsuperscript{328} Because the sale of interests in limited partnerships does not require a real estate license, the appellants' claim was not within the scope of the Fund.\textsuperscript{329}

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\textsuperscript{319} \textit{Id.} at 95, 465 A.2d at 860.  \\
\textsuperscript{320} \textit{Id.} at 89-90, 465 A.2d at 858.  \\
\textsuperscript{321} \textit{Id.} at 92, 465 A.2d at 859.  \\
\textsuperscript{322} \textit{Id.} at 92-93, 465 A.2d at 859-60.  \\
\textsuperscript{323} \textit{Id.}  \\
\textsuperscript{324} \textit{Id.} at 89-90, 465 A.2d at 858.  \\
\textsuperscript{325} \textit{Id.} at 94-95, 465 A.2d at 860.  \\
\textsuperscript{326} \textit{Md. Ann. Code} art. 56, § 217A(a) (1983) (emphasis added).  \\
\textsuperscript{327} 297 Md. at 96, 465 A.2d at 861.  \\
\textsuperscript{328} \textit{Id.} The court's holding effectively limits the Fund to claims arising out of transactions pertaining to the sale or leasing of actual real estate. The court stated that its limitation on eligible claims was dictated by the legislative history of the Fund and its limited financial resources. \textit{Id.} at 95-96, 465 A.2d at 861. Prior to 1971, a real estate broker had to post a $10,000 corporate bond for the benefit of individuals who might suffer a loss due to a broker's misconduct. \textit{Md. Ann. Code} art. 56, § 217(b) (1968 & Supp. 1970), \textit{repealed} by Act of May 4, 1971, ch. 648, 1971 Md. Laws 1361. This procedure was replaced by the Fund in 1971, \textit{see supra} note 316 and accompanying text, which now maintains a $250,000 minimum balance. \textit{Md. Code Ann.} art. 56, § 217A(c) (1983).  \\
\textsuperscript{329} 297 Md. at 94-98, 465 A.2d at 860-62. The court examined \textit{Md. Ann. Code} art. 56, § 212(a) (1983), which defines real estate brokers, to reach this determination. 297 Md. at 95-97, 465 A.2d at 860-61. The court also cited cases in other jurisdictions that held that the sale of interests in a limited partnership does not require a broker's license. \textit{Id.} at 97, 465 A.2d at 861.
\end{flushleft}
2. Auction.—In Childs v. Ragonese, the Court of Appeals applied conflicting standards to reach the conclusion that an auctioneer who enters into a contract to sell real estate at public auction is not entitled to a commission when the highest bidder on the property subsequently fails to consummate the sale. In Childs, an auctioneer and a vendor entered into an employment contract which stated that the auctioneer was to receive a commission based on the amount for which the property sold at auction. The highest bidder entered into a sales contract for the property, but subsequently refused to close the transaction. The auctioneer maintained that he was entitled to the commission under section 14-105 of the Maryland Real Property Article, which entitles real estate brokers to a commission when the contract of sale is signed. Alternatively, he claimed that the words "sell" and "sold" in the employment agreement referred to a contract of sale rather than a consummated sale, thus entitling him to the commission. The court rejected both arguments.

The court's analysis of section 14-105 is consistent with prior cases in which the court has refused to apply the statute to anyone other than a real estate broker who is the procuring cause of a sale of real property. In view of this refusal to equate auctioneers with real estate brokers, it is perplexing that the court then chose to hold auctioneers to the common law consummated sale standard that had heretofore only applied to real estate brokers. Maryland law at the very least implies that an auctioneer's sale is complete "when the auctioneer so announces by the fall of the hammer or in other customary manner." Accordingly, in other jurisdictions an auctioneer is usually entitled to a commission if the auctioneer is the procuring cause of a sale, even if the sale subsequently falls through. In essence, the court concluded that auctioneers selling real estate are not real estate brokers for the purpose of section

330. 296 Md. 130, 460 A.2d 1031 (1983).
331. Id. at 131-32, 460 A.2d at 1032.
333. 296 Md. at 134, 460 A.2d at 1032.
335. MD. COM. LAW CODE ANN. § 2-328(2) (1975). See 296 Md. at 140-42, 460 A.2d at 1036-37 (Cole, J., dissenting). But see id. at 139 n.8, 460 A.2d at 1036 n.8 (in sale of real estate, legal title passes only when deed is properly executed and delivered).
14-105, but are real estate brokers for the purpose of the consummated sale standard.

3. Broker's Commissions.—In Storch v. Ricker,\textsuperscript{337} the Court of Special Appeals held that, when a provision in a contract of sale provides that the seller will pay the broker's commission at the time of "settlement," the broker is not entitled to his commission when the seller rightfully terminates that agreement.\textsuperscript{338}

Storch contracted to sell a parcel of land. The contract of sale provided that the seller would pay a broker commission to Ricker upon the completion of each of several settlements. If any of the settlements did not occur by a certain date, either party could terminate the contract.\textsuperscript{339} Ricker then brokered a second contract in which the purchaser under the first contract agreed to resell the property to a third party.\textsuperscript{340}

Some settlements under the first contract were not reached by the specified date, and Storch terminated the contract.\textsuperscript{341} Storch and the third party then entered into a new contract for the sale of the land, excluding Ricker from any further commissions.\textsuperscript{342} Ricker sued, maintaining that he was entitled to his commission under the original contract pursuant to section 14-105 of the Real Property Article, which states that a broker is entitled to a commission upon signing the sales contract absent a special agreement to the contrary.\textsuperscript{343} Ricker maintained that no special agreement existed and that he was entitled to a commission because the property was sold to a third party he had indirectly procured.\textsuperscript{344}

The court denied Ricker's claim under section 14-105 by finding that the brokerage provision in the real estate contract between the seller and Ricker was a "special agreement" within the meaning of section 14-105.\textsuperscript{345} The court found that "[a]s long as the terms of the special agreement are explicit and unambiguous, they control

\textsuperscript{338} Id. at 699-700, 471 A.2d at 1087.
\textsuperscript{339} Id. at 687-88, 471 A.2d at 1081.
\textsuperscript{340} Id. at 688, 471 A.2d at 1081.
\textsuperscript{341} Id. at 689, 471 A.2d at 1082.
\textsuperscript{342} Id. at 690-91, 471 A.2d at 1082-83.
\textsuperscript{343} Md. REAL PROP. CODE ANN. § 14-105 (1981).
\textsuperscript{344} 57 Md. App. at 696-97, 471 A.2d at 1085-86.
\textsuperscript{345} Id. at 699, 471 A.2d at 1087.
when the broker is entitled to commissions."\textsuperscript{346}

According to the court, Ricker would be entitled to the commission only if Storch and the third party colluded to deprive him of his commission.\textsuperscript{347} The court thus reaffirmed that a broker's claim that his customer engaged in bad faith collusion to avoid paying commission may be negated by a showing of good faith reasons why the contract was not consummated.\textsuperscript{348} Because the parties had sufficient good faith reasons to terminate the contract, Ricker was not entitled to his commission.

\textbf{K. Uniform Commercial Code}

Chapter 693 of the Laws of 1984 amended section 9-301(2) of the Commercial Law Article\textsuperscript{349} to extend the time period from ten to twenty days in which holders of purchase money security interests\textsuperscript{350} may file a financing statement\textsuperscript{351} in order to take priority over the rights of a transferee in bulk or of a lien creditor, which arise between the time the security interest attaches and the time of filing.\textsuperscript{352} Chapter 693 also amended section 9-312(4) of the Commercial Law Article\textsuperscript{353} by increasing from ten to twenty days the time period during which the holder of a purchase money security interest in collateral other than inventory must perfect his or her security interest in order to take priority over a conflicting security interest in the same collateral.\textsuperscript{354}

\textbf{Megan M. Arthur}  
\textbf{Robert M. Kirchner}  
\textbf{Susan F. Kramer}  
\textbf{Elaine D. Solomon}

\textsuperscript{346} Id. at 698, 471 A.2d at 1086. See DeFranceaux Realty Corp. v. Leeth, 283 Md. 611, 615-16, 391 A.2d 1209, 1211-12 (1978).

\textsuperscript{347} Id. at 701, 471 A.2d at 1088. See Development Sales Co. v. McWilliams, 254 Md. 673, 255 A.2d 1 (1969); Hill v. Inglehart, 145 Md. 537, 125 A. 843 (1924).

\textsuperscript{348} Id. at 701, 471 A.2d at 1088. See Development Sales Co. v. McWilliams, 254 Md. 673, 255 A.2d 1 (1969); Hill v. Inglehart, 145 Md. 537, 125 A. 843 (1924).

\textsuperscript{349} Md. Com. Law Code Ann. § 9-301(2) (1975) (current version at id. (Supp. 1984)).

\textsuperscript{350} A purchase money security interest is one
\begin{itemize}
  \item [t]aken or retained by the seller of the collateral to secure all or part of its price;
  \item [t]aken by a person who by making advances or incurring an obligation gives
  value to enable the debtor to acquire rights in or the use of the collateral if such
  value is in fact so used.
\end{itemize}

\textsuperscript{351} Id. § 9-107 (1975).


\textsuperscript{353} Act of May 29, 1984, ch. 693, 1984 Md. Laws 3291.

\textsuperscript{354} Act of May 29, 1984, ch. 693, 1984 Md. Laws 3291.
IV. CONSTITUTIONAL LAW

A. Commerce Clause

In County Commissioners v. Stevens the Court of Appeals upheld Charles County Regulation 4(d) that prohibits the disposal in public landfills of any waste originating outside the county. The court reversed a Charles County Circuit Court determination that regulation 4(d) discriminated against interstate commerce in violation of the commerce clause of the United States Constitution. The Court of Appeals held that, in banning out of county trash from a publicly owned and operated landfill, the county was acting as a market participant, rather than as a market regulator. As a market participant, the county is exempt from dormant commerce clause restrictions.

In Philadelphia v. New Jersey the Supreme Court held unconstitutional a New Jersey statute that made it illegal to dump waste originating outside New Jersey in any landfill, public or private, within the state. In a footnote to its opinion in Philadelphia, however, the Court explicitly left open the question of whether a similar statute that applied only to public landfills would survive constitutional scrutiny. The Maryland court was presented with this exact question in Stevens.

2. Id. at 222, 473 A.2d at 22. Regulation 4(d) provides: "No garbage, trash, or refuse collected outside the territorial limits of Charles County shall be disposed of in any Public Trash Disposal Area of Charles County." Id. at 206, 473 A.2d at 14.
3. Id. at 207, 473 A.2d at 14.
4. Id. at 216, 473 A.2d at 19.
5. Id. at 218-19, 473 A.2d at 20. Although the court discussed the two-part dormant commerce clause analysis developed by the Supreme Court, it correctly pointed out that the market participant exemption takes a regulation outside the ambit of the commerce clause, making such analysis irrelevant. Id. at 208, 212, 473 A.2d at 14-16.
7. Id. at 618, 629. The circuit court relied on Philadelphia, as well as two cases involving Maryland county ordinances, in finding that regulation 4(d) violated dormant commerce clause restrictions. 299 Md. at 207, 473 A.2d at 14. See Shayne Bros., Inc. v. Prince George's County, 556 F. Supp. 182 (D. Md. 1983) (holding invalid a county ordinance that prohibited the transportation of waste from outside the state to any landfill, public or private, within the county); Browning-Ferris, Inc. v. Anne Arundel County, 292 Md. 136, 438 A.2d 269 (1981) (holding unconstitutional an Anne Arundel County ordinance that prohibited the disposal in or transportation through the county of any hazardous waste originating outside the county).
8. 437 U.S. at 627 n.6.
9. Stevens appears to be the first case in the country to address this issue. After the Supreme Court's decision in Philadelphia, there was speculation regarding ways in which states could make use of openings left by the Court's interpretation to ban the
Charles County is expressly authorized to construct landfills and to prescribe regulations governing the matter of their use. The sole landfill in Charles County, the Pisgah facility, is county owned and operated, and funded primarily from county tax revenues. Albert Stevens, a solid waste hauler, sought a declaration that regulation 4(d) was unconstitutional and an injunction barring its enforcement. In rejecting his argument that the regulation violated the commerce clause, the court based its holding on the fact that regulation 4(d) applies only to public facilities. Maryland statutes prohibiting the transportation of waste from outside the state to any landfill within a county have been struck down as violative of the commerce clause. In affirming an exemption for public landfills, the court first traced the evolution of the market participant exception to dormant commerce clause analysis.


11. 299 Md. at 206, 473 A.2d at 13. “Commercial haulers must obtain a permit and pay a fee for using the landfill. Noncommercial trucks and utility trailers are also charged a fee. Individuals hauling waste in any other vehicle may use the landfill without charge. The landfill’s operation is primarily funded from County tax revenues.” Id. The court does not indicate to what extent the commercial haulers’ fees cover the cost of the services provided, nor is there any suggestion that such information would be relevant to its analysis.

12. Stevens operates a solid waste hauling business, which collected trash both within and outside Charles County. The county suspended one of Stevens' permits for violation of regulation 4(d). In response, he sought declaratory judgment and an injunction, charging that the regulation was unconstitutional under the commerce, equal protection and due process clauses of the Federal Constitution and under article 24 of the Maryland Declaration of Rights. The trial judge concluded that regulation 4(d) violated the federal commerce clause, relying on Philadelphia. Id. at 206-07, 473 A.2d at 14. After appeal by the county, the Court of Appeals remanded the case to the Circuit Court for Charles County with directions to enter a partial declaratory judgment on the commerce clause issue consistent with its opinion, and for further proceedings on the remaining constitutional issues raised, but not decided, by the circuit court. Id. at 222-23, 473 A.2d at 22.

13. Id. at 219, 473 A.2d at 20.
restrict the benefits of a government program to the citizens who funded it.\textsuperscript{16} Applying the same rationale in Reeves, Inc. v. Stake,\textsuperscript{17} the Court held that a state could give a preference to state residents in allocating cement manufactured at a state-owned cement plant. The state, as owner of the facility, was itself participating in the market and could therefore refuse to sell to out-of-state buyers. The Court stated that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."\textsuperscript{18}

Applying these distinctions to its own market participant analysis,\textsuperscript{19} the Court of Appeals first determined that the relevant market in Stevens was landfill service, not trash. The court pointed out that "[t]he County neither buys nor sells refuse deposited in its landfill.

\begin{itemize}
\item \textsuperscript{16} Id. at 810. In Alexandria Scrap, the Court upheld a Maryland statute enacted in an effort to rid the state of abandoned cars. Id. at 796, 814. The statute contained a documentary scheme that made it easier for Maryland scrap processors to collect bounties for deliveries of abandoned cars than for out-of-state processors to collect the bounty. Id. at 797. The Court concluded that Maryland had not sought to prohibit the trade in hulks, though noting that the interstate movement of hulks was in fact reduced. Id. at 803. On the contrary, the Court found that Maryland had itself entered the market and, through its bounty, bid up the price in hulks. Id. at 806. It held that nothing in the Constitution prohibited limiting the benefits of this participation in the market to Maryland residents. Id. at 808-09.

In his dissent, Justice Brennan expressed his concern that, using this exemption, states could influence interstate markets free from judicial or congressional scrutiny. Id. at 817-19 (Brennan, J., dissenting).

\item \textsuperscript{17} 447 U.S. 429 (1980).
\item \textsuperscript{18} Id. at 436-37.
\item \textsuperscript{19} The Stevens court also mentioned White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (upholding the constitutionality of a requirement that at least 50% of the work force on all city-funded construction projects be composed of city residents).

It is noteworthy, however, that in a recent case, United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020 (1984), a different result was reached on similar facts. In Camden, as in White, the Court found that the city was a market participant and exempt from commerce clause restrictions, but it remanded the case for consideration of the privileges and immunities issues. Id. at 1028. This clause, as it is presently construed, would not seem applicable in the Stevens situation. In Camden, the Court found that the opportunity to seek employment was sufficiently "fundamental" to place it within the ambit of the privileges and immunities clause. Id. at 1029. It is doubtful that the rights involved in the Stevens situation are equally fundamental. Invoking privileges and immunities restrictions in cases like Camden may close some doors recently opened by the creation of the market participant exemption. For a general discussion of the dormant commerce clause, see Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982) (proposing a new model for judicial scrutiny of state commercial regulation which is "more comfortably embedded" in the privileges and immunities clause).\end{itemize}
Rather, it provides a service to Stevens and the other private waste haulers . . . .”^20 Because regulation 4(d) applied to only one participant in this market, a public facility, without restricting any private landfills that may be constructed, the court concluded that the regulation fell within the scope of the market participant exemption. It also rejected Stevens’ contention that, to qualify as a market participant, the governmental body must have created the market in question, noting that an identical argument had been expressly rejected in Reeves.  

Stevens argued that the market participation exemption, even if correct, should not apply here because landfills are a natural resource and because Reeves created an exception to the market participant exemption, prohibiting the hoarding of natural resources. The court, rejecting this contention, stated that “[w]hatever the extent of any natural resources exception to the market participant rule in Alexandria Scrap, it would not apply here because the Pisgah facility is not a natural resource.”^24 While recognizing that in Reeves the Supreme Court implied that a natural or acquired monopoly over state-owned natural resources would disqualify the state from a market participant exemption,^25 the Court of Appeals reasoned that no such monopoly existed in the Stevens situation. It emphasized that the county had not prohibited the construction of private landfills within its borders, nor was there any showing that the county possessed unique access to suitable landfill sites. Similar factors were cited by the Supreme Court to uphold the regulation in Reeves. Thus, based on the evidence before the court, its determination that no monopoly existed seems well-founded.

The determination that the Pisgah facility is not a natural resource seems strained, however. In Philadelphia v. New Jersey, the Supreme Court strongly suggested that landfills were natural resources. The Court of Appeals distinguished Stevens by suggesting that in Philadelphia the Court was considering landfill space, while

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20. 299 Md. at 216, 473 A.2d at 19. The court recognized that the determination of market participation may turn on how narrowly the market is defined. See, for example, the court’s discussion of Smith v. Department of Agriculture, 630 F.2d 1081 (5th Cir. 1980), cert. denied, 452 U.S. 910 (1981), at 299 Md. at 218, 473 A.2d at 19-20.
21. 299 Md. at 216-17, 473 A.2d at 19.
22. Id. at 217, 473 A.2d at 19.
23. Id. at 219, 473 A.2d at 20.
24. Id.
25. Id. at 220, 473 A.2d at 20.
26. Id.
27. 447 U.S. at 444.
28. 437 U.S. at 628-29.
landfill facilities were at issue in Stevens.²⁹ The court used language from Reeves in stating that the service provided by the Pisgah landfill “is the end product of a complex process whereby a costly physical plant and human labor act on raw materials.”³⁰ Yet the cement plant in Reeves is more clearly a facility, and less a natural resource, than is the landfill in Stevens. It is not clear that the Supreme Court would accept the distinction drawn by the Court of Appeals, especially in light of the strong concern expressed in Philadelphia that states not be allowed to isolate themselves from problems common to many, like the disposal of waste.³¹ Thus, the result in Stevens may not be tenable. Perhaps regulation 4(d) should fall within the natural resource exception to the market participant exemption.

In Baltimore Gas & Electric Co. v. Heintz,³² the United States District Court for the District of Maryland held unconstitutional a Maryland law generally prohibiting public utility holding companies.³³

The Baltimore Gas & Electric Company (BG & E), in an effort to diversify its operations,³⁴ sought to reorganize under the holding company structure. BG & E incorporated a prospective holding company (BGE Corp.) and together with BGE Corp. filed a joint application with the Maryland Public Service Commission (PSC) to transfer all the assets of BG & E by share-for-share exchange to the holding company.³⁵ The PSC rejected the application³⁶ pursuant to article 78, section 24(e) of the Maryland Annotated Code, which prohibited any stock corporation not already controlling a utility company of the same class from acquiring more than ten percent of the stock of a Maryland public utility corporation.³⁷

²⁹. 299 Md. at 219, 473 A.2d at 20.
³⁰. Id. at 220, 473 A.2d at 20 (quoting Reeves, 447 U.S. at 444).
³¹. 437 U.S. at 628.
³³. Id. at 682.
³⁴. BG & E wished to separate its utility and non-utility functions allowing “the company’s non-utility divisions to diversify into activities other than the distribution of gas and electricity,” without being held accountable to the Maryland Public Service Commission. Id. at 677.
³⁵. Id.
³⁶. Id. at 678.
³⁷. MD. ANN. CODE art. 78, § 24(e) (1980) provides:

No public service company shall take, hold, or acquire any part of the capital stock of any public service company of the same class, organized or existing under or by virtue of the laws of this State, without prior authorization of the Commission. No stock corporations of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold, or
BG & E and BGE Corp. brought this action, seeking to have section 24(e) declared unconstitutional or in conflict with federal law. BG & E claimed: (1) that section 24(e) violated the commerce clause of the United States Constitution; (2) that its application to BG & E was a violation of the equal protection and due process clauses of the United States Constitution, and (3) that section 24(e) was an unlawful attempt by the state to legislate in an area preempted by federal law.

Since "a court should hesitate to address the constitutionality of a challenged statute if other grounds exist which would invalidate the law or its application," the court first addressed the preemption issue. BG & E argued that section 24(e) conflicted with the Public Utility Holding Company Act (PUHCA) of 1935 and therefore violated the supremacy clause. The court cited the test for determining preemption as "whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Applying the test, the court held that the section 24(e) prohibition of certain holding companies did not conflict with the "purposes and objectives of Congress" embodied in the Act of 1935. The PUHCA, like section 24(e), was intended to control

acquire more than ten percent of the total capital stock of any public service company organized under or by virtue of the laws of this State, unless such stock is to be taken as collateral security and the Commission approves of its being so taken; and no such public service company shall be party to the violation of this subsection. For the purposes of this subsection, a company controlling a public service company shall be deemed a public service company of the same class as the controlled public service company.

38. 582 F. Supp. at 676-77.
39. Id. at 678.
40. Id. at 680 (citing Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909)).
41. Id. at 680-81.
42. Id. at 680.
43. 15 U.S.C. § 79i(a)(2) (1935). The PUHCA of 1935, section 79i(a)(2) provides: Unless the acquisition has been approved by the Commission under section 79j of this title, it shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate under clause (A) of paragraph (11) of subsection (a) of section 79b of this title, of such company and any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.
44. U.S. Const. art. VI, cl. 2.
45. 582 F. Supp. at 680 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977)).
46. Id. at 680.
and extensively monitor holding companies and in several places expressly recognizes the coexistence of state regulation.

Next the court addressed BG & E's claim that section 24(e) violated the commerce clause of the United States Constitution. The court determined that section 24(e) burdened interstate commerce by "preventing the company from diversifying into areas outside the control of the PSC, affecting BG & E's ability to secure financing, [and] prohibiting BG & E's stockholders from exchanging their shares of BG & E for shares of BGE Corp." Admitting that the burden on interstate commerce may not be overwhelming, the court noted that an assessment of whether the commerce clause is violated required a balancing of the state's interest served by section 24(e) against that section's effect on interstate commerce.

The court found that although Maryland had a legitimate interest in regulating holding companies, that interest was not rationally served by section 24(e)'s outright ban. That same interest could be promoted with lesser impact on interstate activities, by allowing formation of public utility holding companies only upon PSC approval.

47. Id. at 680-81. See, e.g., In re Commonwealth & Southern Corp., 186 F.2d 708, 712 (3d Cir. 1951) (PUHCA is designed to protect the public, investors and consumers).

48. 582 F. Supp. at 681. See 15 U.S.C. §§ 79f(b), 79g(9), 79i(b), 79r(b) (1935). See also Alabama Elec. Coop., Inc. v. Securities & Exchange Comm'n, 353 F.2d 905, 907 (D.C. Cir. 1965), cert. denied, 383 U.S. 968 (1966) (the purpose of the PUHCA of 1935 is to supplement state regulation and not to supplant it). The court in Heintz also noted that the Securities and Exchange Commission had filed an amicus curiae brief maintaining that section 24(e) was not preempted by the PUHCA of 1935. "[T]he construction of a statute by the agency charged with its enforcement is entitled to deference." 582 F. Supp. at 681 (citing NLRB v. Boeing Co., 412 U.S. 67, 75 (1973)).

49. U.S. CONST. art. 1, § 8, cl. 3.

50. 582 F. Supp. at 681-82.

51. Id. at 682.

52. Id. The burden was not so overwhelming that the court would prohibit an attempt by the state to prevent formation of public utility holding companies after "thorough study and reasoned decision." Id.

53. Id. at 681.

54. Id. at 679. The PSC justified the prohibition of certain holding companies by citing various "historical objections" to holding companies such as: (1) they facilitate stock watering and similar forms of misfinancing; (2) they make corporate accounts unavailable to regulatory agencies and facilitate the manipulation of the various subsidiaries; and (3) through the use of excessive "service charges," they are able to milk the subsidiaries, causing utilities to show increased expenses and requiring regulatory agencies to raise rates higher. Id.

55. Id. The court indicated that the state's interest was weakened by an exception to the section 24(e) outright prohibition, which permitted holding companies that already control utilities of the same class as the target utility to acquire utilities upon approval of the PSC. "It is difficult to envision how the state interest could be any different with regard to those holding companies which already own a utility." Id.

56. Id. at 682. The court proposed as a less intrusive alternative a law that requires
Although the court indicated that an outright ban might save administrative costs,\textsuperscript{57} the burden of an outright prohibition was "clearly excessive in relation to the putative local benefits."\textsuperscript{58}

It is unclear whether the court found the Maryland statute unconstitutional per se or merely unconstitutional as applied to BG & E. In its concluding paragraph, the \textit{Heintz} court implied that its ruling should be confined to the facts at hand. The court stated "that the reading of Section 24(e) to constitute an absolute ban on public utility holding companies, as applied to the plaintiffs in this case, is an unconstitutional infringement on interstate commerce."\textsuperscript{59} Yet the court made no attempt to distinguish the BG & E situation from any other circumstance to which section 24(e) might apply.

Assuming the \textit{Heintz} court did hold the Maryland statute unconstitutional per se, there is likely to be little grief over the demise of section 24(e). It appears the section had been inconsistently enforced at best.\textsuperscript{60} The Maryland Public Service Commission may not have ever known that the section existed.\textsuperscript{61}

B. Freedom of Speech

1. Percentage Limitations on Charitable Fund-Raising Expenses.—In \textit{Secretary of State v. Joseph H. Munson Co.},\textsuperscript{62} the Supreme Court found that a professional fund-raising organization had standing to assert the rights of its charitable clients in an action brought to determine whether a Maryland statute was overly broad in violation of the first and fourteenth amendments.\textsuperscript{63} The Court went on to hold that the Maryland statute, which imposed a twenty-five percent limit on

\begin{itemize}
\item PSC approval for the transfer of assets from a regulated utility to a proposed holding company. \textit{Id.} at 679-80, 681-82.
\item 57. \textit{Id.} at 682.
\item 58. \textit{Id.} at 681 (quoting \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 142 (1970)).
\item 59. \textit{Id.} at 682 (emphasis added).
\item 60. The PSC "acknowledged in its answer to the complaint that there have been some instances in which the acquisition of the stock of a utility company by a holding company which does not already control a public service company of the same class has been approved by the Commission." \textit{Id.} at 678.
\item 61. Lack of awareness by the PSC of the existence of section 24(e) was offered as an explanation for the approval of acquisitions apparently in violation of that section. \textit{Id.}
\item In \textit{Heintz}, the existence of section 24(e) had been brought to the attention of the PSC when the office of the Maryland People's Counsel, which represents the interests of consumers in regulatory proceedings and litigation, moved to dismiss BG & E's application for the transfer of assets. \textit{Id.} at 677.
\item 63. \textit{Id.} at 2848. Justice Blackmun wrote the plurality opinion. Justice Stevens filed a concurring opinion. Justice Rehnquist dissented and filed an opinion in which Chief Justice Burger, Justice Powell, and Justice O'Connor joined.
\end{itemize}
charitable fund-raising expenses, was unconstitutionally overbroad.\textsuperscript{64}

Section 103D of article 41 of the Annotated Code of Maryland provided that a charitable organization "may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity."\textsuperscript{65} Joseph H. Munson Company, Inc. (Munson), a professional fund-raising organization that regularly charged at least one of its clients in excess of 25\% of the gross raised, brought this action in the Circuit Court for Anne Arundel County seeking to have section 103D declared unconstitutional in violation of the first and fourteenth amendments.\textsuperscript{66} The Secretary of State of Maryland (Secretary) challenged Munson's standing, asserting that the statute was aimed at charitable organizations and only those organizations may question its constitutionality.\textsuperscript{67} Without reaching the standing issue, the circuit court upheld the statute on the merits.\textsuperscript{68} The court relied on a provision in section 103D, which permitted a waiver of the 25\% limitation "in those instances where the 25\% limitation would effectively prevent the charitable organization from raising contributions,"\textsuperscript{69} to find the statute "sufficiently flexible to accommodate legitimate First Amendment interests."\textsuperscript{70} The Court of Special Appeals of Maryland affirmed.\textsuperscript{71}

The Court of Appeals of Maryland granted certiorari to determine whether Munson had standing to challenge the statute and if so whether the statute was unconstitutional.\textsuperscript{72} The Court of Appeals found that Munson had suffered injury as a result of section 103D\textsuperscript{73} and therefore had standing to challenge the validity of the statute.\textsuperscript{74} Munson was not prevented from asserting the first

\begin{itemize}
\item \textsuperscript{64} Id. at 2854.
\item \textsuperscript{65} Md. Ann. Code art. 41, § 103D(a) (1982).
\item \textsuperscript{66} 104 S. Ct. at 2843-44.
\item \textsuperscript{67} Id. at 2844.
\item \textsuperscript{68} Id. at 2845.
\item \textsuperscript{69} Md. Ann. Code art. 41, § 103D(a) (1982).
\item \textsuperscript{70} 104 S. Ct. at 2845.
\item \textsuperscript{72} Joseph H. Munson Co. v. Secretary of State, 294 Md. 160, 162, 448 A.2d 935 (1982).
\item \textsuperscript{73} Id. at 171, 448 A.2d at 941. At least one of Munson's potential clients had refused to contract with the fundraiser because of the 25\% limitation. In addition, the Secretary of State had threatened to seek prosecution of Munson if it did not comply with section 103D. \textit{Id.} at 166, 448 A.2d at 938-39.
\item \textsuperscript{74} \textit{Id.} at 173, 448 A.2d at 942.
\end{itemize}
amendment rights of its charitable clients because the statute was
directed "at persons with whom [Munson] has a business or profes-
sional relationship, and impairs [Munson] in that relationship,"75
and because the statute is said to "substantially abridge[] the First
Amendment rights of other parties not before the court."76

The Court of Appeals went on to conclude that section 103D
was unconstitutional on its face,77 finding that it denied charities the
constitutional right to choose to allocate an amount in excess of
25% of the gross raised to other than "charitable" purposes, and
"lump[s those charities which do choose to make such an allocation
together] with those engaging in fraud."78 The "extremely narrow"
waiver provision relied upon by the circuit court and Court of Spec-
ial Appeals did not prevent the statute from "unnecessarily inter-
fering with First Amendment freedoms."79

The Supreme Court granted certiorari to decide whether the
Court of Appeals of Maryland was correct when it determined that
Munson had standing to challenge section 103D and that the statute
was unconstitutional on its face.80

The Court's standing inquiry was two-tiered. It decided that
since Munson had "suffered both threatened and actual injury as a
result of" section 103D,81 it satisfied the case or controversy re-
quirement of article III of the United States Constitution.82 This
alone, however, did not entitle Munson to challenge the statute.83
Normally a party "must assert his own legal rights and interests,
and cannot rest his claim to relief on the legal rights or interests of
third parties."84 Here, Munson was not asserting its own first

75. Id. at 171, 448 A.2d at 941.
76. Id. at 172, 448 A.2d at 942 (quoting Schaumburg v. Citizens for Better Env't, 444
U.S. 620, 634 (1980)).
77. Id. at 181, 448 A.2d at 947.
78. Id., 448 A.2d at 946.
79. Id. at 180-81, 448 A.2d at 946.
80. 104 S. Ct. at 2846.
81. Id.
82. Id. See U.S. Const. art. III, § 2, cl. I.
83. "In addition to the limitations on standing imposed by Article III's case or con-
troversy requirement, there are prudential considerations that limit the challenges
courts are willing to hear." 104 S. Ct. at 2846.
84. Id. (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975) (citations omitted)).
The reason for this rule is twofold. The limitation "frees the Court not only
from unnecessary pronouncement on constitutional issues, but also from pre-
mature interpretations of statutes in areas where their constitutional application
might be cloudy," United States v. Raines, 362 U.S. at 22, 80 S. Ct. at 523,
and it assures the court that the issues before it will be concrete and sharply
amendment rights but the rights of its charitable clients.\textsuperscript{85} Third party standing has been allowed, on occasion, when the injured party was somehow prevented from bringing suit on its own behalf, and the third party both satisfied the case or controversy requirement and was able to effectively present the issues.\textsuperscript{86} In Munson, however, there was no reason to believe that a charity could not come forward and challenge the statute on its own behalf.\textsuperscript{87} But in a case like Munson, when a statute is suspected of being overly broad in violation of the first amendment, denial of third party standing may result in great social loss.\textsuperscript{88} Parties whose rights are directly affected by the statute in question, such as Munson's charitable clients, may be available to challenge the statute but hesitate to do so, opting instead to forego engaging in the constitutionally protected activity rather than chance punishment under the statute.\textsuperscript{89} In such a situation, the Court, in an effort to avoid the chilling of free speech, has allowed a third party whose own activities may not be governed by the statute to assert the first amendment rights of other parties not before the Court, regardless of the capabilities of those other parties to assert their own rights.\textsuperscript{90} The third party will have standing if it satisfies the case or controversy requirement and is able to effectively frame the issues.\textsuperscript{91}

The Court found that Munson satisfied both requirements.\textsuperscript{92} "The activity sought to be protected is at the heart of the business relationship between Munson and its clients, and Munson's interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents."\textsuperscript{93} Satisfied that Munson had standing to challenge the constitutionality of section 103D, the Court turned to the merits.\textsuperscript{94} The

\begin{itemize}
\item \textsuperscript{85} See Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L.Ed.2d 663 (1962).
\item \textsuperscript{86} Id. at 2846-47.
\item \textsuperscript{87} Id. at 2847. See, e.g., Craig v. Boren, 429 U.S. 190, 193-94 (1976) (\textit{ jus tertii standing}).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id. at 2847-48 (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).
\item \textsuperscript{91} Id. at 2848.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id. In his concurring opinion, Justice Stevens raised some interesting issues regarding the proper scope of the Supreme Court's standing inquiry in a case such as this. He concluded that the Court "had no business granting certiorari to review the determination 'that Munson had standing to challenge the validity of § 103D,' " id. at 2857 (Ste-
Court relied on its 1980 decision in *Village of Schaumburg v. Citizens for Better Environment*.\(^95\) In *Schaumburg*, the Court held unconstitutional, in violation of the first amendment, a municipal ordinance imposing a percentage limitation on charitable fund-raising expenses substantially similar to the provisions of section 103D.\(^96\) The *Schaumburg* Court determined that charitable solicitations were entitled to first amendment protection as they are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues."\(^97\) In order to survive a constitutional challenge, a restriction on protected activity, such as a percentage limitation on charitable solicitation costs, must "serve a sufficiently strong, subordinating interest that the Village is entitled to protect"\(^98\) and must be a "narrowly drawn regulation[ ] designed to serve [the] interest[ ] without unnecessarily interfering with First Amendment freedoms."\(^99\) The *Schaumburg* ordinance, like section 103D, was enacted to prevent fraud.\(^100\) The *Schaumburg* Court found, however, that while the prevention of fraud was a legitimate interest, the percentage limitation on solicitation costs was "too imprecise an instrument to accomplish that purpose."\(^101\)

The ordinance struck down in *Schaumburg* was substantially similar to section 103D, but not precisely the same.\(^102\) The Secretary argued that the differences in the two statutes should have caused section 103D to survive Munson's constitutional challenge.\(^103\) The Supreme Court did not agree.\(^104\) A significant portion of the Secretary's argument concerned the waiver provision present in section

\(^{95}\) 444 U.S. 620 (1980).

\(^{96}\) Id. at 639. The ordinance in *Schaumburg* required charitable organizations desiring to solicit contributions to apply for a permit. To obtain a permit, the organization had to demonstrate that at least 75% of its solicitation proceeds would be used for charitable purposes. *Id.* at 623-24.

\(^{97}\) Id. at 632.

\(^{98}\) Id. at 636.

\(^{99}\) Id. at 637 (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)).

\(^{100}\) 104 S. Ct. at 2849, 2852.

\(^{101}\) Id. at 2849. The *Schaumburg* Court stressed the availability of less intrusive measures for prohibiting fraud such as penal laws and "efforts to promote disclosure of the finances of charitable organizations." 444 U.S. at 637-38.

\(^{102}\) 104 S. Ct. at 2850.

\(^{103}\) Id. at 2851-54.

\(^{104}\) Id. at 2851, 2853.
103D but absent from the *Schaumburg* ordinance. The Court found the scope of the waiver provision too narrow to save the statute. Only charities that were "effectively prevent[ed]" from raising funds were entitled to a waiver. Charities whose fund-raising expenses exceeded 25% of gross receipts because of a decision to disseminate information during fund-raising activities, those same charities the Court sought to protect in *Schaumburg*, were not "effectively prevented" from raising funds and therefore not entitled to a waiver.

The Secretary further argued that the waiver provision sufficiently reduced "the number of impermissible applications of" section 103D to render it no longer "substantially overbroad." The court, therefore, should not have found the statute unconstitutional on its face but should have required Munson to show that section 103D was unconstitutional as applied to its clients and limited its holding accordingly. Again, the Court disagreed.

If the "remainder of a statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct," the Court will not strike down the statute on its face simply because it has potential unconstitutional applications, but the Court found that section 103D was not such a statute. The "flaw" in section 103D was not

105. Id. at 2851. The Court in *Schaumburg* distinguished that village's ordinance from a similar ordinance that contained a waiver provision and was upheld in National Found. v. Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970). 444 U.S. at 635 n.9.
107. 104 S. Ct. at 2850-51. Justice Rehnquist, in his dissent, argued that the waiver provision "'decrease[s] the number of impermissible applications of the statute'. . . [and] any decrease in this number of impermissible applications of the statute is extremely significant as tending to decrease overbreadth in relation to the statute's legitimate sweep.' Id. at 2861 n.3 (Rehnquist, J., dissenting) (quoting id. at 2853).
108. Id. at 2850.
109. Id. at 2850-51.
110. Id. at 2853.
111. Id. at 2851. "'Substantial overbreadth' is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner." Id.
112. Id.
113. Id.
114. Id. (quoting CSC v. Letter Carriers, 413 U.S. 548, 580-81 (1973)).
115. Id.
116. Id. at 2852. Justice Rehnquist's disagreement with this aspect of Justice Blackmun's opinion was the primary reason for his dissent. Id. at 2857-58. Justice Rehnquist stressed that in the past the Supreme Court has "insisted that the overbreadth of a statute be 'substantial' in relation to its legitimate sweep before the statute will be invalidated on its face." Id. at 2858. He went on to say that any potential overbreadth was
its potential to be unconstitutional as applied to a limited number of parties or situations. Its "flaw" was that it incorrectly equated high solicitation costs with fraud\textsuperscript{117} and, by imposing a direct restriction on those solicitation costs, created in all its applications an unnecessary risk of chilling free speech.\textsuperscript{118}

The Secretary pointed to several other differences between section 103D and the ordinance struck down in \textit{Schaumburg}: the fact that section 103D regulated after-the-fact instead of imposing a prior restraint on the protected activity;\textsuperscript{119} the fact that section 103D may not have applied to as many organizations as the \textit{Schaumburg} ordinance;\textsuperscript{120} and the fact that section 103D applied to all fundraising activities;\textsuperscript{121} but the Court remained unpersuaded.\textsuperscript{122}

The Supreme Court's decision in \textit{Munson}, although far from unanimous, when read along with its recent decision in \textit{Schaumburg}, clearly indicates that efforts to prevent fraud in charitable activities that take the form of poorly aimed, arbitrary percentage limitations on fund-raising costs will not survive constitutional challenge.

Since the Supreme Court has determined that charitable solicitations are entitled to first amendment protection, any statute that affects this activity must be precisely tailored to accomplish a sufficiently strong state objective "without unnecessarily interfering

\footnotesize{\begin{itemize}
\item \textsuperscript{117} Id. at 2852.
\item \textsuperscript{118} Id. at 2853.
\item \textsuperscript{119} While "[a]n organization may register as a charity and solicit funds without first demonstrating that it satisfies § 103D," \textit{id.} at 2853-54, the Court was not convinced that section 103D contained no prior restraints to solicitation. \textit{Id.} at 2854. However, even if section 103D could be said to regulate only "after-the-fact," the Court would have found no less interference with first amendment rights. \textit{Id.}
\item \textsuperscript{120} \textit{Id.} The Court indicated that, although section 103D may have applied to fewer charities than the ordinance struck down in \textit{Schaumburg}, that did not "alter the fact that significant fundraising activity protected by the First Amendment is barred by the percentage limitation." \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item Finally, the fact that the statute regulates all charitable fundraising, and not just door-to-door solicitation, does not remedy the fact that the statute promotes the State's interest only peripherally. The distinction made in \textit{Schaumburg} was between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process. The statute's aim is not improved by the fact that it fires at a number of targets.
\item \textsuperscript{122} \textit{Id.} at 2853.
\end{itemize}}
with First Amendment freedoms." Percentage limitations on solicitation costs can never meet this test. High solicitation costs may be attributed to any one of a number of factors, not all of which are undesirable. Indiscriminate measures like the one employed in section 103D prohibit charitable organizations from engaging in moderately expensive yet desirable activities without insuring that the risk of fraud is eliminated.

A waiver provision is not the answer, although the four dissenting justices may disagree. The narrowly drawn waiver provision in section 103D was applicable only to those organizations that could demonstrate financial necessity. To extend the scope of the waiver provision to provide a state official with discretion to grant additional exemptions "whenever necessary" would be "only slightly less troubling." Perhaps the best solution is to rely on the existing penalties for fraud, the ability of charitable organizations to bargain freely with professional fund-raising organizations, and the remaining sections of the charitable organizations subtitle of article 41, which require charitable organizations to register with the Secretary of State, to report financial data for public inspection, and require professional fundraisers to post a bond.

2. Public Employees.—In Beeler v. Behan, the Court of Special Appeals upheld disciplinary action taken against Baltimore County Police Officer Beeler for violation of police department rules...
prohibiting any conduct that undermines the department’s good order or discredits its members, and forbidding the public criticism or ridicule of any member of the department.\(^\text{135}\) The court rejected Beeler’s contention that the rules were unconstitutionally vague and an unconstitutional restriction of his first amendment right of free speech.\(^\text{136}\)

Officer Beeler was a patron at a county night club when fellow officers arrived at the club to close it down. He approached the officers in a hostile manner and suggested that the club owner “took care of” the local police, and that every time a particular lieutenant worked, the place was “hassled.”\(^\text{137}\) This conduct was found to violate the departmental rule.

The court’s finding that the regulations in question were not unconstitutionally vague was based on precedent sustaining nonspecific regulations in analogous situations.\(^\text{138}\) The court properly

\[\text{loss of two days leave, and the imposition of ten hours extra duty without pay. The Baltimore County Police Chief concurred in the Board’s findings and recommendation. The Circuit Court for Baltimore County affirmed the police department’s decision. Id. at 518-19, 464 A.2d at 1092-93.}\]

\[\text{135. The relevant rules and regulations of the Baltimore County Police Department provide as follows:}\]

\begin{itemize}
  \item Rule 1—Conduct
    
    Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any members of the Department, either within or without Baltimore County, which tends to undermine the good order, efficiency, or discipline of the Department, or which reflects discredit upon the Department or any member thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or laid down, shall be considered conduct unbecoming a member of the Police Department of Baltimore County, and subject to disciplinary action by the Police Chief.
\end{itemize}

\[\text{Section 11. No member of the Department shall publicly criticize or ridicule the official action of any member of the Department, public official or judge.}\]

\[\text{55 Md. App. at 517-18.}\]

\[\text{136. Id. at 523, 525, 464 A.2d at 1094, 1096. The court also rejected the contention that Beeler was not within the scope of the rules because he was off duty. Id. at 525, 464 A.2d at 1096.}\]

\[\text{137. Id. at 519-20, 464 A.2d at 1093. Beeler never offered any evidence to support his statements. Id. at 520, 464 A.2d at 1093.}\]

decided the case based only on the facts before it, by asking whether the language was so broad that Beeler would not have known that his behavior would fall within its ambit. The court stated that "Beeler could have scarcely doubted that his remarks . . . could be considered, under the regulation, conduct unbecoming a member of the police department."140

In addressing the freedom of speech issue raised by Beeler, the court applied the guidelines developed by the Supreme Court in Pickering v. Board of Education141 for balancing a public employee’s interest in his first amendment rights against the interests of the state as an employer in maintaining efficiency and morale.142 The court’s discussion of Beeler’s individual interest in freedom of speech is rather cursory143—an omission perhaps explained by the circumstances under which he chose to assert it.144 The court merely queries in passing whether Beeler’s unsubstantiated statements were knowingly and recklessly false, and thus outside the ambit of first amendment protection.145 Yet the suspicion arises that a proper evaluation of the contrary interests involved turns in large part on this issue. Beeler’s accusations of bribes and police harassment are by their nature difficult for the police department to disprove, and they may well have been believed by at least some of the bar’s other patrons. Of course, the accusations, even if true, might be considered, under the regulation, conduct unbecoming a member of the police department."
be equally difficult for Beeler to substantiate. Query what would have been the result if Beeler had been able to document his assertions?

Instead of performing a bona fide balancing analysis, the Beeler court concentrated almost exclusively on the state's interest as an employer. The court distinguished Beeler from Brukiewa v. Police Commissioner, in which the Court of Appeals found a police officer's statements to be protected by the first amendment. Officer Brukiewa, who was President of the Baltimore Police Union, had been suspended from duty for one year for comments made during a television interview in which he sharply criticized the Police Commissioner, as well as department procedures and morale. The Court of Appeals emphasized that its holding was based on the State's failure to show that Brukiewa's statement hurt or imperiled the operation of the police department.

The court's comparison of the facts of Beeler with the circumstances in Brukiewa was disappointingly brief. Beeler stated only that the facts were markedly different because Beeler's statements were directed toward fellow officers as well as superiors and because the statements had an adverse effect on the relationship between Beeler and his fellow officers. The court also noted that a finding by the hearing board that Beeler's statements were demeaning and injurious to morale was "entitled to considerable deference." Because the Beeler court's analysis of the facts was so limited, it is not clear to what extent the court made its own evaluation of the impact of the statements when it applied the Pickering balancing test. Overall, the court's factual analysis was so conclusory that Beeler offers little guidance, except as an example of speech which is not protected when weighed against a strong showing of contrary state interest.

C. Equal Protection

1. Rational Basis Test.—In Department of Transportation v. Armacost, the Court of Appeals vacated an interlocutory injunction delaying implementation of Maryland's Vehicle Emission Standards.
Inspection Program (VEIP) in Carroll County.\textsuperscript{153}

VEIP was instituted in response to mandates from the federal government pursuant to the Clean Air Act.\textsuperscript{154} Congress had determined that inspection programs were best accomplished under state administration and, in the 1977 amendments to the Act, had taken the extraordinary action of legislating economic sanctions as a means of inducing states to adopt such programs.\textsuperscript{155}

During the years since the Clean Air Act was passed, the courts have heard a number of challenges to the programs.\textsuperscript{156} These cases have addressed the authority of the Environmental Protection Agency to demand implementation of the programs,\textsuperscript{157} the obligation of states to enforce the programs,\textsuperscript{158} the adequacy of the state programs,\textsuperscript{159} and the use of sanctions by the EPA or the courts to ensure implementation.\textsuperscript{160} These issues having been resolved gen-

\textsuperscript{153} Id. at 424, 474 A.2d at 207. In response to mandates from the federal government, the Maryland General Assembly authorized the Motor Vehicle Administration to adopt rules and regulations establishing a vehicle emission inspection program. Md. TRANSP. CODE ANN. §§ 23-201 to -208 (1984). After several delays, the program was scheduled to begin on February 1, 1984. 299 Md. at 403, 474 A.2d at 197. Several Carroll County Commissioners, as individuals and officials, the town of Mt. Airy, and a county resident sought to have VEIP declared unconstitutional as applied to the county. Id. at 404, 474 A.2d at 197. The Circuit Court for Carroll County granted petitioners' request for an interlocutory injunction. Id. The Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals. Id.


\textsuperscript{155} Ostrov, Inspection and Maintenance of Automotive Pollution Controls: A Decade-long Struggle Among Congress, EPA and the States, 8 HARV. ENVTL. L. REV. 139, 156 (1984).

\textsuperscript{156} Id. at 163. Ostrov, supra note 155, provides a comprehensive discussion of judicial and legislative developments in the area of vehicle emission inspection programs, as well as an analysis of the success of the programs. See also Battle, Transportation Controls Under the Clean Air Act—An Experience in (Un)Cooperative Federalism, 15 LAND & WATER L. REV. 1 (1980).

\textsuperscript{157} In 1977, Congress passed the Clean Air Act Amendments to resolve the legal uncertainty which was hampering EPA's efforts to implement inspection programs. Ostrov, supra note 155, at 147-50. States are free to reject the programs, but various forms of federal aid are conditioned on compliance with Clean Air Act terms. 42 U.S.C. § 7506 (1983). See generally Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 YALE L.J. 1196 (1977).

\textsuperscript{158} See, e.g., United States v. Ohio Dep't of Highway Safety, 635 F.2d 1195 (6th Cir. 1980) (upholding enforcement against state where state failed to deny registration to motorists whose vehicles did not comply with pollution control requirements), cert. denied, 451 U.S. 949 (1981).


\textsuperscript{160} See, e.g., Pacific Legal Found. v. Costle, 627 F.2d 917 (9th Cir. 1980) (concluding that EPA sanctions did not constitute an unconstitutional method to coerce the state's legislature to act), cert. denied, 450 U.S. 914 (1981).
erally in favor of the EPA's position, the plaintiffs in *Armacost* raised other constitutional challenges to the program. In vacating the interlocutory injunction, the court limited its review to a preliminary determination that the plaintiffs had little chance of prevailing on the merits of their claims.

The court determined that tailpipe tests of the type used in the program did not constitute an unconstitutional search and seizure. The court concluded that insertion of a testing probe ten inches into the tailpipe of a vehicle was tantamount to an examination of the exterior of a car. Examination of the exterior of a car does not violate any reasonable expectation of privacy and consequently does not come within the scope of the fourth amendment.

Furthermore, the court concluded that inclusion of just one rural county in the program was not a violation of equal protection safeguards. Applying the rational basis test, the court found there was sufficient reason for including only Carroll County in the program because it is a nonattainment area for ozone. The court noted that the exclusion of other "rural" counties in the area was completely irrelevant because the other "rural" counties had not been identified as nonattainment areas.

The court found a similarly sufficient rational basis to support the exclusion of nine classes of vehicles otherwise covered by the inspection program. The court correctly noted that under-

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161. *See supra* notes 156-60.
162. Plaintiffs challenged the program on fourth amendment, equal protection and due process grounds.
163. 299 Md. at 404, 474 A.2d at 197. The court listed four factors, which were to be considered before granting an interlocutory injunction: (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be done to defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction was granted; and (4) the public interest. *Id.* at 404-05, 474 A.2d at 197. Since the court concluded that there was little chance of the plaintiffs prevailing on the merits they did not go on to address the other three factors. *Id.*
164. *Id.* at 406, 474 A.2d at 198.
165. *Id.*
166. *Id.* (citing State v. Burns, 121 Ariz. 471, 475, 591 P.2d 563, 567 (1979) (in which Arizona court held that the state's vehicle emission program did not violate the fourth amendment)).
167. *Id.* at 408-14, 474 A.2d at 199-202.
168. *Id.* at 409, 474 A.2d at 199.
169. *Id.* at 410 n.8, 474 A.2d at 200 n.8.
170. *Id.* at 410-14, 474 A.2d at 200-01. The court rejected the suggestion that the VEIP impaired the constitutionally protected right to travel and must therefore be reviewed under a "heightened scrutiny" analysis. *Id.* at 410-11, 474 A.2d at 200.
inclusiveness does not render an otherwise valid law unconstitutional. "We need not be convinced that the reasons for the distinctions are good ones; that is a question for the legislature." 171

Finally, the court concluded that on its face VEIP did not violate either procedural or substantive due process.172 "To establish a violation of procedural due process of law in this case, the aggrieved party must show that state action has resulted in a deprivation of a property interest within the meaning of the due process clause." 173 The court found that the procedures set forth by VEIP for sending notice, recording test results, and taking appeal were constitutionally sufficient in light of the various property interests involved.174 The possible revocation of a vehicle registration likewise survived due process scrutiny. Assuming, without deciding, that a vehicle registration was a property interest, 175 the court reasoned that this interest was less than the interest in a driver's license because even if a registration is revoked, the owner remains free to drive any other car. 176 Weighing this limited interest against the state's interest in eliminating pollution, the court found the revocation procedures adequate, especially when, as set forth in VEIP, the determinations are largely automatic and based on scientifically objective standards. 177 Moreover, the court rejected the argument that revocations amounted to a taking of property without just compensation because the owner is not deprived of all beneficial use of his property; the car can still be sold. 178

In vacating the interlocutory injunction, the court affirmed traditional constitutional tests and rejected a new set of challenges to the implementation of state inspection programs.

2. Legislative Districting.—Under the Maryland Constitution, the Governor of Maryland is required after each federal decennial
census to prepare a plan setting forth legislative districts for electing members of the Senate and House of Delegates.\footnote{179} A districting plan was accordingly prepared and enacted by House Joint Resolution No. 32 (H.J.R. 32) during the 1982 General Assembly session.\footnote{180} A number of petitions were filed challenging the plan.\footnote{181} After reviewing the findings of a Special Master,\footnote{182} the Court of Appeals held in \textit{In re Legislative Districting}\footnote{183} that the plan complied with state and federal constitutional requirements, and affirmed H.J.R. 32 as enacted.\footnote{184}

The court's opinion, handed down almost two years after its decision was rendered,\footnote{185} is squarely in line with precedent and thus reflects the limits of current standards. After the Supreme Court's landmark decision in \textit{Baker v. Carr},\footnote{186} holding for the first time that the issue of apportionment was justiciable,\footnote{187} the Court established that fair representation required equal population bases between districts to ensure one person, one vote.\footnote{188} Given substantial equal-

\footnote{179} Md. Const. art. III, § 5.
\footnote{180} \textit{In re Legislative Districting}, 299 Md. 658, 667-68, 475 A.2d 428, 432-33 (1982). The plan was prepared by an advisory committee, which conducted “numerous” public hearings throughout the state. The Governor himself held two public hearings, made several changes, and submitted the plan to the General Assembly. \textit{Id.}
\footnote{181} \textit{Id.} at 668, 475 A.2d at 435. The Court of Appeals has original jurisdiction to review legislative districting upon petition filed by any registered voter. After receiving the first petition challenging the districting, the court appointed a Special Master to conduct hearings and to submit findings of fact and conclusions of law. By an order dated March 5, 1982, the court directed that any voter who claimed the plan was invalid must intervene by March 31, 1982. Ten petitions challenging various aspects of the plan were filed. \textit{Id.}
\footnote{182} The Special Master found no merit in any of the petitions, with one exception: he concluded that Baltimore City District 44 violated the compactness requirement of Md. Const. art. III, § 4, and proposed alterations to remedy the defect. 299 Md. at 671-72, 475 A.2d at 435. The Court of Appeals sustained the State’s exception to this finding. \textit{Id.} at 672, 475 A.2d at 435. \textit{See infra} note 210.
\footnote{183} 299 Md. 658, 475 A.2d 428 (1982).
\footnote{184} \textit{Id.} at 672, 475 A.2d at 435.
\footnote{185} The decision was handed down on June 4, 1982, and the opinion delivered on May 29, 1984. \textit{Id.} at 658, 475 A.2d at 428.
\footnote{186} 369 U.S. 186 (1962).
\footnote{187} \textit{Id.} at 208-37. The \textit{Baker} opinion suggested a number of factors used by modern courts to characterize an issue as a nonjusticiable, political question: the presence of a textually demonstrable constitutional commitment of the issue to a coordinate political department; the lack of judicially discoverable and manageable standards for resolving the issue; the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. \textit{Id.} at 217.
\footnote{188} \textit{See} Reynolds \textit{v. Sims}, 377 U.S. 533, 561-71 (1964). Equal population between
ity of population in each district, other considerations, such as political, natural or historical boundaries, may legitimately be taken into account.\textsuperscript{189}

By not imposing rigid, randomly determined mathematical equality between districts, current standards leave room for sophisticated gerrymandering. The Supreme Court has upheld judicial intervention to remedy racially discriminatory districting,\textsuperscript{190} but has imposed a heavy burden on those challenging an apportionment plan to show not just a discriminatory effect, but that the districts were conceived or maintained for a discriminatory purpose.\textsuperscript{191} The Court has been reluctant even to address the issue of partisan gerrymandering.\textsuperscript{192} This reluctance is apparently shared by the Court of Appeals, and the extent to which partisan gerrymandering is susceptible to judicial review remains an open issue.\textsuperscript{193}

Any legislative districting plan must, of course, conform to the dictates of both the state and federal constitutions. After an exhaustive discussion of the general principles involved, the Court of Appeals examined those claims alleging violations of federal constitutional requirements.\textsuperscript{194} The court upheld disparities between subdistricts of +6.69 and −6.13 from the mean population, respectively, even though the disparity might have been reduced by combining the two into a single, two-member district.\textsuperscript{195} These dis-

\textsuperscript{189} 299 Md. at 674, 475 A.2d at 436. See generally Obee, \textit{Constitutional Law and Civil Rights: State and Federal}, 29 WAYNE L. REV. 455 (1983) (arguing that currently permissible deviations from a strict, mathematically precise model have eroded the principles underlying \textit{Baker} and \textit{Reynolds}).

\textsuperscript{190} See, e.g., \textit{United Jewish Organizations, Inc. v. Carey}, 430 U.S. 144 (1976) (upholding in a plurality opinion New York City district lines drawn to correct alleged under-representation of black and Puerto Rican minorities). In \textit{Carey}, the plan had been challenged by Hasidic Jews whose community had been split between two predominantly black districts by the redistricting plan. \textit{Id.} at 152.

\textsuperscript{191} Compare \textit{City of Mobile v. Bolden}, 446 U.S. 55 (1980) (holding in a plurality opinion that a multimember districting plan did not unconstitutionally dilute black voting strength and suggesting the high standard of proof now imposed to show discriminatory intent), \textit{with Rogers v. Lodge}, 458 U.S. 613 (1982) (affirming district court’s finding of discrimination when evidence of discriminatory intent, as well as impact, was offered).


\textsuperscript{194} 299 Md. at 681-86, 475 A.2d at 440-42.

\textsuperscript{195} \textit{Id.} at 682-83, 475 A.2d at 440. The goal underlying the Maryland plan was to
parities were permissible given "the obvious need to maintain continuity of territory in order to preserve constituent-representative communication" in an area complicated by uneven population distribution and unbridged waters.196

Eight petitions alleged that the districting plan was invidiously discriminatory in violation of the equal protection clause of the fourteenth amendment.197 The court found that none of the petitioners met the strong burden imposed upon them to prove, first, that the plan had a discriminatory effect, and second, that this effect was intended.198 Thus, the inclusion of Rockville and Gaithersburg in a single district was not an unconstitutional debasement of voting strength where consideration was given to municipal boundaries and the district's population was within 2.56% of the statistical ideal.199 Similarly, the court upheld the splitting of the unincorporated town of Columbia between two districts, where Howard County's total population prohibited a single district and where the district boundary ran along a major highway.200

The court also rejected the contention that a mere showing that districts were drawn so as to minimize contests between incumbents was sufficient to support a finding of invidious discrimination.201 To support such a finding, the court suggested it would be necessary to prove "that the districts were unfairly fashioned to favor or hinder either incumbents or nonincumbents."202 This rather cryptic distinction is supported by Supreme Court precedent upholding the protection of incumbents in similar circumstances.203 The Maryland court stated: "It is incongruous in our view to profess the virtues of constituent-representative communication while at the same time condemning the practice of permitting the voters to decide whether an incumbent is to continue as an elected representative."204 Yet at some point constituent-representative communication degenerates

have no deviation larger than 10% (±5) from the ideal population—a standard that the Court of Appeals held to be well within permissible limits. Id. at 682, 475 A.2d at 440.
196. Id. at 682, 475 A.2d at 440.
197. Id. at 683, 475 A.2d at 440.
198. Id. at 683-86, 475 A.2d at 440-42.
199. Id. at 683-84, 475 A.2d at 441.
200. Id. at 684-85, 475 A.2d at 441.
201. Id. at 685, 475 A.2d at 441-42.
202. Id., 475 A.2d at 442.
203. See White v. Weiser, 412 U.S. 783, 791 (1973) (fact that district may have been drawn in a way that minimizes number of contests between incumbents does not in and of itself establish invidiousness); Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (politics and political considerations are inseparable from districting and apportionment).
204. 299 Md. at 685, 475 A.2d at 442.
into locked-in seats. The court failed to provide any meaningful standard for determining when minimizing contests between incumbents becomes impermissible gerrymandering.

Turning to alleged state constitutional violations, the court stressed that Maryland's compactness requirement is a relative standard, with compactness only one of several valid considerations involved in districting. Therefore, an affirmative showing of intentional, unfair bias is "ordinarily required" to overcome a districting plan's presumption of validity. Valid considerations mentioned by the court in rejecting petitioners' claims include constituent-representative communication, natural boundaries, as well as legitimate desires to achieve racial balance or reduce the number of contests between incumbents. However, the court indicated that the requirement of "due regard" for political boundaries does not encompass "communities of interests." The court argued convincingly that the concept is nebulous, and the number of such communities is virtually unlimited.

Taken as a whole, the court's opinion exposes the limited protection against gerrymandering afforded by current standards of review. The court could have faced these limitations more forthrightly, if only to declare certain issues nonjusticiable.

D. Due Process

1. Summary Procedure.—In Litzenberg v. Litzenberg, the Court of Special Appeals found that the summary procedure used by a trial...
judge constituted a denial of due process because a genuine factual dispute existed and the parties were not given sufficient time to frame their responses.\textsuperscript{215} The dispute involved an attorney's authority to bind his client, Ms. Litzenberg, to a divorce settlement agreement. Ms. Litzenberg saw the agreement for the first time at a scheduled hearing and objected that she had not given her attorney the express authority required to make such an agreement.\textsuperscript{216} The judge immediately held a hearing on the issue in open court. After receiving sworn testimony from the attorneys, appellant, and her accountant, he granted summary enforcement of the agreement.\textsuperscript{217} On appeal, the court found that the factual dispute involved warranted an adversarial evidentiary hearing in which Ms. Litzenberg would have sufficient time to seek new counsel and prepare her response.\textsuperscript{218} In its analysis, the court applied the traditional test for evaluating due process, weighing the interest in a just and speedy resolution of the dispute against the parties' property or liberty interests and the probable benefits of more extensive procedures.\textsuperscript{219}

2. Right to Counsel and Right to Jury Trial in Civil Contempt.—In \textit{Rutherford v. Rutherford}\textsuperscript{220} the Court of Appeals considered whether the constitutional right to appointed counsel\textsuperscript{221} extends to indigent persons charged with civil contempt for noncompliance with a child support order.\textsuperscript{222} The \textit{Rutherford} court held that denying a defend-

\textsuperscript{215} \textit{Id.} at 314, 469 A.2d at 1285.
\textsuperscript{216} \textit{Id.} at 308-09, 469 A.2d at 1282. The day before the scheduled hearing, the parties' attorneys had reached what they thought was a settlement, and Ms. Litzenberg's attorney described it to her in very general terms over the phone. \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id.} at 314, 469 A.2d at 1285. The court emphasized that summary and plenary proceedings are at opposite ends of a continuum, and that the formality required depends upon the complexity of the dispute. \textit{Id.} at 312, 469 A.2d at 1284.
\textsuperscript{219} In Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) the Court found that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
\textsuperscript{220} 296 Md. 347, 464 A.2d 228 (1983).
\textsuperscript{222} 296 Md. at 348, 464 A.2d at 229. \textit{Rutherford} was a consolidation of two civil
the right to appointed counsel in a civil contempt proceeding violates both the due process clause of the fourteenth amendment and article 24 of the Maryland Declaration of Rights. The court specifically limited the right of counsel to those instances when actual incarceration is ordered.

The right to counsel in *Rutherford* springs from the fourteenth amendment and not the sixth amendment because the sixth amendment only requires appointed counsel in criminal cases involving incarceration. The opinion cited Supreme Court, lower federal court and state court cases holding that in most situations due process requires the appointment of counsel for proceedings that result in defendant's loss of liberty. The court primarily relied on two Supreme Court cases, *Lassiter v. Department of Social Services* and *In Re Gault*, citing these cases for the proposition that the right to contempt proceedings involving unemployed defendants who failed to make court-ordered child support payments. In January 1982, Mr. Rutherford agreed to make child support payments as part of a separation settlement agreement. A March, 1982 divorce decree incorporated the child support provision. In April, Rutherford's ex-wife filed a petition to hold him in contempt for failing to make the payments under the decree. After a hearing on the matter in which he represented himself, Rutherford was held in contempt for nonpayment. After the sentencing, an attorney from the Public Defender's Office began representing Mr. Rutherford.

In the other case, Katzenberger v. Katzenberger, Mr. Katzenberger had been ordered by the Circuit Court for Anne Arundel County to make child support payments. After failing to make regular payments, the defendant was brought into court on contempt charges. Representing himself, Mr. Katzenberger was found in contempt for nonpayment. After sentencing, an attorney from the Public Defender's Office began to represent the defendant.

Chief Judge Murphy concurred in part and dissented in part, criticizing both the violation of the court's "'established policy of not deciding constitutional questions unless necessary,'" and the majority's conclusion that the state and federal constitutions compel the appointment of counsel for indigents in civil contempt cases leading to sentences of incarceration. He argued that the right to counsel in civil cases involving loss of liberty is not absolute, but rather depends on a case-by-case balancing of private and governmental interests and the risk that the procedures used will lead to an erroneous result.

*Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 336, 435 A.2d 425, 428 (1981), and *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). (An indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.).

*387 U.S. 1, 36-37 (1967)* (A juvenile sentenced to commitment in a state industrial school as a result of a civil proceeding had a due process right to counsel because of, among other factors, "the awesome prospect of incarceration in a state institution.").
appointed counsel for indigents in civil proceedings generally depends upon the "presence or absence of actual incarceration." However, neither Lassiter nor Gault held that the right to counsel pertains in all cases in which incarceration is possible.

With Rutherford, Maryland joined the majority of jurisdictions that require court appointed counsel for indigents in civil contempt proceedings involving actual incarceration. The court also expressly refused to follow the minority of jurisdictions that require appointed counsel in civil contempt proceedings only when "special circumstances" are present. The court found that the "special circumstances" standard was not workable because often the special circumstances are not apparent unless the defendant is represented by counsel.

By restricting the right to appoint counsel to only those instances in which actual incarceration occurs, the court has perpetuated the problem of Scott v. Illinois. The requirement that an indigent defendant be actually incarcerated before he is entitled to counsel forces a judge to make a decision before the trial begins regarding whether there is a chance that the defendant may be incarcerated at the close of the trial. If the judge determines that the defendant probably will not be incarcerated and does not order counsel appointed, he has lost the option to send the defendant to prison. A judge can only avoid losing the option to incarcerate by appointing counsel in every case in which there is a potential for incarceration. Ruling that the right to counsel attaches when there is a potential for incarceration, rather than when actual incarceration occurs, would prevent the need for such pretrial determinations by already overburdened judges.

229. 296 Md. at 362-63, 464 A.2d at 236.
230. Lassiter, 452 U.S. at 26-27; Gault, 387 U.S. at 41. Chief Judge Murphy, concurring in part and dissenting in part in Rutherford, interpreted Lassiter to mean that "[t]he due process right of indigents to appointed counsel in civil cases involving an actual loss of liberty is not absolute but depends upon a balancing of interests, i.e., the private interests at stake, the government's interest, and the risk that the procedures used will lead to an erroneous decision." 296 Md. at 365-66, 464 A.2d at 238 (Murphy, C.J., concurring in part and dissenting in part).
231. See 296 Md. at 358-60, 464 A.2d at 234-35 and cases cited therein.
233. 296 Md. at 361, 464 A.2d at 235.
234. 440 U.S. 367 (1979). Scott held that as long as an indigent defendant is not sentenced to imprisonment, the state is not required to appoint counsel for him, even if the offense is one which is punishable by imprisonment. Id. at 373-74.
The Court of Appeals left open the question of what other rights are activated by a civil contempt proceeding in which actual incarceration is ordered. In criminal contempt proceedings the burden of proof is increased, the accused cannot be compelled to testify against himself, he cannot be put in double jeopardy, and he has a right to notice and the opportunity to be heard.\textsuperscript{235} The question remains whether actual incarceration in civil contempt proceedings triggers this same panoply of fundamental due process rights.

A part of this question was answered in a subsequent Maryland Court of Special Appeals decision, \textit{Lee v. State},\textsuperscript{236} when the court held that a defendant in a civil contempt proceeding has no right to a jury trial.\textsuperscript{237} The court reasoned that criminal contemners only have a right to a jury trial in cases of "serious" contempt, usually involving determinate sentences in excess of six months. Civil contempt sanctions, on the other hand, are coercive and may be purged immediately. Because the sentence in a civil contempt case cannot be "determinate," it would arguably not be a "serious" offense which might require a jury trial.\textsuperscript{238} This reasoning seems flawed in light of the fact that, in \textit{Lee}, the defendant was sentenced to two years in the Baltimore County jail.\textsuperscript{239}

In addition to this ruling, the \textit{Lee} court expanded the right to appointed counsel established in \textit{Rutherford} to include the right to presentation of closing arguments by counsel.\textsuperscript{240} The court relied on \textit{Spence v. State},\textsuperscript{241} in which the Court of Appeals held that a defendant in a criminal case has a constitutional right to have counsel make a proper closing argument.\textsuperscript{242} Synthesizing the holdings in \textit{Rutherford} and \textit{Spence}, the Court of Special Appeals held in \textit{Lee} that a

\begin{itemize}
\item \textsuperscript{235} State v. Roll & Scholl, 267 Md. 714, 730-31, 298 A.2d 867, 877 (1972).
\item \textsuperscript{236} 56 Md. App. 613, 468 A.2d 656 (1983).
\item \textsuperscript{237} \textit{Id.} at 623, 468 A.2d at 661.
\item \textsuperscript{238} \textit{Id.} at 622, 468 A.2d at 660-61.
\item \textsuperscript{239} \textit{Id.} at 618, 468 A.2d at 659.
\item \textsuperscript{240} \textit{Id.} at 615, 468 A.2d at 657. In \textit{Lee}, at the close of the evidence, defense counsel requested to be heard. The court ignored the request and proceeded to sentence defendant to two years in jail with the option to purge the contempt. \textit{Id.} at 618-19, 468 A.2d at 658-59.
\item \textsuperscript{241} 296 Md. 416, 463 A.2d 808 (1983). \textit{See infra} CRIMINAL LAW note 318 and accompanying text.
\item \textsuperscript{242} \textit{Id.} at 423, 463 A.2d at 811-12. Defendant's counsel was permitted to make closing argument after the judge in a nonjury trial pronounced a premature verdict, realized this error, struck his verdict to hear closing argument, and then reinstated his prior verdict. In \textit{Spence}, the Court of Appeals reaffirmed its holding in \textit{Yopps v. State}, 228 Md. 204, 178 A.2d 879 (1962) that the opportunity for closing argument by defense counsel in a criminal case prior to verdict in both nonjury and jury trials is a basic constitutional right guaranteed by article 21 of the Maryland Declaration of Rights and the sixth
"defendant in a civil contempt proceeding may not be sentenced to a period of incarceration unless his counsel is afforded the right to make a closing argument."\textsuperscript{243}

The \textit{Lee} result regarding the right to presentation of closing argument by counsel is sound. \textit{Rutherford} established the right to counsel in civil contempt proceedings leading to incarceration. The right to counsel in such civil contempt cases was based on an analogy to the sixth amendment right to counsel in criminal cases; incarceration exists in both situations.\textsuperscript{244} Since the right to counsel in criminal cases includes the right to make a closing argument, it follows that the same right should accrue in civil contempt cases when incarceration results.

\section*{E. Maryland Constitutional Law}

\textbf{1. Equal Protection.—}In \textit{Turner v. State},\textsuperscript{245} the Court of Appeals held that the Female Sitters Law,\textsuperscript{246} which made it illegal to employ women to solicit sales in nightclub-like establishments, was a violation of the Maryland Equal Rights Amendment (ERA).\textsuperscript{247} The defendant employed female dancers to provide entertainment and to circulate among the patrons to produce sales. She was convicted of violating the Female Sitters Law.

In considering the constitutionality issue, the court was first
confronted with a standing issue. Ordinarily in a challenge to a criminal prosecution based on an allegation that a statute is discriminatory, there must be a showing that the defendant's constitutional rights were adversely affected by the alleged discrimination. In *Turner*, it was the female sitters' rights that were violated, not the defendant's rights. However, when the relationship between the litigant and the third person is such that the enjoyment of the third person's rights is inseparable from the activity the litigant wishes to pursue, the litigant is very nearly as effective a proponent of the right as the third person. Accordingly, the court in *Turner* found that the defendant employer had standing because the success of her business depended on the employees' activity of soliciting sales.

After finding that the defendant had standing, the court turned to the constitutional questions. The Court of Appeals has consistently held that a law that imposes different benefits and different burdens upon persons based solely upon their sex violates the Maryland ERA. The Female Sitters Law provided different benefits to, and imposed different burdens upon, men and women. Under the statute, a man could be employed as a sitter but a woman could not. As a result, the court held that the Female Sitters Law was premised upon gender-based discrimination and was, therefore, unconstitutional.

The court then determined whether the statute should be invalidated in its entirety or whether its gender-based discrimination should be eliminated by severing the word "female," so that the prohibition against sitters would apply to both sexes. For the severability issue, the court attempted to predict what the legislative intent would have been if the legislature had known that the statute


250. 299 Md. at 573, 474 A.2d at 1301.


252. 299 Md. at 576, 474 A.2d at 1302.
could be only partially effective. The legislative history of the Female Sitters Law unequivocally demonstrated that the General Assembly knew that the law was of questionable constitutionality. Notwithstanding this knowledge, on six occasions the General Assembly failed to delete the word "female" so that the prohibition would apply to both sexes, and on two occasions it failed to abolish the prohibition against sitters. Under these circumstances, the court held that the presumption in favor of severability was not applicable. As a result, the Female Sitters Law was invalidated in its entirety.

The court's decision not to sever simply the word "female" from the statute was correct in view of the legislative history. It is now up to the General Assembly either to enact a constitutionally permissible sitters statute or to ratify the court's effective abolition of the prohibition against sitters.

2. Preemption.—Controversy surrounding the location of a landfill in Montgomery County reached the Court of Appeals in East v. Gilchrist. Pursuant to an order by the Maryland Department of Health and Mental Hygiene, Montgomery County was required to identify a site for a sanitary landfill. In response, the county first selected four possible locations, then narrowed its selection to a site zoned for residential use, near the town of Laytonsville. Meanwhile, citizens initiated a proposed amendment to the county charter prohibiting the expenditure of county funds for any landfill

253. Id.
254. The Maryland ERA was ratified in 1972. Between 1972 and 1974, several bills were introduced in the General Assembly to remove sex discrimination from the codified law. Four of these bills—S.B. 121 (1974), S.B. 385 (1973), S.B. 436 (1972), and H.B. 1464 (1973)—involved the Female Sitters Law. Their purpose was to delete the word "female" from the statute so that the prohibition against sitters would apply to both sexes. None of these bills was enacted. Furthermore, in April, 1974, the Governor's Commission to Study Implementation of the Equal Rights Amendment not only strongly questioned the constitutionality of the Female Sitters Law, but also recommended that it be abolished. In 1975, S.B. 536 was introduced to abolish the Female Sitters Law and S.B. 95 was introduced to extend the prohibition against sitters to both sexes. Neither bill was enacted. In 1976, S.B. 192 was introduced to abolish the Female Sitters Law, but it was not enacted. Finally, in 1978, S.B. 1066 was introduced to extend the prohibition against sitters to both sexes, but, like its predecessors, it was not enacted. 299 Md. at 577-79, 474 A.2d at 1303-04.

255. Id. at 580, 474 A.2d at 1304.
257. Id. at 369, 463 A.2d at 285. The county was also ordered to obtain the permits required for operation of the landfill. Id. at 369-70, 463 A.2d at 285-86.
258. Id. at 370, 463 A.2d at 286.
located on land zoned for residential use.\textsuperscript{259} This amendment was approved by the voters in November, 1978, and became article 3, section 311A, of the Montgomery County Charter.\textsuperscript{260} The county continued to develop plans for the Laytonsville site, however, and final permits were issued in May, 1979.\textsuperscript{261} In June, 1981, the Secretary of Health and Mental Hygiene ordered the county to begin landfill operations at the Laytonsville site within one year.\textsuperscript{262}

The Court of Appeals found that based on those facts, a conflict existed between section 311A, prohibiting the expenditure of county funds for landfills in areas zoned for residential use, and section 9-214 of the Maryland Annotated Code, Health-Environmental Article,\textsuperscript{263} requiring a county to raise the funds necessary to comply with an order of the Secretary.\textsuperscript{264} Noting that under the Maryland Constitution,\textsuperscript{265} when a provision in a county charter conflicts with a public general law, the public general law prevails, the court held that section 311A could not be given effect in the circumstances before it.\textsuperscript{266} The court stressed that its holding was limited to situations in which an order by the Secretary was outstanding, and thus the court did not reach the general validity of section 311A.\textsuperscript{267}

\begin{itemize}
  \item\textsuperscript{259} \textit{Id.}
  \item\textsuperscript{260} The amendment was approved on Nov. 7, 1978, by a margin of over two to one. Brief for Appellant at 6, East v. Gilchrist, 296 Md. 368, 463 A.2d 285 (1983). \textit{Montgomery County, Md., Code art. 3 § 311A (Supp. 1982) provides:}

    \textit{§ 311A. Limitations on expenditures for landfills in residential zones.}

    \textit{No expenditure of county funds shall be made or authorized for the operation of a landfill system of refuse disposal on land zoned for residential use.}

  \item\textsuperscript{261} 296 Md. at 370, 463 A.2d at 286. The court’s opinion does not mention the county’s reasons for continuing plans for the Laytonsville site after the voters’ approval of § 311A.

  \item\textsuperscript{262} \textit{Id. at 370-71, 463 A.2d at 286. This litigation was initiated by several Montgomery County taxpayers and a former member of the Maryland House of Delegates in January, 1981, in the Circuit Court for Montgomery County. \textit{Id. at 371, 463 A.2d at 286. The circuit court held § 311A invalid and the Court of Appeals granted certiorari before plaintiffs’ appeal was heard by the Court of Special Appeals. \textit{Id. at 371-72, 463 A.2d at 287.}}

  \item\textsuperscript{263} \textit{Md. Health-Envtl. Code Ann. § 9-214(a) (1982) provides:}

    \textit{§ 9-214. Funds to comply with order of Secretary.}

    (a) In general. — The State, or any county, legally constituted public water, sewerage, or sanitary district, or any municipality served with an order of the Secretary, through its proper official or department, shall proceed to raise such funds as may be necessary to comply with the order within the time specified.

  \item\textsuperscript{264} 296 Md. at 372-74, 463 A.2d at 287-88.

  \item\textsuperscript{265} \textit{Md. Const. art. XI-A, § 1 (charter law is subject “to the Constitution and Public General Laws of this State”).}

  \item\textsuperscript{266} 296 Md. at 374, 463 A.2d at 288.

  \item\textsuperscript{267} \textit{Id.}
As framed by the court, *Gilchrist* is a straightforward application of Maryland constitutional law. It is not clear, however, that the court correctly determined that a conflict between section 311A and section 9-214 existed on the facts presented. The state order requiring the county to begin operation at the Laytonsville site was not issued until June, 1981, almost two years after the voters had approved section 311A. Prior to this date, the county was operating only under a general mandate to build a landfill. If the county had chosen another site after the voters had approved section 311A, compliance with both the charter provision and state directives would have been possible. In blindly choosing to apply the preemption doctrine rather than remanding the case with a suggestion that Montgomery County find another landfill site, the *Gilchrist* court effectively ignored the voters' mandate and reached an apparently undemocratic result.

**Richard A. Monfred**  
**Michael G. Nardi**  
**Diane K. Smith**  
**Susan M. Stevens**

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268. Only permits for the Laytonsville site and an emergency health order had been issued prior to the June, 1981 order. *Id.* at 369-70, 463 A.2d at 286.

269. **Other Developments:**

1. In *Frick v. Maldonado*, 296 Md. 304, 462 A.2d 1206 (1983) the Court of Appeals struck down a two-year statute of limitations for paternity proceedings as violative of the equal protection clause of the fourteenth amendment. *Id.* at 309, 462 A.2d at 1208. For a discussion of *Frick*, see infra **Family Law** notes 213-32 and accompanying text.

2. The Maryland Court of Appeals held in *Buzbee v. Journal Newspapers*, 297 Md. 68, 465 A.2d 426 (1983), that the press has a qualified right of public access to pretrial judicial proceedings based on the first and fourteenth amendments and the Maryland Declaration of Rights. However, this right must be weighed against probable prejudice to the defendant. *Id.* at 70, 465 A.2d at 427. For a discussion of *Buzbee*, see infra **Criminal Law** notes 265-98 and accompanying text.

3. In *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984), the Maryland Court of Special Appeals held that a husband was constitutionally prohibited from enjoining his wife's abortion. *Id.* at 763, 471 A.2d at 1119. For a discussion of *Coleman*, see infra **Health Law** notes 121-41 and accompanying text.
V. CRIMINAL EVIDENCE

A. Search and Seizure

1. Incident to Arrest.—The Court of Appeals decided two cases addressing the permissible scope of a search incident to a lawful arrest. In Foster v. State the court upheld a police officer’s search of an area within a handcuffed arrestee’s reach. In Stackhouse v. State the court declined to approve the warrantless search of an area from which an arrestee had been removed, absent some exigent circumstance threatening the destruction or removal of evidence. Both decisions recognized a physical proximity standard for searches incident to arrest.

In Foster the police arrested the accused in a small motel room. At the time of her arrest, Foster was standing approximately two feet away from a nightstand, the top drawer of which was partially opened. The arresting officer patted her down, searched for weapons, and then handcuffed her hands behind her back. He then searched the area immediately around the arrestee, including the nightstand drawer, for weapons. The officer found no weapon, but did find money in the drawer. The State later introduced the money as evidence at Foster’s trial.

Foster contended that the trial court should have suppressed the evidence seized incident to her arrest. She asserted that the nightstand drawer in which the evidence was found was not within her immediate control because she was handcuffed during the search. The Court of Appeals, noting that other courts had recognized that there is a continuing potential for harm “even after an arrestee has been handcuffed,” found it “reasonable for the

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2. Id. at 220, 464 A.2d at 1001.
4. Id. at 217-18, 468 A.2d at 341.
5. It is not clear whether the officer considered the limiting effect of the handcuffs in determining the extent of his search.
6. 297 Md. at 217-18, 464 A.2d at 1000.
7. Id. at 218, 464 A.2d at 1000. See Chimel v. California, 395 U.S. 752, 763 (1969) (“There is ample justification . . . [during a search incident to an arrest] for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”); see also New York v. Belton, 453 U.S. 454, 460 (1981).
8. 297 Md. at 219, 464 A.2d at 1001. The court noted that a number of other jurisdictions have found that a handcuffed arrestee may still represent a potential for harm. Id. See, e.g., United States v. Quigley, 631 F.2d 415, 419 (5th Cir. 1980); United
arresting officer to search for a weapon in a partially open drawer located within two feet of the [handcuffed] accused. 9 Because the nightstand drawer—"a natural place for a weapon to be hidden"—remained within the arrestee's reach, the search of the drawer was necessary for the arresting officer's protection. 10 It is difficult, however, to imagine an arrestee breaking free of handcuff restraints. In fact, the arresting officer probably left himself vulnerable to attack by leaving the arrestee unattended while he searched the drawer. Under these circumstances, the court's conclusion that the search and seizure was reasonable because of the possibility of harm to the officer is suspect.

The Court of Appeals found the search and seizure in Stackhouse v. State to be illegal. The police arrested Stackhouse, an armed robbery suspect, after discovering him hiding in the attic of his house. A police officer ordered Stackhouse to crawl out of the attic. 11 After Stackhouse agreed and came down to the second floor, the officer handcuffed him. The officer subsequently entered the attic and recovered a shotgun barrel located near the place where the accused had been hiding. The gun barrel served as evidence at Stackhouse's trial. 12

The Court of Appeals reiterated the rule established by the Supreme Court in Chimel v. California 13 that, incident to a lawful arrest, a police officer may "search the area within the arrestee's reach from where he might grab a weapon or evidence." 14 The court held that the warrantless search of the attic incident to the appellant's arrest was not justified "as within the area of appellant's reach or grasp" because the police had taken Stackhouse out of the attic and handcuffed him prior to the search. 15 The circumstances were distinguishable from the situation in Foster, where the arrestee was standing within a few feet of the area being searched. Because Stackhouse could not possibly have reached anything in the attic, the search and seizure was not justifiable on that basis.

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9. 297 Md. at 220, 464 A.2d at 1001.
10. Id.
11. The only access to the attic was through a small hatchway in the ceiling of the second floor.
12. 298 Md. at 208, 468 A.2d at 336.
14. 298 Md. at 209, 468 A.2d at 336.
15. Id. at 217-18, 468 A.2d at 341.
The State, however, contended that an exigent circumstance\textsuperscript{16} justified the warrantless search. Stackhouse’s foster sister was present in the house at the time the police arrived to arrest him.\textsuperscript{17} The State argued that her presence constituted an exigency “because she could have destroyed or removed the evidence.”\textsuperscript{18} In rejecting the State’s argument, the Court of Appeals noted that the mere presence of third persons who could possibly destroy or remove evidence is not an exigent circumstance justifying a warrantless search of a home.\textsuperscript{19} Moreover, a mere belief that an article sought is concealed in a dwelling house is insufficient justification for a warrantless search of that house.\textsuperscript{20} The court refused to recognize a mere possibility as an exigent circumstance; instead, the court required actual knowledge of both the presence of evidence and the third person’s intent to destroy or remove it. In the absence of such knowledge, there is not an “urgent and compelling need for police action.”\textsuperscript{21} Because the search and seizure in \textit{Stackhouse} failed to satisfy the appropriate criteria, it violated the fourth amendment.

2. \textit{Plain View}.—In \textit{Norwood v. State}\textsuperscript{22} the Court of Special Appeals clarified the meaning of “inadvertence” and “immediately apparent” with regard to the seizure of items under the plain view doctrine. While executing a search of the defendant’s apartment pursuant to a warrant, a police officer found and seized keys and a...

\textsuperscript{16} \textit{Chimel} requires a showing that the warrantless search was made because exigencies made such a search imperative. \textit{Chimel}, 395 U.S. at 761. The Court of Appeals in \textit{Stackhouse} considered the nature of exigent circumstances in a warrantless search context. 298 Md. at 211-13, 468 A.2d at 338. It determined that “[u]pholding warrantless searches based upon exigent circumstances involves two principal categories of cases: ‘hot pursuit,’ and destruction or removal of evidence.” \textit{Id.} at 213, 468 A.2d at 338. See also United States v. Santana, 427 U.S. 38, 43 (1976) (destruction of evidence); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit); Ker v. California, 374 U.S. 23, 40-41 (1963); see generally Thompson v. Louisiana, 105 S. Ct. 409, 410-11 (1984) (noting that warrantless searches are valid only if they fall within narrow and specifically delineated exceptions to the warrant requirement).

\textsuperscript{17} The police took the foster sister out of the house during the time the officers were searching for Stackhouse. 298 Md. at 208, 468 A.2d at 336.

\textsuperscript{18} \textit{Id.} at 219, 468 A.2d at 341. The State argued that such an exigency was particularly compelling with respect to the foster sister because she had lied to the police on two previous occasions that evening. \textit{Id.} The two dissenting judges found that argument persuasive. \textit{Id.} at 222, 468 A.2d at 343 (Smith, J., dissenting).

\textsuperscript{19} \textit{Id.} at 219, 468 A.2d at 342.

\textsuperscript{20} \textit{Id.} This is consistent with the court’s view that the dwelling house “always has been accorded the highest degree of fourth amendment protection.” \textit{Id.} at 211, 468 A.2d at 337.

\textsuperscript{21} \textit{Id.} at 220, 468 A.2d at 342.

\textsuperscript{22} 55 Md. App. 503, 462 A.2d 93 (1983).
key blank that were not mentioned in the warrant.\textsuperscript{23} The defendant contended that the evidentiary significance of these items was not "immediately apparent" to the officer as required for a valid plain view seizure.\textsuperscript{24} Since the officer admitted that he had previously suspected that entrance might have been made to the victim's apartment using a pass key, the defendant further argued that these items were not discovered inadvertently.\textsuperscript{25} Referring to \textit{Texas v. Brown},\textsuperscript{26} a recent Supreme Court decision, the Court of Special Appeals concluded that the "inadverdence" requirement precludes a police officer's knowing in advance the location of specific evidence and seizing it under the cloak of the plain view doctrine.\textsuperscript{27} The "immediately apparent" requirement means only that there must be probable cause to associate the items with criminal activity.\textsuperscript{28} The Court of Special Appeals determined that both the "inadverdence" and "immediately apparent" requirements of the plain view doctrine were met in this case.\textsuperscript{29}

3. Wiretap.—In \textit{Sanders v. State}\textsuperscript{30} the Court of Special Appeals held that federal officials conducting a federal investigation can introduce electronic surveillance evidence they collected, if those officials comply with both state and federal standards for acquiring such evidence. This is true even when the person initiating the surveillance is authorized by federal, but not by state, statute to use electronic surveillance.\textsuperscript{31}

\textsuperscript{23} \textit{Id.} at 508, 462 A.2d at 96.
\textsuperscript{24} \textit{Id.} In \textit{Coolidge v. New Hampshire}, 403 U.S. 443 (1971), the plurality stated that the evidentiary significance of an item seized without a warrant under the "plain view" exception to the fourth amendment must be "immediately apparent" to the officer seizing the item. \textit{Id.} at 466.
\textsuperscript{25} 55 Md. App. at 508, 462 A.2d at 96.
\textsuperscript{26} 460 U.S. 730 (1983).
\textsuperscript{27} 55 Md. App. at 508, 462 A.2d at 96. In \textit{Texas v. Brown} Justice Rehnquist, with whom Justices O'Connor and White concurred, found that the "inadverdence" requirement was met in a seizure of a balloon filled with narcotics when the seizing officers had only a generalized expectation that the vehicle might contain narcotics and had no reason to believe that any particular object would be in the owner's automobile. 460 U.S. at 744. The Court of Special Appeals, citing \textit{Texas v. Brown}, stated that inadvertence requires only that the officer not "'know' in advance the location of specific evidence," 55 Md. App. at 508, 462 A.2d at 96. This seems to be an expansive reading, if in fact the court meant that an officer, expecting to find a key but not knowing where he would find it, could call the finding "inadvertent."
\textsuperscript{28} 55 Md. App. at 508, 462 A.2d at 96.
\textsuperscript{29} \textit{Id.} at 509, 462 A.2d at 96.
\textsuperscript{31} \textit{Id.} at 171, 469 A.2d at 484.
The defendant was arrested for contracting with one Smithson to murder an IRS agent whom the defendant thought was overzealous in an audit of the defendant's accountant. By chance, Smithson was arrested for shoplifting. To avoid being prosecuted for this matter, he revealed the murder scheme and agreed to cooperate with an IRS criminal investigator. Smithson consented to be wired for sound in order to obtain damaging evidence of the defendant's murder scheme. The IRS agent's superior received approval to use a wiretap, in accordance with federal administrative procedures. Smithson met the defendant and damaging evidence was obtained.

At a pretrial suppression hearing, the issue raised was whether a federal IRS agent comes within the definition of an "investigative or law enforcement officer" who is permitted by Maryland statute to intercept wire or oral communications. The Maryland wiretap statute defines an "investigative or law enforcement officer" as "any officer of this State." If the IRS agents do not come within this definition, the defendant argued, then they did not comply with the statute and the wiretap evidence should not have been introduced into evidence.

In responding to this argument, the court noted that the federal agents complied with federal statutes that authorize them to intercept wire or oral communications. Further, the court reasoned that the supremacy clause mandates that when there is a conflict between state and federal laws, the federal law shall govern. The

32. Id. at 161-62, 469 A.2d at 479.
33. Id. at 161, 469 A.2d at 479.
34. Id. at 162, 469 A.2d at 479.
35. Id. at 166, 469 A.2d at 481.
"Investigative or law enforcement officer" means any officer of this State or a political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this subtitle, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses . . . .
38. 57 Md. App. at 163, 469 A.2d at 480.
39. Id. at 166, 469 A.2d at 481. 18 U.S.C. § 2511(2)(c) (1982) provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception" (emphasis added). 18 U.S.C. § 2510(6) (1982) defines "person" to include "any employee, or agent of the United States or any State or political subdivision thereof."
40. 57 Md. App. at 167, 469 A.2d 482. For a comparison of the Maryland and
The court noted that while the federal wiretap statute permits states to set stricter standards for state law enforcement officers to protect personal privacy rights, the statute does not empower the states to make stricter standards for federal officials.\footnote{57 Md. App. at 168, 469 A.2d at 482. The court observed that the former wiretap statute specifically stated that the "subtitle [does] not apply to the Federal Bureau of Investigation or to any other federal investigating agency" and argued that the Maryland General Assembly was aware that it could not impose stricter standards for federal officials. Id. (quoting MD. CTS. & JUD. PROC. CODE ANN. § 10-407(a) (1973) (repealed 1977)).}

The court emphasized that the defendant was accorded every privacy protection under both the federal and the stricter Maryland statute and it was unwilling to reverse simply because the IRS agents, who acted lawfully, were not Maryland investigative or law enforcement officers.\footnote{57 Md. App. at 167, 469 A.2d at 482. The court unambiguously rejected an argument for reversal on such a ground. Id.}

Noting that the function and purpose of the law had been satisfied, the court concluded that so long as federal officials follow with both the state and federal procedures, then a "suppression of the fruits of their investigation [would be] unwarranted."\footnote{Id. at 171, 469 A.2d at 484. In 1983, the Maryland General Assembly amended § 10-407 to include federal agents who comply with the Maryland statute among those who can lawfully disclose the contents of a communication. See MD. CTS. & JUD. PROC. CODE ANN. § 10-407(f) (1984).}

4. Other.—In Hughes v. State,\footnote{56 Md. App. 12, 466 A.2d 533 (1983), cert. denied, 298 Md. 394, 470 A.2d 353 (1984).} a case of first impression in Maryland, the Court of Special Appeals held that the surgical extraction of incriminating evidence from a defendant’s body, pursuant to a court order, was proper and not violative of appellant’s fourth and fourteenth amendment rights.\footnote{ld. at 18, 466 A.2d at 535-36.}

Defendant committed an armed robbery during which he fatally shot the victim, but was himself shot five times. After emergency surgery to repair extensive internal damage, three bullets remained lodged beneath defendant’s skin.\footnote{ld. at 17, 466 A.2d at 535-36.} The State was granted a search warrant to compel removal of the three bullets.\footnote{ld. at 19, 466 A.2d at 536.} These bullets proved to be crucial to the State’s case because the positive comparison of the bullets with the pistol used by the victim provided the

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federal wiretap acts, see Gilbert, A Diagnosis, Dissection and Prognosis of Maryland’s Surveillance Law, 8 U. BALT. L. REV. 183 (1979).

41. 57 Md. App. at 168, 469 A.2d at 482. The court observed that the former wiretap statute specifically stated that the "subtitle [does] not apply to the Federal Bureau of Investigation or to any other federal investigating agency" and argued that the Maryland General Assembly was aware that it could not impose stricter standards for federal officials. Id. (quoting MD. CTS. & JUD. PROC. CODE ANN. § 10-407(a) (1973) (repealed 1977)).

42. 57 Md. App. at 167, 469 A.2d at 482. The court unambiguously rejected an argument for reversal on such a ground. Id.

43. Id. at 171, 469 A.2d at 484. In 1983, the Maryland General Assembly amended § 10-407 to include federal agents who comply with the Maryland statute among those who can lawfully disclose the contents of a communication. See MD. CTS. & JUD. PROC. CODE ANN. § 10-407(f) (1984).


45. Id. at 18, 466 A.2d at 535-36.

46. Id. at 17, 466 A.2d at 535-36.

47. Id. at 19, 466 A.2d at 536.
only substantive evidence linking the defendant to the shooting of the victim.

In assessing whether the removal of the bullets was constitutional, the court embraced the four-factor test elaborated in United States v. Crowder. As a prerequisite to the admission of evidence obtained by surgical methods, the following factors must exist:

1. the evidence is relevant, can be obtained in no other way, and there is probable cause to believe that the proposed operation will produce it;
2. the operation is a minor one, to be performed by a skilled surgeon, with every possible precaution taken to guard against any surgical complications, so that the risk of permanent injury is minimal;
3. prior to the operation, the individual is afforded a full adversary hearing at which he is represented by counsel;
4. before the operation the individual is afforded the opportunity for appellate review.

The Court concluded that the test had been met because: the only evidence linking the defendant to the crime was the bullets in his body; the surgery would be simple because the bullets were lodged just beneath the skin's surface; the defendant had been represented by both a public defender and a private attorney at the hearing before the operation; and the District of Columbia Court of Appeals had affirmed the lower court's decision to permit extraction.

It is unclear whether this decision will pass constitutional muster after the recent Supreme Court decision on this matter. In Winston v. Lee, the Supreme Court held that police could not require a suspect to undergo surgery for the removal of a bullet. The Court concluded that the operation, which would have required general anesthesia, would have endangered the suspect's life or health. Further, the State could not show a compelling need for the evidence because it was obtainable in other ways. The Winston balancing test will give state courts a uniform standard by which to analyze this issue and thus may bring a uniformity to this issue.

49. Id. at 316.
50. 56 Md. App. at 19, 466 A.2d at 536. The court noted that although it had been appropriate to consider defendant's fourth and fourteenth amendment arguments on the search and seizure question, the trial court's action had been dictated by the full faith and credit clause, U.S. Const. art. IV, § 1, in light of the prior adjudication of the matter in the District of Columbia court. 56 Md. App. at 20, 466 A.2d at 536-37.
B. Identification Evidence

In *Straughn v. State*\(^{53}\) the Court of Appeals held that the trial court did not abuse its discretion by admitting the defendant's mug shot—police identification photograph—as substantive evidence of a prior identification.\(^{54}\) The Court of Appeals noted that, for this use of police identification photographs, a trial court must balance the probative value of the mug shot against its prejudicial impact on the defendant because the photographs may imply that the defendant has a prior criminal record.\(^{55}\) The Court of Appeals declined to adopt the three-prong test set forth in *United States v. Harrington*\(^{56}\) as a rigid standard for admissibility of mug shots,\(^{57}\) but the court accepted the *Harrington* test as a useful guide to trial courts.\(^{58}\) 

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\(^{53}\) U.S. 935 (1974) (court-ordered surgical removal of bullet from suspect's body was unreasonable), *with* Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) (trial court properly ordered removal of bullet from accused's body where there was probable cause that bullet was in accused's body and that it was connected with homicides, and where accused would not be harmed by removal).

\(^{54}\) Id. at 336, 465 A.2d at 1166 (1983).

\(^{55}\) Id. at 336, 465 A.2d at 1170. A police officer who observed the storehouse breaking for which the defendant was on trial selected the defendant's photograph from an array of ten mug shots prior to trial. *Id.* at 331, 465 A.2d at 1168. After the police officer made a positive in-court identification of the defendant and testified about the pretrial photographic identification, *id.*, the trial court admitted the entire photo array into evidence to corroborate the extrajudicial identification, *id.* at 332, 465 A.2d at 1168.

\(^{56}\) Id. at 333-34, 465 A.2d at 1169. In considering use of the mug shots, the court also affirmed that evidence of a defendant's prior criminal acts may not be used to prove his guilt of the offense for which he is on trial, *id.* at 333, 465 A.2d at 1168, and confirmed that such evidence may be admissible if relevant to prove motive, intent, absence of mistake, a common scheme or plan related to the commission of two or more closely related crimes, and the identity of the defendant, *id.* at 333 n.3, 465 A.2d at 1169 n.3. A decision to use the prior crime evidence for one of these purposes is within the discretion of the trial judge.

\(^{57}\) 490 F.2d 487 (2d Cir. 1973). In that case, the Court of Appeals for the Second Circuit held that in order to be admissible:

1. The Government must have a demonstrable need to introduce the photographs; and
2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and
3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

*Id.* at 494.

\(^{58}\) 297 Md. at 336, 465 A.2d at 1170. The *Straughn* court observed that application of the *Harrington* test as a rigid standard would limit the trial court's discretion.

Subsequent decisions interpreting *Harrington* view the test "as a series of factors to be balanced and applied in light of the totality of the circumstances." *Id.* at 335, 465 A.2d at 1170. *But see* United States v. Fosher, 568 F.2d 207 (1st Cir. 1978) (applying *Harrington* as a rigid test so that the failure to meet any one of the prerequisites precludes the use of the mug shots).

\(^{58}\) 297 Md. at 336, 465 A.2d at 1170.
lowing the Fourth Circuit’s approach in *United States v. Johnson*, the Court of Appeals weighed all of the factors that might prejudice the defendant. The court found that the need for the evidence—to corroborate an in-court identification—was real, the photographs’ origin was masked, and the fact that the jury might recognize them as mug shots and infer that the defendant had been arrested was insufficiently prejudicial to constitute reversible error. Straughn thus affirms earlier rulings allowing use of police identification photographs and further refines the test for admissibility.

In *Roberts v. State*, the Court of Appeals held, *inter alia*, that evidence of the tracking by a dog of the scent of a suspected criminal is not per se inadmissible for identification purposes and that the lineup from which the identification was made was not prejudicial. The dog, after sniffing a ski cap worn by the assailant, identified the defendant from a group of police officers with whom the dog had some familiarity.

The court reviewed the trial court’s application of the test for admitting dog tracking evidence laid down in *Terrell v. State*. Not-
ing that the defendant did not question the trial court's threshold determination that an adequate foundation had been laid.69 the court then turned to the issue of whether dog tracking evidence is admissible for identification purposes.70 In a majority of jurisdictions use of such evidence is permissible; a few jurisdictions exclude it as unreliable.71 To determine if this particular evidence should be admitted, the court reviewed the general literature and the training history of the dog in question, finding that the dog was trained only to follow the scent and that there was no evidence indicating that this or any other trained dog would pick out a person simply because it was unfamiliar with that person.72 Concluding that all tracking evidence involves, essentially, a lineup situation because the dog is required to distinguish one particular scent from many,73 the court allowed the evidence to be admitted.74 Thus, the court in Roberts joined the majority of jurisdictions that admit dog tracking evidence for identification purposes, but declined to establish a test for evidentiary foundation.

In Colvin v. State75 the Court of Appeals approved for the first time the threefold test for fingerprint evidence enunciated by the Court of Special Appeals in Lawless v. State.76 The Court of Appeals had stated previously that fingerprint evidence found at the scene of a crime may be used to support an inference of criminal agency if it is "coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime."77 Lawless construed "other circumstances" to include "circumstances such as the location of the print,

69. 298 Md. at 269, 469 A.2d at 445.
70. Id. at 269-70, 469 A.2d at 445-46.
71. Id. The court found that 29 jurisdictions have held that such evidence is admissible and that five jurisdictions exclude dog tracking evidence for identification altogether as being too unreliable. Id. (citing Annot., 18 A.L.R.3d 1221 (1968 & Supp. 1983)). The court noted in particular a recent Connecticut decision that allowed dog tracking evidence when a proper foundation is laid. See State v. Wilson, 180 Conn. 481, 488, 429 A.2d 931, 935 (1980).
72. 298 Md. at 270-73, 269 A.2d at 446-47. The court observed that the dog was trained to follow scents and that it had a 99% success rate in practice training and an 85% success rate in actual cases. The court agreed with the trial court that the dog was reliable and the trainer competent to interpret the dog's responses. Id. at 274, 469 A.2d at 448.
73. Id. at 270, 469 A.2d at 446. The court noted that under the present circumstances it was unnecessary to lay down any test for foundation and questioned whether it was even possible to create a "hard and fast test for all cases." Id.
74. Id. at 274, 469 A.2d at 447-48.
the character of the place or premises where it was found, and the accessibility of the general public to the object on which the print was impressed." 78 The Court of Appeals in *Colvin* placed its imprimatur on that threefold test. 79

C. Hearsay*

1. Admission of a Party.—In *Finke v. State* 80 the Court of Special Appeals was faced with significant questions regarding the admissibility of several different types of evidence at the defendant's criminal trial. Among these was the admissibility of an inculpatory statement made by the defendant during questioning by police, which was later received into evidence by the trial court. 81 The defendant contended on appeal that the statement was not given voluntarily but was improperly induced by the police in violation of state nonconstitutional confession law. 82 One of the inducements cited by the defendant was a statement made by the detective, which

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78. 3 Md. App. at 659, 241 A.2d at 159-60.
79. 299 Md. at 110-11, 472 A.2d at 964. Applying the threefold test to the *Colvin* facts, the court found evidence of other circumstances sufficient to exclude the possibility that Colvin's fingerprints were impressed at the scene of the crime at a time other than that of the crime. *Id.* at 111, 472 A.2d at 964-65.

*Related Development:

In *Aetna Casualty & Sur. Co. v. Kuhl*, 296 Md. 446, 463 A.2d 822 (1983), the Court of Appeals reaffirmed the well-settled rule in Maryland that a criminal conviction is inadmissible in a civil case as evidence of the facts upon which it is based. *Id.* at 452, 463 A.2d at 826. The Maryland court's position is contrary to Fed. R. Evid. 803(22), which provides that convictions of "crimes punishable by death or imprisonment in excess of one year" are admissible "to prove any fact essential to sustain the judgment," but is in accordance with the rule in a number of state courts. *See* cases cited in *Kuhl*, 296 Md. at 451, 463 A.2d at 825. *But see* C. *McCORMICK, EVIDENCE* § 318, at 895 (3d ed. 1984) (trend is toward broader admissibility). The court also considered whether the statements made by the defendant driver/insured to the police were admissible as exceptions to the hearsay rule. Reviewing a number of exceptions, including state of mind, business records, admission of party-opponent, and declaration against interest, the court found that none of them was applicable, and upheld the exclusion of the evidence. 296 Md. at 453-58; 465 A.2d at 826-29.

81. *Id.* at 481-82, 468 A.2d at 369.
82. *Id.*, 468 A.2d at 369-70. Defendant contended that the statement was illegally induced in three ways: a promise that if a statement were made it would be to his advantage, *id.* at 483, 468 A.2d at 371, a threat to use a three-year-old to identify him, which would cause emotional harm to the three-year-old, *id.* at 484, 468 A.2d at 371, and a threat to let "the aggrieved widower take the law into his own hands," *id.* at 486, 468 A.2d at 372. The court dismissed all three arguments, finding there had been no improper promise by the police, no threatened harm against the defendant's cousin, and no threat against the defendant.
the defendant maintained was a threat of physical violence.\textsuperscript{83} Relying on the defendant's calm reaction to the statement, the Court of Special Appeals rejected the defendant's argument that the detective's statement was a threat of physical violence.\textsuperscript{84} The Court of Special Appeals concluded that "[s]uch an ambiguous statement could only be a threat if appellant perceived it to be one."\textsuperscript{85} Thus, the Court of Special Appeals determined that the defendant's statement had not been induced by any violation of state nonconstitutional law.\textsuperscript{86}

The court also considered whether the statement had been induced in violation of constitutional due process requirements. Reviewing eleven factors established in Leuschner v. State,\textsuperscript{87} the court found that there was nothing to indicate a violation of due process. Further arguments by the defendant, that the detective had lied to him about other evidence and that religious arguments were used to persuade him, were also not found to invalidate the statement on due process grounds.\textsuperscript{88}

The Finke court also considered whether the defendant's testimony from his first trial could be read into evidence at his second trial.\textsuperscript{89} The defendant had testified to counteract the effects of the statements, introduced into evidence, that he had made to the police.\textsuperscript{90} The defendant's felony-murder conviction from the first trial subsequently was reversed because the trial court had failed to make a preliminary decision on the voluntariness of those statements.

\textsuperscript{83} Id. In Jackson v. State, 209 Md. 390, 121 A.2d 242 (1956), the Court of Appeals stated that the threat of physical violence automatically invalidates confessions. \textit{Id.} at 395, 121 A.2d at 244.

\textsuperscript{84} 56 Md. App. at 487, 468 A.2d at 372.

\textsuperscript{85} Id. The court accepted the rule established in Jackson v. State, 209 Md. 390, 395, 121 A.2d 242, 244 (1956), that the effect of a threat on the will of an individual need not be shown to invalidate a confession as involuntary. However, the court found the effect on the individual to be relevant to the determination of whether a statement was a threat. 56 Md. App. at 486-87, 468 A.2d at 372.

\textsuperscript{86} 56 Md. App. at 487, 468 A.2d at 372.

\textsuperscript{87} Id. The factors are: the age of the accused, his character (timid or impressionable), his record, his education, his intelligence, the legality of the arrest, conditions of incarceration, delay in presentment, removal to a distant jail, prolongation of interrogation, and failure to give \textit{Miranda} warnings. 56 Md. App. at 488-89, 468 A.2d at 373. The court also relied on \textit{Leuschner} in holding that the trial court did not err by admitting evidence of Finke's prior, unrelated arrest and polygraph test on the issue of the voluntariness of his statements to police. \textit{Id.} at 503-04, 468 A.2d at 381.

\textsuperscript{88} 56 Md. App. at 490, 468 A.2d at 374.

\textsuperscript{89} Id. at 494-97, 468 A.2d at 376-77.

\textsuperscript{90} Id. at 494, 468 A.2d at 376.
before they were introduced into evidence.91 On retrial it was determined that the defendant’s statements had been made voluntarily92 and the State read into evidence the defendant’s testimony from the first trial.93

Citing Harrison v. State,94 Finke argued on appeal that his testimony at the first trial was inadmissible as “fruit of the poisonous tree” because it had been impelled by the improperly admitted statements to the police.95 The court rejected this argument, holding Finke’s testimony admissible “because, as it was eventually determined, the tree was not poisonous.”96 In so holding, the Court of Special Appeals emphasized that the Harrison doctrine was inapplicable because the illegality that rendered Finke’s confession inadmissible was not its illegal acquisition, but the trial court’s failure to render a preliminary determination of voluntariness.97 Thus, the Court of Special Appeals concluded that Harrison was applicable only to cases involving substantive rather than procedural illegalities. Such procedural illegalities can subsequently be cured, while substantive illegalities such as the illegal acquisition of confessions, cannot.

The Court of Special Appeals also upheld the trial court’s refusal to allow a defense psychiatric expert to give his opinion of the voluntariness of Finke’s admission.98 Finke sought to introduce the

91. Id. In Jackson v. Denno, 378 U.S. 368 (1964), the Supreme Court held that a trial court must provide procedures which are “fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession.” Id. at 391. The Supreme Court further stated that a determination of the voluntariness of a confession prior to its admission into evidence was both practical and desirable. Id. at 395.
92. 56 Md. App. at 497, 468 A.2d at 377.
93. Id. at 494, 468 A.2d at 376.
95. 56 Md. App. at 494, 468 A.2d at 376. In Harrison the defendant’s murder conviction was reversed on the ground that confessions admitted into evidence had been illegally obtained. 392 U.S. at 220. On retrial the prosecution read into evidence testimony given by the defendant at the first trial following the admission of the confessions. Id. at 221. The Supreme Court held that the defendant’s testimony at the first trial was inadmissible at the second trial because it was “fruit” of the illegally obtained confessions. Id. at 223.
96. 56 Md. App. at 497, 468 A.2d at 377.
97. Id.
98. Id. at 502, 468 A.2d at 380. The psychiatrist had been permitted to testify at the suppression hearing. Finke contended on appeal that this required the trial court to allow him to testify at trial, citing Day v. State, 196 Md. 384, 399, 76 A.2d 729, 736 (1950), in which it was stated that “the jury is entitled to have before it all of the evidence which affects the voluntary character of the document, and which the court passed upon in admitting it.” The Court of Special Appeals pointed out that this language in Day was dicta, which merely described a generally accepted procedure in Maryland, but which did not create a new rule of evidence. 56 Md. App. at 500-01, 468 A.2d at 379.
expert testimony to show that the statements he gave to the police were not given voluntarily.\textsuperscript{99} In the first Maryland case to address the issue of the admissibility of psychiatric testimony relating to voluntariness, the Court of Special Appeals determined that such testimony was relevant.\textsuperscript{100} However, the Court of Special Appeals held that the trial judge's conclusion—that the jury would not receive appreciable help from the expert's reply to a hypothetical question—was not an abuse of discretion.\textsuperscript{101}

The Court of Special Appeals also approved the trial court's admission of prior consistent statements to rehabilitate a witness' testimony that had been impeached on cross-examination.\textsuperscript{102} The court found it irrelevant that the attack was on the memory of the witness rather than on his veracity.\textsuperscript{103}

2. Additional Exceptions.—In Foster v. State\textsuperscript{104} the Court of Appeals held that application of the hearsay rule to exclude exculpatory testimony in a capital punishment case constituted a due process violation.\textsuperscript{105} At Foster's murder trial, the prosecution and the defense presented conflicting versions of the circumstances surrounding the crime. Testifying for the State, the accused's husband and daughter implicated Foster as the murderer.\textsuperscript{106} Foster, however, testified that her husband and daughter had killed the victim.\textsuperscript{107}

\textsuperscript{99} 56 Md. App. at 497, 468 A.2d at 377.
\textsuperscript{100} Id. at 499, 468 A.2d at 378.
\textsuperscript{101} Id. at 502, 468 A.2d at 380. The fact that the psychiatric expert had never examined the accused was an important factor in the trial judge's decision to exclude the psychiatric expert's testimony. Id. at 501-02, 468 A.2d at 380.
\textsuperscript{102} Id. at 494, 468 A.2d at 376. Two elements must exist in order for an out-of-court statement to be admissible as a prior consistent statement: 1) the witness whose prior statement is offered must have been impeached so as to indicate that his present testimony is a fabrication, and 2) the prior statement must have been made before the time of probable fabrication. Id. at 492, 468 A.2d at 375. In Finke the court determined that the State's cross-examination of Blevins amounted to an attempt to show fabrication because if Blevins was shown to not accurately remember the facts to which he testified, he was fabricating his testimony. Id. at 493, 468 A.2d at 376.
\textsuperscript{103} Id. at 493-94, 468 A.2d at 375-76. In the present case, the cross-examination of Blevins, a witness for the State, concentrated on the difficulty of remembering what one did at a specific time on a particular day many years ago. Id. at 493, 468 A.2d at 375. In Boone v. State, 33 Md. App. 1, 363 A.2d 550 (1976), the Court of Special Appeals upheld the introduction of prior statements to rehabilitate testimony that was impeached by an expert witness' opinion that the memories of two witnesses at the time of trial may have been impaired by drug abuse. Id. at 6, 363 A.2d at 554.
\textsuperscript{105} Id. at 212, 464 A.2d at 997.
\textsuperscript{106} Id. at 194-95, 464 A.2d at 988.
\textsuperscript{107} Id. at 195, 464 A.2d at 988.
In an effort to impeach the testimony of the accused’s husband, the defense sought to call the victim’s friend as a witness.\textsuperscript{108} The friend was to testify about a conversation in which the victim stated that the accused’s husband had threatened to kill the victim.\textsuperscript{109} The court noted that, in refusing to admit the proffered hearsay testimony, the trial judge found “that there was a ‘necessity for it,’ but that it was not sufficiently reliable to be admitted.”\textsuperscript{110}

The Court of Appeals reversed the trial court’s judgment with respect to the hearsay testimony, in light of the Supreme Court’s holdings in \textit{Chambers v. Mississippi}\textsuperscript{111} and \textit{Green v. Georgia}.\textsuperscript{112} In \textit{Chambers} the Supreme Court held that, in circumstances “where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”\textsuperscript{113} The \textit{Chambers} Court set forth certain indicia of reliability to serve as guidelines in determining whether hearsay testimony could be admitted, including: whether the statement was made spontaneously to a close acquaintance; whether the statement was corroborated by some other evidence; and whether the statement was against interest.\textsuperscript{114} \textit{Green} established that a single rule of evidence, such as the hearsay rule, could not be applied if its application resulted in the exclusion of evidence “relevant to a critical issue.”\textsuperscript{115} In both \textit{Chambers} and \textit{Green}, the Supreme Court emphasized that its decision rested upon the “unique circumstances” of the case.\textsuperscript{116}

The Court of Appeals in \textit{Foster} ruled that the excluded testimony of the victim’s friend constituted “a critical additional piece of evidence” tending to support Foster’s account of the murder.\textsuperscript{117} Such testimony was “highly relevant” to a central issue, the credibility of the three primary witnesses.\textsuperscript{118} The court also found “suffi-
cient indicia of reliability . . . to assure the proffered testimony's trustworthiness." The husband's threat was made spontaneously during an argument with the victim and was a statement against interest. The victim's extrajudicial statement was also made spontaneously, to a close acquaintance, and under circumstances in which she had no reason to lie. Both the accused's husband's threat and the victim's reporting of that threat to her friend were corroborated by other evidence. The Court of Appeals concluded that the exclusion of the hearsay testimony violated the appellant's right to due process.

D. Circumstantial Evidence

In *Hourie v. State*, the Court of Appeals addressed Maryland's application of the two-witness rule to perjury. The court held that evidence showing that the defendant had fraudulently applied for food stamps and welfare was sufficient to support conviction, even though it consisted only of circumstantial evidence and the testimony of one witness. This is in accord with prior Maryland cases where circumstantial evidence was allowed to take the place of a "living witness."

In *Finke v. State* the Court of Special Appeals addressed the level of proof required to support a conviction of felony murder based on circumstantial evidence. The court reiterated the well-settled proposition that circumstantial evidence may be sufficient to sustain a conviction and noted that the inquiry is "whether, after

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119. *Id.*

120. *Id.*

121. 298 Md. 50, 467 A.2d 1016 (1983).

122. A conviction for perjury should not be obtained solely on the evidence of a single witness. The falsity of evidence relied on for conviction of perjury must be established by the evidence of two independent witnesses or by that of one witness and corroborating circumstances. R. Perkins & R. Boyce, *Criminal Law* 523 (3d ed. 1982).

123. Brown v. State, 225 Md. 610, 617, 171 A.2d 456, 459 (1961) (sufficient evidence of perjury to submit the question to the jury despite the fact that no direct testimony was offered relevant to the falsity of the defendant's statements); see State v. Devers, 260 Md. 360, 372, 272 A.2d 794, 800 (1971) ("It is enough that there is testimony of one witness and other independent corroborative evidence is of such a nature so as to be of equal weight to that of at least a second witness . . . .").


126. 56 Md. App. at 468, 468 A.2d at 362 (citing Veney v. State, 251 Md. 182, 246 A.2d 568 (1968)).
viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’”

In *Finke* the court also held that because there was circumstantial evidence that the defendant entered the victim’s house with trespassory intent and murdered the victim, the jury could have found, beyond a reasonable doubt, the requisite intent underlying the felony of daytime housebreaking with intent to murder. The court reasoned that, in the absence of other evidence of intent, the best evidence of what the defendant intended to do is what he did. Thus, an intent to murder may be inferred from the murder itself. The court held that this inference satisfied both federal and state tests.

**E. Character and Reputation**

1. **Witness Impeachment.—Prior Bad Acts.**—In *State v. Cox*, the Court of Appeals examined the rule allowing impeachment by use of a prior conviction and prior misconduct. In considering what evidence may be used in a cross-examination to impeach a witness, the court appears to have substantially relaxed the limits on impeachment evidence. The court held that the trial court improperly denied defense counsel the opportunity to impeach on cross-examination the testimony of a prosecuting witness in a rape case. At
trial, defense counsel was precluded from impeaching the credibility of the prosecuting witness by establishing that she had previously accused another of criminal assault under oath and later recanted that testimony on cross-examination. Finding the trial court’s refusal to allow the cross-examination to be reversible error, the court noted that the inquiry would have been highly probative and relevant to the witness’ credibility because the prior misconduct consisted of lying under oath in a similar situation. The court stated that the “proffered question would have gone to the very heart of the witness’ credibility.” Thus, the court would have allowed the use of one prior bad act, not resulting in a conviction, to impeach the testimony of a witness.

The general rule in Maryland is that witnesses may be cross-examined on matters and facts affecting their credibility, as long as such facts are not immaterial or irrelevant to the issue being tried. In practice, courts have allowed the admission of extrinsic evidence regarding a prior conviction of a witness for impeachment purposes but have not allowed the use of mere accusations of crime or acts of misconduct for this purpose. Although cross-examination of a witness about prior bad acts that were relevant to the witness’ credibility was allowed in at least one old case, the rule was clearly stated recently that evidence concerning specific acts of misconduct, other than criminal convictions, is inadmissible for impeachment purposes. Yet the court in Cox ignored this statement of the rule and allowed the use of evidence concerning the witness’s prior falsification of testimony to impeach her credibility.

Cox thus establishes a new rule that a witness may be cross-examined about prior bad acts that are relevant to an evaluation of her
credibility, even when there is no conviction for those bad acts. However, the court stated that before allowing cross-examination about prior misconduct, the trial judge must be "satisfied that there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial."\textsuperscript{141} Since these elements were satisfied in Cox, the Court of Appeals held that the trial judge abused his discretion in not allowing defense counsel to cross-examine as proffered.\textsuperscript{142}

The Court of Appeals decided Robinson v. State\textsuperscript{143} the day after it decided State v. Cox. Robinson also concerned the admissibility of evidence of prior misconduct for impeachment purposes. In Robinson, defense counsel in a murder trial attempted to impeach a key witness who was a long-term resident of a mental hospital.\textsuperscript{144} The trial court precluded inquiry into certain incidents involving the witness's conduct while a patient at the mental hospital.\textsuperscript{145} The Court of Appeals agreed that the acts in question did not logically relate to credibility and found no error in the decision to exclude.\textsuperscript{146} In reaching this decision, the court stated a new principle: In assessing a witness' credibility, "[t]he probative value of acts committed while a person is mentally incapacitated is negligible."\textsuperscript{147}

In the course of its opinion, the Court of Appeals acknowledged its decision in Cox that a witness may be cross-examined

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\item \textsuperscript{141} 298 Md. at 179, 468 A.2d at 322. The court also emphasized that the cross-examiner is bound by the witness's denial of prior misconduct, and may not prove the discrediting acts by extrinsic evidence. \textit{Id.} at 183, 468 A.2d at 322. Cf. Smith v. State, 275 Md. 152, 157, 328 A.2d 274, 277 (extrinsic evidence of prior inconsistent statements on collateral or irrelevant issues may not be used to impeach witness's credibility).
\item \textsuperscript{142} 298 Md. at 184, 468 A.2d at 324.
\item \textsuperscript{143} 298 Md. 193, 468 A.2d 328 (1983).
\item \textsuperscript{144} \textit{Id.} at 195, 468 A.2d at 329-30. Although the witness had been found not guilty by reason of insanity of another crime, a doctor testified that the witness was able to comprehend his obligation to tell the truth and could accurately relate past events. \textit{Id.}, 468 A.2d at 330.
\item \textsuperscript{145} \textit{Id.} at 195-96, 468 A.2d at 330. These incidents involved an attack upon a fellow patient, the setting of fires, possession of a contraband cigarette lighter, the planning of an escape, and leaving the mental hospital in violation of a court order.
\item \textsuperscript{146} \textit{Id.} at 198, 468 A.2d at 331. The court indicated that the proffered incidents suggest character traits related to "violence, pyromania, and a desire to escape confinement" rather than credibility. \textit{Id.}
\item \textsuperscript{147} \textit{Id.} Once a person has been determined to be insane, he "is presumed to remain in that state of mental incapacity for the duration of confinement." \textit{Id.} Because the witness's mental condition precluded his conviction, the court determined that acts committed by the witness while he was mentally incapacitated had very little relevance to his credibility.
\end{itemize}
about prior bad acts for which there was no conviction when the acts are relevant to assessing credibility. In the absence of a conviction, however, the court cautioned that the trial judge must be especially careful in determining the proper scope of cross-examination relating to bad acts. The Court of Appeals anticipated that trial judges would permit cross-examination of a witness with respect to prior bad acts only if there were a close nexus between the acts and the witness’s credibility and a showing of a firm basis for believing that the conduct actually occurred.

2. Reputation of Witness.— represents the first time that a Maryland court has approved the admission of a character witness’s opinion of the reputation of another witness. Section 9-115 of the Courts and Judicial Proceedings Article of the Maryland Code permits a witness to express an opinion regarding the general character of another witness provided that the opinion is “relevant” and has “an adequate basis.” In prior cases, Maryland courts have held such character evidence to be inadmissible for lack of an adequate basis. For example, in the Court of Appeals stated that “a brief and limited encounter with the witness” could not provide a character witness with an adequate basis. In however, the fact that the witness offering the opinion, a police chief, had interviewed the other witness three or four times over a two-year period, and had been “faintly ac-

148. Id. at 197, 468 A.2d at 331.
149. Id. at 200, 468 A.2d at 332. In exercising this discretion, the trial judge must weigh the probative value of the proffered "bad act" evidence against the potential prejudice to the witness. Id. at 201, 468 A.2d at 332. Cross-examination about prior bad acts not resulting in convictions may be disallowed even though the same questioning would be permitted if there was a conviction. This is so because conviction provides greater certainty that the bad act or acts did in fact occur. Id., 468 A.2d at 332-33.
150. Id., 468 A.2d at 333. This statement by the Court of Appeals serves to clarify the Cox holding.
155. Id. at 453, 397 A.2d at 605. In that case, the trial court had excluded proffered veracity testimony about a witness which was based solely on an allegedly false larceny report made by the witness on one occasion. Id. at 447, 397 A.2d at 602.
quainted” with her for several years prior to this two-year period constituted an adequate basis for the admission of opinion testimony. Thus, Barnes serves to clarify the amount of contact necessary to satisfy the adequate basis requirement of section 9-115.

**F. Documentary Evidence**

In In re Robert G. the Court of Appeals reviewed the trial court’s determination that a prosecutor may review court records of a defendant when deciding whether to seek the death penalty. Maryland law prohibits disclosure of the contents of a juvenile record “except by order of the court upon good cause shown.” The court, interpreting the statute for the first time, upheld the trial court’s ruling that good cause existed for divulging the records.

In reaching its determination that a prosecutor’s need for all pertinent information in making a decision about seeking the death penalty could constitute the requisite good cause, the court looked to the traditional definition of good cause and exhaustively reviewed case law in Maryland and elsewhere that interpreted the concept of good cause in other contexts. Finding that a trial

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156. 57 Md. App. at 57, 468 A.2d at 1043.
157. Id. at 59, 468 A.2d at 1044.
158. In Barnes the Court of Special Appeals also upheld the trial court’s admission of a supervisor’s testimony as to his worker’s non-smoking habits in a criminal prosecution for arson. Id. at 60, 468 A.2d at 1045. This decision affirms the well-settled principle in Maryland that testimony regarding a person’s habitual response to a repeated specific situation may be received to show that a person acted in accordance with his habits on a particular occasion. See, e.g., Leaman v. League Lumber Co., 239 Md. 258, 262-63, 211 A.2d 296, 298 (1965) (evidence of prior dealings between parties admissible in action on lost note to prove manner in which defendant normally signed), cited in Barnes, 57 Md. App. at 60, 468 A.2d at 1045.
159. 296 Md. 175, 461 A.2d 1 (1983).
160. Robert G. was charged with first degree murder, first degree sex offense and related offenses arising from a single incident. Id. at 177, 461 A.2d at 2.
162. 296 Md. at 188, 461 A.2d at 7.
163. Id. at 179, 461 A.2d at 3. The court adopted the definition of “good cause” found in BLACK’S LAW DICTIONARY 623 (5th ed. 1979):

Substantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase “good cause” depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed. . . Good cause is a relative and highly abstract term, and its meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures involved in type of case presented.
judge’s good cause determination should be reviewed only for abuse of discretion, the court in Robert G. held that determination to be valid. In doing so, the court affirmed that the good cause standard in the statute protecting the confidentiality of juvenile records simply requires a judge to make a reasonable weighing of the respective interests involved.

G. Enhanced Testimony

In State v. Collins the Court of Appeals changed the former Maryland rule that permitted liberal admission of hypnotically enhanced testimony, thereby bringing Maryland in line with other states. The court ruled that hypnotically enhanced testimony should be evaluated by the same standard as other evidence based on scientific procedures, and applied the test set forth in Frye v. United States, which admits such evidence only when the procedure is generally accepted in the scientific community. Because hypnotically enhanced memory has not been shown to meet the Frye test, the Collins court found it to be inadmissible. The court elected not to spell out general standards of scientific reliability, but rather left the specific standards open for case-by-case development. Although it disallowed the use of the hypnotically enhanced testimony in Collins, the court did state that hypnotically enhanced testimony that is consistent with pre-hypnotic statements denied, 441 U.S. 906 (1979) (good cause for changing election of court trial to that of jury trial); Stanford v. District Title Ins. Co., 260 Md. 550, 555, 273 A.2d 190, 192-93 (1971) (good cause for suspension of rule 530 requiring dismissal for lack of prosecution); Kay Constr. Co. v. County Council, 227 Md. 479, 489, 177 A.2d 694, 700 (1962) (good cause for reconsideration of zoning resolution). The court also looked at other Maryland cases, and cases from Alaska, Arizona, California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nebraska, New Jersey, South Carolina, South Dakota, Virginia, and Wyoming.

165. 296 Md. at 179-80, 461 A.2d at 3.
166. Id. at 188, 461 A.2d at 7.
171. 296 Md. at 680-81, 464 A.2d at 1034.
172. Id. at 702, 464 A.2d at 1044.
173. Id. at 702-03, 464 A.2d at 1044-45.
is admissible without proof of scientific reliability.\textsuperscript{174}

The Collins analysis was applied in two cases decided the same day, Simkus v. State\textsuperscript{175} and State v. Metscher.\textsuperscript{176} Thus, Maryland's current rule is that hypnotically enhanced testimony is admissible if it is either consistent with pre-hypnotic statements\textsuperscript{177} or is found to be scientifically reliable.

In Norwood v. State\textsuperscript{178} the Court of Special Appeals held that two criminal defendants failed to preserve the issue of the admissibility of the victim's hypnotically enhanced testimony by not objecting to its admission on the ground that such testimony is unreliable.\textsuperscript{179} Relying on the holding of the Court of Special Appeals in Collins v. State,\textsuperscript{180} a decision rendered after their trial, the appellants in Norwood argued that none of the victim's testimony relating to her post-hypnotic identifications was admissible. The Norwood court declined to address the issue of admissibility because the defendants failed to object to the victim's hypnotically enhanced testimony in spite of the "warning flag" raised by Polk v. State.\textsuperscript{181} In Polk, decided five months before the defendants' trial, the Court of Special Appeals had specifically questioned the scientific reliability of hypnosis.\textsuperscript{182}

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  \item \textsuperscript{174} Id. at 702, 464 A.2d at 1044. For a detailed analysis of Collins, see Recent Decision, supra note 169.
  \item \textsuperscript{175} 296 Md. 718, 464 A.2d 1055 (1983).
  \item \textsuperscript{176} 297 Md. 368, 464 A.2d 1052 (1983).
  \item \textsuperscript{177} In Simkus, the Court of Appeals affirmed the trial court, which had excluded hypnotically enhanced testimony except to the degree that it was consistent with pre-hypnotic statements. 296 Md. at 723, 464 A.2d at 1058. The court suggested that the best procedure would be to introduce a videotape of statements made by the witness prior to hypnosis. \textit{Id.} at 727, 464 A.2d at 1060. In Metscher, the court held that hypnotically enhanced testimony not consistent with pre-hypnotic statements should have been excluded due to its lack of scientific reliability. 297 Md. at 374-75, 464 A.2d at 1055.
  \item \textsuperscript{178} 55 Md. App. 503, 462 A.2d 93 (1983).
  \item \textsuperscript{179} Id. at 506, 462 A.2d at 95. The victim had been hypnotized prior to identifying Howard, one of the defendants, from a photographic array, and Norwood, the other defendant, from a lineup. \textit{Id.} at 505, 462 A.2d at 94. Norwood also argued that the identification procedure used was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. \textit{Id.} at 507, 462 A.2d at 95. Although the victim was unable to identify Norwood from an initial photographic array that included his picture, she selected him from a lineup weeks later. The victim did not realize that Norwood's picture had been in one of the three photographic arrays she had reviewed prior to the lineup. Noting the absence of any suggestive circumstances, the Court of Special Appeals dismissed Norwood's objection by stating that it would be "outlandish" to hold that a suspect may not be placed in a lineup or subsequently identified because a victim previously had failed to identify his photograph. \textit{Id.}
  \item \textsuperscript{182} \textit{Id.} at 394, 427 A.2d at 1048. However, the general acceptability \textit{vel non} of hyp-
Because *Polk* provided authority for an objection, the *Norwood* defendants should have objected to any hypnotically enhanced testimony on the ground that hypnosis had not "gained general acceptance in the relevant scientific community as a reliable technique of memory retrieval."\(^{183}\)

The *Norwood* decision is troublesome because it required an objection to hypnotically enhanced testimony before any Maryland court had specifically held that hypnotically enhanced testimony is inadmissible. This decision suggests that all conceivable objections based on any kind of judicial forewarning must be made in order to avoid waiving those objections on appeal.

**H. Sufficiency of Evidence**

In *State v. Leach,*\(^ {184}\) the Court of Appeals considered the question of what evidence is sufficient to convict a defendant of the crimes of possession of a controlled dangerous substance and controlled paraphernalia.\(^ {185}\) The defendant and his brother were arrested in a one-bedroom apartment in Baltimore City. At the time of the arrest drugs and paraphernalia were found in the apartment, in closed containers and a closet.\(^ {186}\) The trial court convicted defendant and his brother of the possession crimes based on the brother's obvious occupancy of the apartment and the fact that the defendant had keys to the apartment and listed it as his residence. This occupancy established possession. Finding that this evidence of the defendant's actual or constructive possession was insufficient to convict, the Court of Appeals reversed that conviction\(^ {187}\)

In reaching its determination, the court looked at the definition of possession in the relevant statute: "'Possession' means 'the exercise of actual or constructive dominion or control over a thing by one or more persons.'"\(^ {188}\) To be sufficient to convict, the evidence must support a rational inference that the defendant exercised some restraining or directing influence over the items.\(^ {189}\) Whether de-

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183. 55 Md. App. at 506, 462 A.2d at 95.
185. *Id.* at 592-93, 463 A.2d at 872-73. Those possession crimes are violations of Md. ANN. CODE art. 27, § 287(a), (d) (1982).
186. 296 Md. at 594, 463 A.2d at 873.
187. *Id.* at 597, 463 A.2d at 875.
188. *Id.* at 595, 463 A.2d at 874 (quoting Md. ANN. CODE art. 27, § 277(s) (1982)).
189. *Id.* at 596, 463 A.2d at 874 (citing Garrison v. State, 272 Md. 123, 142, 321 A.2d 767, 777 (1974)). Comparing Garrison to the instant case, the court clarified how there
defendant did so turned on whether he resided where the prohibited substances were found. Although he had ready access to the apartment and had identified the address of the apartment as his own, other evidence indicated that defendant had been residing elsewhere. Moreover, since the trial court found that defendant’s brother was the occupant of the one-bedroom apartment, the Court of Appeals noted that it could not be “reasonably inferred” that defendant exercised control over things not in plain view. Accordingly, the court held the evidence of possession insufficient to convict. In so doing, the court affirmed that while possession may be constructive, if possession is not actual, there must be sufficient facts linking the accused to the prohibited items to support a finding that they were his.

I. Newly Discovered Evidence

In one recent case, Stevenson v. State, the Court of Appeals had the opportunity to determine the standard to be applied in deciding whether to grant a new trial when newly discovered evidence is presented. The court declined to rule on a standard, however, and found instead that the newly discovered evidence was not material.

In Stevenson the court held that a trial court did not abuse its discretion in denying a defendant’s motion for a new trial. The motion was based on newly discovered evidence clearly indicating that one of the State’s expert witnesses had perjured himself in listing his academic credentials. In considering this new evidence as could be joint occupancy of the premises but not joint possession of items on the premises. Here, where there was a finding by the Court of Appeals that only defendant’s brother, and not defendant, occupied the premises, the possession evidence was even weaker than in Garrison, where the court found joint occupancy but not joint possession. Id. at 596-97, 463 A. 2d at 874-75.

190. Id. at 595, 463 A.2d at 874.
191. Id. at 596, 463 A.2d at 874.
192. Id. at 597, 463 A.2d at 875.
193. The dissent argued that the court had ignored “the first principle of appellate review of nonjury criminal cases,” i.e., that the judgment of the lower court should not be set aside on the evidence unless “clearly erroneous.” Judge Murphy cautioned that the question was whether the trial court had sufficient evidence to convict; in his view, the evidence of record did not indicate that the trial judge’s finding of sufficiency was clearly erroneous. Id. at 599-600, 463 A.2d at 876 (Murphy, C.J., dissenting).
195. The defendant was accused of the first degree murder of her husband whose death was caused by severe burns. The victim lived for nineteen days after the assault and during that time made several statements essentially saying that the defendant poured gasoline on him while he was in his bedroom and then ignited him with a match.
grounds for a new trial, the trial court found that the other evidence of guilt was so overwhelming that the verdict would have been the same despite the perjured testimony, a finding which the Court of Appeals upheld.

The pertinent procedural rule provided that a court in a criminal case "may grant a new trial . . . on the ground of newly discovered evidence." The court declined to decide whether the standard under that rule to be used in deciding to grant a new trial should be (1) whether the evidence would probably alter the judgment or (2) whether the evidence might alter the judgment. However, the court did state that regardless of which standard is followed, there must first be a showing that the new evidence is material, because a finding of materiality is a prerequisite to both the "would probably alter" and the "might alter" standard. Because the materiality prerequisite was not met in Stevenson, the question of the new trial standard was not decided.

The defendant also argued that use of the perjured testimony

The defendant claimed that the fire started spontaneously. To rebut this contention, the State called a number of expert witnesses, including Dennis Michaelson. In the qualifying part of Michaelson's testimony, he falsely stated that he had graduated cum laude from the Illinois School of Technology. The State's Attorney had no prior knowledge of the witness's false statements. Upon discovering the true facts, nearly two years after the trial, the State's Attorney informed the defendant's attorney, who then filed a motion for a new trial. Id. at 299-300, 473 A.2d at 451.

The trial judge was convinced "beyond a reasonable doubt that the state presented a case without the testimony of Mr. Michaelson that overwhelmingly pointed to the guilt of the accused." Id. at 301, 473 A.2d at 451. 197. Md. R.P. 770(b) (Supp. 1983) (emphasis added). Former rule 770 has been revised and renumbered as Md. R.P. 4-331. Section (b) of former rule 770 is substantially identical to section (c) of rule 4-331.

The defendant argued that the trial court erred when it held that the standard for granting a new trial was whether the newly discovered evidence "would probably alter the judgment." The defendant urged adoption of the less stringent standard of whether the new evidence "might alter the judgment," on the basis that "a murder conviction 'may not rest on probabilities.' " Id.

The court also examined decisions in jurisdictions that have rejected the Larrison "might" rule and that adhere to the majority "probably" rule. All required an initial finding of materiality. See id. at 302-04, 473 A.2d at 452-53.

The court indicated that because "the trial judge expressly found . . . that the state's evidence without Michaelson's testimony overwhelmingly pointed to [the defendant's] guilt . . . in essence, the trial judge implicitly concluded that the newly discovered evidence was not material to the outcome of the case." Id.
had violated her right to a fair trial, and thus the court should grant her a new trial. In considering this argument, the court rejected the adoption of a per se rule that would find a violation of due process whenever a State's paid expert witness testifies falsely. Instead, the court, relying on federal case law, found that the proper rule "requires that an initial inquiry be made to determine if the testimony is material to the outcome of the case; if it is not, the due process clause does not automatically require a new trial." Applying the rule, the court found that the false testimonial evidence was not material in light of the overwhelming evidence of guilt.

J. Other Developments

1. Blood Chemical Test in Drunk Driving Cases.—In State v. Werkheiser, the Court of Appeals held that a blood chemical test is not a prerequisite to prosecution for driving while under the influence of alcohol. Werkheiser was involved in a single car accident. Due to the odor of alcohol on Werkheiser and in his car, the police officer investigating the accident had reasonable grounds to suspect Werkheiser of driving while intoxicated or under the influence of alcohol. Werkheiser was taken to a hospital for treatment; no blood test was administered. Werkheiser was subsequently charged with driving or attempting to drive while under the influence of alcohol, but the trial judge granted his motion to dismiss the charges on the ground that the State failed to comply with the terms of the statute requiring a police officer to obtain a blood chemical test from a suspected drunk driver who is unconscious. On appeal,

201. See id. at 305, 473 A.2d at 453.
202. The Court of Appeals considered Smith v. Phillips, 455 U.S. 209, 220 n.10 (1982) (new trial required only when tainted evidence material); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (failure to disclose that a key witness had been promised immunity was material, requiring reversal of conviction); Miller v. Pate, 386 U.S. 1, 6-7 (1967) (reversing conviction where State knowingly used false testimony pertaining to vital piece of evidence); Napue v. Illinois, 360 U.S. 264, 272 (1959) (implying that due process is violated only when perjured testimony is material). See also United States v. Brown, 634 F.2d 819, 827 (5th Cir. 1981) (new trials required only when there is knowing and intentional use of false evidence that is material); Ross v. Heyne, 638 F.2d 979, 986 (7th Cir. 1980).
204. Id. at 539, 474 A.2d at 904.
205. Id. at 531, 474 A.2d at 899. Driving or attempting to drive while under the influence of alcohol constitutes a violation of MD. TRANSP. CODE ANN. § 21-902(b) (1984).
(d) Procedure where individual incapable of refusing test—(1) If a police officer has reasonable grounds to believe an individual has been driving or attempting to drive a motor vehicle while intoxicated or under the influence of alcohol,
the State challenged that ruling.

Although the court recognized that the use of the word "shall" in the statute made the police officer's duty to obtain a blood alcohol test mandatory, it held that dismissal was not the appropriate sanction for the officer's failure to obtain such a test. The court found that the general intent of the several statutes applicable to prosecutions for drunk driving is to protect the public. Thus, due process does not require the State to give a chemical test to "'gather evidence for the accused.'"

The court stated that the appropriate remedy for the officer's failure to obtain a blood test would be "to allow an inference that had the test been administered, the result would have been favorable to [Werkheiser]." The trier of fact would then consider this inference, together with all of the other evidence presented, in determining Werkheiser's guilt or innocence.

The holding that dismissal was not the appropriate sanction for the officer's failure to obtain a blood test is consistent with case law in Maryland and in other jurisdictions holding that chemical tests are neither necessary nor required to prove intoxication.

and if the police officer determines the individual is unconscious or otherwise incapable of refusing to take a chemical test for alcohol, the police officer shall:

- If a chemical test for alcohol would not jeopardize the health or well-being of the individual, direct a qualified medical person to withdraw blood for a chemical test for alcohol to determine the alcohol content of the individual's blood.

and if the police officer determines the individual is unconscious or otherwise incapable of refusing to take a chemical test for alcohol, the police officer shall:

(iii) If a chemical test for alcohol would not jeopardize the health or well-being of the individual, direct a qualified medical person to withdraw blood for a chemical test for alcohol to determine the alcohol content of the individual's blood.

207. 299 Md. at 533, 474 A.2d at 900.
208. 299 Md. at 538-39, 474 A.2d at 903.
209. 299 Md. at 537, 474 A.2d at 902; see also State v. Moon, 291 Md. 463, 477, 436 A.2d 420, 427 (1981).
210. 299 Md. at 538, 474 A.2d at 903 (quoting People v. Culp, 189 Colo. 76, 537 P.2d 746 (1975) (en banc) (quoting State v. Reyna, 92 Idaho 669, 448 P.2d 762, 767 (1968)):

Thus, the right to due process of law does not include the right to be given a blood test in all circumstances. To hold otherwise would be to transform the accused's right to due process into a power to compel the State to gather in the accused's behalf what might be exculpatory evidence.

211. 299 Md. at 538, 474 A.3d at 903.
212. 299 Md. at 538, 474 A.3d at 903.
213. See, e.g. Major v. State, 31 Md. App. 590, 596, 358 A.2d 609, 613 (1975) (under an earlier statute, court held that chemical evidence of alcohol content in body is not prerequisite for drunk driving conviction) cert. denied sub nom. Flanagan v. State, 278 Md. 722 (1976); see also People v. Culp, 189 Colo. 76, 78, 537 P.2d 746, 748 (1975) (en banc) (State may prove intoxication by methods other than chemical test); State v. Reyna, 92 Idaho 669, 448 P.2d 762, 766 (1968) (no obligation on State to administer blood test in all drunk driving cases).
However, there is nothing to support the court's proposition that the failure to obtain a blood test should give the defendant a presumption of nonintoxication. Because the court found that the intent of the statute was to protect the public, not the accused, it would seem that there should not be any presumption at all.

2. Scientific Devices.—In Fitzwater v. State\textsuperscript{214} the Court of Special Appeals upheld the trial court's determination that the accuracy of a radar device used by a police officer to detect speeding could be established without admitting maintenance records into evidence.\textsuperscript{215} The records were not admitted because the State violated discovery rules by failing to list the records as an exhibit.\textsuperscript{216} However, the fact that the maintenance records existed was admitted.\textsuperscript{217} This fact, and trial testimony indicating that proper procedures had been followed by the police officer, convinced the court that the guidelines for proving the accuracy of radar set forth in Great Coastal Express, Inc. v. Schrufer\textsuperscript{218} were satisfied.\textsuperscript{219}

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\textsuperscript{215} Id. at 280, 469 A.2d at 912.
\textsuperscript{216} Id. at 278, 469 A.2d at 911.
\textsuperscript{217} Id. at 280, 469 A.2d at 912.
\textsuperscript{218} 34 Md. App. 706, 369 A.2d 118, cert. denied, 280 Md. 730 (1977). In that case, the Court of Special Appeals stated:

It is sufficient to show that the equipment has been properly tested and checked, that it was manned by a competent operator, that proper operative procedures were followed, and that proper records were kept.

\textsuperscript{219} 57 Md. App. at 280, 469 A.2d at 912. The court also applied the established rules of present recollection revived in holding that there was no reason for opposing counsel to view a document that a witness had looked at before taking the witness stand but had not used to refresh his recollection while on the witness stand. Id. at 285, 469 A.2d at 915. Further, the court rejected an argument that because the trooper was not a certified technician he should not have been allowed to testify as to the accuracy of the equipment's calibration. Following established law, the court found that the tests for the admissibility of expert testimony, i.e., that the jury can receive "appreciable help from the particular witness" and that the witness is competent to express an expert opinion by reason of familiarity with the subject matter, had been met. Id. at 281, 469 A.2d at 913.
VI. CRIMINAL LAW

During the past year Maryland appellate courts reviewed a wide range of substantive and procedural issues relating to criminal law. At the same time, the General Assembly made significant revisions to the statute dealing with the insanity defense.

A. Elements of Crimes

Several cases before the courts involved considerations of the substantive elements of various crimes. In Foster v. State\(^1\) the Court of Appeals clarified the scope of "presence" as an element of robbery. The court defined robbery as "the felonious taking and carrying away of the personal property of another from his person or in his presence by the use of violence or by putting him in fear."\(^2\) The State needed to prove presence in Foster in order to establish an underlying felony, as the basis for a felony-murder conviction. The murder victim was the manager of a motel where Foster resided. The evidence indicated that money belonging to the victim was taken from a room in the motel other than the room in which the murder occurred.\(^3\)

Citing other courts and commentators,\(^4\) the Court of Appeals announced that the concept of "presence" entails "proximity and control," such that "had the [victim] not been subject to violence or intimidation by the robber, he could have prevented the taking."\(^5\) Based on the evidence in Foster, the court concluded that the victim's money, while in a different room of the motel, was "close enough and sufficiently under the victim's control" as to be within her "presence."\(^6\) Thus, the evidence supported the State's contention that a robbery had been committed.

The Foster court also considered whether the appellant committed the murder "in the perpetration" of the robbery, as required by

\(\text{References}\)

2. Id. at 213, 464 A.2d at 997-98 (emphasis added) (quoting Hadder v. State, 238 Md. 341, 354, 209 A.2d 70, 77 (1965)).
3. Id. at 214, 464 A.2d at 998.
5. 297 Md. at 213, 464 A.2d at 998.
6. Id. at 214, 464 A.2d at 998.
Maryland's felony-murder statute. Foster contended that the underlying felony of robbery was not completed until after the murder had been committed. She argued that the murder, therefore, did not occur "in the perpetration" of the robbery. The Court of Appeals, interpreting "perpetration" broadly, ruled that the killing demonstrated the existence of force, another essential element of robbery. In the absence of any contention that there was insufficient evidence of force to convict her of robbery, the court rejected Foster's argument that the murder was not committed in the perpetration of the felony.

In Lee v. State, a case of first impression, the Court of Special Appeals held that a person does not have to leave the store to be convicted of theft for shoplifting, if his actions indicate an intent to deprive the owner of his property. This is also the view of other courts that have considered the issue.

In Cover v. State, the court discussed the offense of obstructing or hindering a police officer in the performance of his duties. The court held that the defendant's action of sounding her car horn to warn a third person that he was under observation by police was insufficient to support a finding that the sound was understood as a warning of police presence. Because the State could not demonstrate a sufficient causal connection between the sounding of the

7. MD. ANN. CODE art. 27, § 410 (1982).
8. 297 Md. at 215, 464 A.2d at 999. See also Stebbing v. State, 299 Md. 331, 356, 473 A.2d 903, 915 (1984) (intent to steal need not have existed at time force was exerted or threatened).
10. Id. at 36, 474 A.2d at 541. In many cases, the determinative factor in finding this intent is the defendant's act of concealing the goods under his clothing or in a container. Id. at 39, 474 A.2d at 542.
13. Generally, the elements of this offense are
   (1) a police officer engaged in the performance of a duty;
   (2) an act, or perhaps an omission, by the accused that obstructs or hinders the officer in the performance of the duty;
   (3a) knowledge by the accused of facts comprising the first element; and
   (3b) intent to obstruct or hinder officer by act or omission constituting the second element. Id. at 413, 466 A.2d at 1284.
14. Id. at 414-15, 466 A.2d at 1285. Given that the defendant was a block away on a well-travelled street, the court felt that the more likely inference was that the horn blower was a reveller. Id. at 415, 466 A.2d at 1285.
horn and the subject's apparent departure from the scene, it could not prove the element that the defendant's actions in fact hindered the police from further observing the subject.\textsuperscript{15} Without this element, the defendant's conduct did not constitute the crime of obstructing or hindering an officer of the law in the performance of his duties.\textsuperscript{16}

B. Capacity to Commit and Responsibility for Crime

1. Insanity.—The insanity defense has long been recognized in the United States.\textsuperscript{17} The Maryland General Assembly, in its 1984 session, substantially revised Maryland's statute concerning this defense.\textsuperscript{18} The changes are likely to result in a more restrictive use of the defense and in lengthy confinements for those defendants who do use it successfully.

A key change in the statute is semantic. Instead of the terms "insane" or "not responsible," the new statute uses the term "not criminally responsible" throughout.\textsuperscript{19} There are several reasons for the change. The first is a desire to avoid further stigmatizing the mentally ill population by use of the term; past use of the term "insane" for the mentally ill who commit crimes has had a carryover effect on the non-criminal mentally ill.\textsuperscript{20} A second reason for the change is that use at trial of the term "insane" conveys to the jury an image that may be inconsistent with the appearance of the actual defendant who is mentally ill but appears normal. That is, a jury expects to see some manifestation of "insanity" and, when it does not, the jury may be prejudiced in assessing a defendant's mental condition. By emphasizing a lack of criminal responsibility as the characteristic, the authors of the legislation hoped to avoid this prejudice.\textsuperscript{21} But more important than these policy reasons for the use of the term "not criminally responsible," is the legal reason for the change. The term now correctly defines the status of the defendant under the criminal law in Maryland. That is, in Maryland, a court

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} See, e.g., Davis v. United States, 160 U.S. 469 (1895). The seminal case in Anglo-American law is, of course, M'Naghten's case, 8 Eng. Rep. 718 (1843).
\textsuperscript{18} Md. Health-Gen. Code Ann. Title 12, Incompetency and Criminal Responsibility in Criminal Cases. The changes made in the statute were the outcome of recommendations made by the Governor's Task Force to Review the Defense of Insanity. For explanations of changes, see id. task force comments throughout Title 12 (Supp. 1984).
\textsuperscript{20} See id. § 12-109 task force comments.
\textsuperscript{21} Id.
may find a defendant guilty of criminal conduct but not criminally responsible because of his mental state when the crime was committed. That finding means that although there are no criminal consequences to the defendant's wrongful behavior, there may be other consequences that stem from the guilty conviction. A recent case illustrates that, with this change, the legislature is affirming the position taken by Maryland courts in a key issue related to the insanity defense: Should a defendant who is mentally ill but who commits a crime be subject of any action on the part of the State?

In *Pouncey v. State*, the Court of Appeals held that a criminal defendant who had drowned her son, believing the devil was pursuing him, could be found guilty and insane. In reaching this decision, the court looked at the argument that a finding of insanity is the functional equivalent of an acquittal. To make a determination that this was not so, the court had to deal with statutory language that describes what procedure is to be followed when "an individual is found not guilty of a crime by reason of insanity." In *Pouncey*, as in an earlier case on the same issue, *Langworthy v. State*, the court held that a finding of insanity did not mean an individual was not guilty, and explained that this language was "a holdover from common law concepts and prior statutory provisions regarding insanity and the commission of crimes." In both cases the court indicated that the then current statutory scheme contemplated first a determination of guilt or innocence under the general plea, and then a finding of sanity under the special plea, and thus, despite the language of section 12-110, a finding that a defendant is insane does not...

23. 297 Md. at 269, 465 A.2d at 478.
26. 297 Md. at 268, 465 A.2d at 478 n.2 (quoting Langworthy, 284 Md. at 599 n.12, 399 A.2d at 584 n.12). The defendant in *Pouncey* argued that the language in the commitment statute precluded a finding of guilty but insane because a finding of insanity is inconsistent with a finding of criminal guilt. *Id.* at 269, 465 A.2d at 478.
27. *Id.* at 265-66, 465 A.2d at 476-77. Under the new statutory scheme, the jury must still find guilt beyond a reasonable doubt under the general plea, then determine criminal responsibility under the special plea. Md. Health-Gen. Code Ann. § 12-109(c) (Supp. 1984).
mean the defendant is not guilty of the crime.28

The Pouncey court also considered the defendant’s argument that a successful insanity plea is inconsistent with a finding of criminal guilt because an insanity defense recognizes an absence of moral blameworthiness, an absence that is inconsistent with a finding of criminal guilt.29 Looking again to Langworthy, the court noted that "a finding of insanity is not tantamount to an absence of mens rea, or inconsistent with a general intent to commit a crime."30 In Pouncey, the defendant specifically intended to kill her child. A successful insanity defense might relieve her of criminal liability, but, the court noted, the legislature had not removed all of the consequences of committing a criminal act while insane.31 The court emphasized that there are collateral, non-criminal consequences, namely, commitment to a mental hospital, that may accompany a finding that an insane defendant is guilty of a crime. Since the legislature has determined that a person may be insane but still have the necessary general intent to commit a crime, the court reasoned, if she commits a crime, the finding of insanity does not preclude state actions to prevent the commission of further crimes.32

As Pouncey and its predecessor Langworthy indicate, the position of the Maryland courts is clear: Mental disorder at the time a crime is committed may preclude the State from imposing criminal punishment, but will not preclude other actions to protect society. The language of the new statute crystalizes the concepts behind decisions allowing guilty but insane verdicts. By changing the term "insane" to "not criminally responsible" the statute more precisely focuses on the fact that a defendant’s mental state precludes criminal punishment, but does not obviate non-criminal actions against him.

Among other changes in the law, one of the most important releases the State from its burden of proving that the defendant was sane, and instead imposes a burden on the defendant to demonstrate that he was not "criminally responsible" for the criminal conduct.33 Under the old law, the defendant had only to introduce

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28. 299 Md. at 268, 465 A.2d at 478.
29. Id. at 269, 465 A.2d at 478.
30. Id.
31. Id.
32. Id. at 269-70, 465 A.2d at 478.
33. MD. HEALTH-GEN. CODE ANN. § 12-109(b) (Supp. 1984) states: "Burden of proof.—The defendant has the burden to establish, by a preponderance of the evidence, the defense of not criminally responsible."
evidence of mental disorder to rebut the presumption of sanity.

Once this was done, the State assumed the burden of proving the defendant's sanity beyond a reasonable doubt. In contrast, under the new statute, the defendant is required to show by a preponderance of the evidence that he was not criminally responsible for the criminal conduct. To do this, the defendant must show that, at the time of the conduct, because of a mental disorder or mental retardation, he lacked substantial capacity to: (1) appreciate the criminality of that conduct; or (2) conform that conduct to the requirements of law.

The view of the Court of Appeals prior to the enactment of this statute was that the State had the burden of proving the defendant's sanity as part of its burden of proving all the necessary elements of a criminal offense. One element of most criminal offenses is the mens rea or intent to commit the offense. Under this view, to prove its case it was necessary for the State to prove the defendant had the

34. Bradford v. State, 234 Md. 505, 510, 200 A.2d 150, 153 (1964). In Bradford the court stated the requirement for the defendant as follows:

[I]t must be shown by sufficient competent evidence that the defendant, at the time of the commission of the offense, did not have capacity and reason sufficient to enable him to distinguish between right and wrong and understand the nature and consequences of his acts as applied to himself. Evidence of some undefined mental disorder or instability is insufficient proof to overcome the presumption of sanity. Id. at 510, 200 A.2d at 153 (emphasis in original). See also Davis v. United States, 160 U.S. 469, 482, 486 (1895) (presumption of law that all men are sane is justified by the general experience of mankind and general considerations of public safety).


36. MD. HEALTH-GEN. CODE ANN. § 12-108(a) (Supp. 1984). Section (b) excludes from the definition "an abnormality that is otherwise antisocial conduct." The latest revision returns the text to its status before the 1982 amendments. The Task Force Comments to this section note that a decision was made to retain the two pronged test, with volitional and cognitive components, because the test fully reflects all aspects of culpability. A key factor in the decision to retain the volitional prong (a decision that runs counter to the American Bar Association's view that the second prong should be eliminated, see Fifth Circuit Ponders Changing Insanity Defense, 70 A.B.A. J. 152 (1984)) was a study done for the Task Force by the staff at Clifton T. Perkins Hospital Center that indicated that dropping the volitional prong "could systematically eliminate a class of psychotic patients whose illness is clearest in symptomatology, most likely biologic in origin, most eminently treatable, and potentially most disruptive in penal detention." § 12-108 task force comment, quoting Silver & Spodak, Dissection of the Prongs of A.L.I., (June 12, 1983). Retaining the two-pronged test places Maryland in the majority of the states. See Caplan, Annals of Law: The Insanity Defense, THE NEW YORKER, July 2, 1984, at 45, 51. For a discussion of this test and those used in other jurisdictions, see Richardson, Should We Allow the Hinckley Backlash to Cause Bad Law? The Insanity Defense, 53 OKLA. B.J. 2180, 2184-90 (1982).

37. Bradford, 234 Md. at 514, 200 A.2d at 155.
capacity to form the requisite intent.\textsuperscript{38} Once the defendant's sanity had been raised as an issue, the State had to prove that sanity in order to meet its burden of proving all the elements of the offense.\textsuperscript{39}

If sanity is part of the \textit{mens rea} and is thus an element of the offense that must be proven by the State, then there is a constitutional issue as to whether the State may place the burden of proving insanity on the defendant.\textsuperscript{40} The General Assembly specifically addressed this issue and determined that it was not unconstitutional to place the burden of proof on the defendant.\textsuperscript{41} The current procedure of an insanity defense requires the jury first to determine whether the State proved beyond a reasonable doubt all the elements of the crime, including the requisite \textit{mens rea}. If this burden is met, then the plea of not criminally responsible is considered.\textsuperscript{42} This procedure assumes that a mentally ill defendant can be shown to have held the necessary intent to commit the crime at issue.\textsuperscript{43} Once the State shows that, then the defendant may argue that he is not criminally responsible for the act. Thus, the General Assembly apparently concluded that being not criminally responsible is an exculpatory fact related to criminal punishment, and therefore due process does not prohibit placing the burden of proof of the fact on the defendant.

Another significant change relates to commitment of an individual who has been adjudged guilty but not criminally responsible. Under section 12-111 of the revised statute, following such a verdict, the court is now authorized to commit automatically an individual found not to be criminally responsible to the Department of Health and Mental Hygiene for institutional care. Following that commitment, a hearing to determine if the individual is eligible for release must be held within fifty days of the commitment.\textsuperscript{44} The

\textsuperscript{38} Id. at 512, 200 A.2d at 154.
\textsuperscript{39} Id.
\textsuperscript{40} See 54 IND. L.J. 95, 98 (1978). The Maryland statute is drafted to address the issue of whether sanity is an element of the offense. See also Md. HEALTH-GEN. CODE ANN. § 12-109 task force comment (Supp. 1984) ("Subsection (b) [burden of proof] does not alter the state's burden to prove all essential elements beyond a reasonable doubt"); 67 Op. Md. Att'y Gen. 74 (1982) (successful proof of either prong of the insanity defense is not necessarily inconsistent with general criminal intent or with a person's ability to form a particular specific criminal intent).
\textsuperscript{41} Md. HEALTH-GEN. CODE ANN. § 12-109 task force comment (Supp. 1984). See also State v. Evans, 278 Md. 197, 209, 362 A.2d 629, 636 (1975) (noting that the Supreme Court has not held that giving the defendant the burden of proving insanity is unconstitutional).
\textsuperscript{42} Id. § 12-109(c) (Supp. 1984).
\textsuperscript{43} See generally id. § 12-109 task force comment.
\textsuperscript{44} Id. § 12-114.
former law authorized the court to commit the defendant to the Department only for a limited time for the purpose of examination and evaluation. In order to commit an individual for institutional care, the State was required at a hearing to prove by clear and convincing evidence that the individual was dangerous to people or property because he suffered from a mental disorder or was mentally retarded.\footnote{Maryland Health-General Code Annotated § 12-110, 12-113 (1982).} The new statute dispenses with this requirement for a hearing on the individual's danger to society.\footnote{See id. § 12-111 (Supp. 1984).} The rationale behind this change is that the verdict under the revised statute would be the result of two findings: that the defendant committed the criminal act charged and the defendant suffered, at the time, from a mental disorder or mental retardation. Based on these findings, an assumption is made that the State would be justified in considering the defendant presently dangerous and continuing to suffer from the mental condition.\footnote{Id. § 12-111 task force comment.}

Beyond this key change in the commitment process, there are several changes to the statute that relate to the process of obtaining a release from commitment. One change involves the burden of proof concerning eligibility for release. Once committed, the defendant is granted release hearings at various intervals.\footnote{See generally id. §§ 12-114 to -118.} Under the new statute the committed individual has the burden of proving, by a preponderance of the evidence, that he is no longer, as a result of mental disorder or retardation, dangerous to himself or to others.\footnote{Id. § 12-113(d).} Previously, the State had the burden of proving that the individual should remain in confinement; the State had to prove by a preponderance of the evidence the criteria for commitment: mental disorder or retardation and dangerousness.\footnote{Dorsey v. Solomon, 435 F. Supp. 725 (D. Md. 1977), modified, 604 F.2d 271 (4th Cir. 1979).}

A recent Supreme Court case, \textit{Jones v. United States},\footnote{103 S. Ct. 3043 (1983).} indicates that changes in the Maryland law, including the automatic commitment provision and the shift in the burden of proof for release, are likely to pass constitutional scrutiny. In \textit{Jones}, the Supreme Court dealt with a District of Columbia Code that, like the new statute, placed the burden on the defendant to establish his sanity.\footnote{D.C. Code Annotated § 24-301(j) (1981) provides in part: No person accused of an offense shall be acquitted on the ground that he was}
court held that, when a criminal defendant was found not guilty of a crime by reason of insanity, the due process clause permitted the government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he established that he had regained his sanity or was no longer a danger to himself or society.\(^{53}\) The holding indicates that the Maryland procedure for automatic commitment followed by a timely release hearing is constitutionally permissible.\(^{54}\)

Another changed provision now makes release at a time other than the scheduled release hearing date more difficult, by requiring an affidavit for release to be made by either a physician or a licensed psychologist.\(^{55}\) Previously, a committed individual could file an application for release at any time following an initial unsuccessful release hearing, if the application was accompanied by an affidavit from anyone, other than the patient, which stated that there had been an improvement in the mental condition of the committed individual since the last hearing.\(^{56}\) This new provision may make release at times other than the scheduled yearly hearing more difficult, since a physician or licensed psychologist, faced with potential liability for negligent release, will require significant evidence of improvement before issuing an affidavit.

The last change related to commitment and release makes it easier for the court to revoke a conditional release and recommit the individual to the Department for institutionalization. Under the revised statute, unless the committed individual proves he is no longer dangerous, his conditional release can be revoked by a showing at a hearing that a condition of release has been violated.\(^{57}\) Under the
earlier provision, the revocation required the State to establish that the criteria for initial commitment—mental disorder or retardation and dangerousness—still existed.\(^{58}\)

The effect of all the changes in Maryland's insanity defense made during the 1984 legislative session is substantial. By shifting the burden of proof to the defendant, it is more difficult for a defendant to make a successful insanity defense. In making this change, Maryland joins the majority of the states.\(^{59}\) If, however, the defendant is successful in the defense, commitment is now automatic; and, once the defendant has been committed on the basis of the insanity defense, it is easier for the state to keep the individual institutionalized. At the same time, by its change in terminology, the statute now correctly reflects Maryland courts' view of the status of a mentally disordered defendant: that he is not criminally culpable, but should be otherwise accountable for his acts. As a group, these changes in the statute appear to be an attempt to correct perceived problems with, and abuses of, the insanity defense in the past.\(^{60}\)

2. Necessity.—In *Sigma Reproductive Health Center v. State*,\(^{61}\) the Court of Appeals considered for the first time the validity of the necessity defense.\(^{62}\) In doing so, the court approved two earlier Court of Special Appeals' decisions\(^{63}\) that found necessity to be a valid de-

\(^{58}\) *Id.* § 12-115(a)(2) (1982).

\(^{59}\) Caplan, *supra* note 36, at 70. This is a change from 1978 when a slight majority of the states required the prosecution to prove sanity beyond a reasonable doubt. 54 *Ind. L.J.* 95, 97-98 (1978). But as Lincoln Caplan pointed out, roughly two-thirds of the states revised their insanity laws in some way after the Hinckley verdict. Caplan, *supra* note 36, at 70.

\(^{60}\) See Richardson, *supra* note 36, for a discussion of the reaction caused by John J. Hinckley, Jr.'s acquittal by reason of insanity for the shooting of President Reagan on March 30, 1981.

\(^{61}\) 297 Md. 660, 467 A.2d 483 (1983).

\(^{62}\) *Id.* at 679, 467 A.2d at 492. This case arose from a criminal trespass action against Debra Braun, one of the appellees. She served a subpoena duces tecum on appellant Sigma Reproductive Health Center to obtain records relating to abortions performed at the center. Sigma moved to quash the subpoena and appealed the denial of that motion. *Id.* at 662-63, 467 A.2d at 484. Although the court dismissed the appeal on the grounds that the order denying the motion was not an appealable final order, it decided to address the necessity defense in the interests of judicial economy. *Id.* at 675, 467 A.2d at 490.

The defense in criminal prosecutions. The court, however, followed the lead of other jurisdictions and declined to permit the defense in this protest case involving a charge of criminal trespass.

Criminal law recognizes the defense of necessity when the pressure of circumstances forces a person to commit one crime in order to avoid the commission of a more serious one. This pressure must come from physical forces and operate upon the mind rather than the body of the defendant. The defense exists for public policy reasons; the law recognizes that circumstances may present a choice of evils and prefers that the defendant avoid the greater evil by committing the lesser one. For the defense to apply, the defendant must have acted with the intention to avoid greater harm and have no alternative to breaking the law. In addition, the court must conclude that the defendant's analysis of the relative harms was correct.

Defendants have raised the defense to criminal charges resulting from political and social protests in several cases, including criminal cases involving trespass on abortion clinics. The courts, the trial court should have allowed the defendants to present a necessity defense. In Frasher, the court recognized the validity of the necessity defense as a part of the defense of duress, but found the plaintiff's contention, that he possessed contraband because he was forced to, to be unsubstantiated. 8 Md. App. at 447-51, 260 A.2d at 662-63.

In Frasher, the Court of Special Appeals found that the defense only applied to crimes requiring intent. 8 Md. App. at 448-49, 260 A.2d at 662. In Robinson, the court used the criteria enumerated in People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) to determine the applicability of the defense to the crime of escape. 42 Md. App. at 619, 402 A.2d at 117. Those criteria are: that a prisoner is physically threatened with immediate harm, that there is no time for complaints to authorities or there is a history of futile complaints, that there is not time to resort to the courts, that the escape was done without force, that the prisoner reports to proper authorities when he is safe from the threat. Id. at 471, 402 A.2d at 117 (citing Lovercamp).

If the pressure comes from another individual, the defense, if applicable, is called duress. If the pressure acts on the defendant's body, the defendant's defense is that no act was done. Id.

Four jurisdictions have found the defense to be improper in situations similar to this case. Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Gaetano v. United States, 406 A.2d 1291 (D.C. 1979); People v. Stiso, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982).
however, have uniformly rejected the defense in these situations on three grounds. First, legal alternatives to criminal activity have been available to protest the particular activity. Second, the defendants themselves have not been threatened. Third, their activities have not been designed to prevent further harm. Moreover, in the abortion cases, the defendants were in fact interfering with the clinic patients’ exercise of their constitutional rights.

In Sigma, defendant Braun raised the necessity defense to justify criminal trespass at an abortion clinic. She claimed that her actions were necessary to save the lives of the unborn and to discourage women from undergoing what she considered an unnecessarily dangerous medical procedure. The Court of Appeals analyzed a number of criminal trespass on abortion clinic cases and found that their reasoning, when applied to the facts of this case, resulted in a rejection of the defendant’s necessity arguments. The argument made by the defendant—that her actions were necessary to save the lives of the unborn—was rejected for two reasons. First, her actions were not undertaken to prevent unlawful harm, because abortion is a legally protected activity; and second, her actions were in fact unlikely to prevent the threatened action. Defendant’s argument concerning incompetent treatment was rejected because she offered no evidence that there was such treatment. Further, even if such treatment had occurred, there exist other avenues of complaint. Accordingly, the Court of Appeals characterized her activities as political protest and followed the lead of other jurisdictions in rejecting her claim of necessity.

C. Pleas

Plea bargaining agreements were the subject of a number of cases reviewed by the Maryland appellate courts in the past year. Issues considered by the courts included the circumstances under which an agreement may be voided, the nature of a breach of an agreement, and the scope of an agreement.

1982); see also Note, Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic, 48 U. CIN. L. REV. 501 (1979).
72. For example, protesters can picket peacefully, write letters, and seek legislative change.
73. 297 Md. at 683, 467 A.2d at 494.
74. See authorities cited supra note 71.
75. 297 Md. at 681, 467 A.2d at 493.
76. See cases cited supra note 71.
77. 297 Md. at 683-89, 467 A.2d at 494-97.
78. Id. at 689, 467 A.2d at 497.
1. Plea bargaining.—In Ellison v. State, the Court of Special Appeals held that the State may void a plea agreement when it discovers that a defendant lied in statements made pursuant to the agreement. The agreement in Ellison provided that, if appellant breached any of the conditions, the State could void the agreement in its entirety. Ellison involved a homicide. One of the conditions of the agreement was the defendant's stipulation that he did not actually shoot the victim. When the State discovered facts sufficient to charge the defendant as the killer, it revoked the agreement.

The court reaffirmed established law that the State need not honor its bargain if the defendant has not, to a substantial degree and in a proper manner, performed his obligations. Bargaining in bad faith will not be tolerated, let alone rewarded. The question of a breach is not, however, to be determined unilaterally by the State; rather, once the State acknowledges the existence of an agreement, it has the burden of establishing the breach. The court in Ellison held that the State clearly met its burden. It is apparent that Maryland courts will not allow defendants to receive the benefits of a plea agreement unless they have performed their obligations under the agreement.

In Clark v. State, the Court of Special Appeals held that, when, pursuant to a plea agreement, the State agrees to recommend to the court whatever disposition the pre-sentence investigation recommends, it is a breach of that plea agreement for the State to remain silent. Rejecting the State's argument that its silence amounted to

80. Id. at 577, 468 A.2d at 418.
81. Id. at 573, 468 A.2d at 416.
82. Id.
83. See, e.g., State v. Brockman, 277 Md. 687, 698, 357 A.2d 376, 383 (1976) (defendant's inconsequential hesitation in identifying a co-conspirator held not to have violated plea agreement).
84. Sweetwine v. State, 42 Md. App. 1, 2, 398 A.2d 1262, 1264 (1979), aff'd, 288 Md. 199, 421 A.2d 60, cert. denied, 449 U.S. 1017 (1980). "May a defendant strike a bargain with the State, repudiate that bargain so far as his obligations under it are concerned and yet retain all of the advantages he ostensibly bargained for? The answer is an immediate and absolute, 'No'." Id. at 2, 398 A.2d at 1263-64.
86. 56 Md. App. at 576, 468 A.2d at 418.
88. Id. at 562, 471 A.2d at 319. No explanation was given for the State's failure to comment on the pre-sentence investigation.
tacit acknowledgement of the plea bargain, the court focused on the State's promise to take affirmative action. It is well-established that when a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The State's promise to make a recommendation was the inducement to obtain appellant's plea. By its total silence, the State did not express the degree of advocacy required.

The court's ruling recognizes that the State's recommendation may have an impact on the judge. Although the judge is aware of the plea agreement, he may be more apt to follow the disposition recommended in the pre-sentence report if the State makes the same recommendation. This decision shows that the State must abide strictly by the terms of the agreement, regardless of its motives for the failure in performance.

In contrast to the deception in Ellison, which allowed a plea agreement to be breached, was the situation found in Banks v. State. In Banks, the Court of Special Appeals held that, absent any fraudulent representations by the defendant, neither the judge nor the State can void a plea agreement even when it is discovered that the defendant's criminal record is much more extensive than previously thought. At an off-the-record chambers conference between the prosecution, defense counsel and judge, the judge ascertained that defendant was not then on parole or probation, but no inquiry was made about the extent, if any, of his prior criminal record. When he received the pre-sentence report the judge discovered that the defendant's record was more extensive than had been revealed. Both the prosecutor and the judge stated that they would

91. 57 Md. App. at 561, 471 A.2d at 319.
93. Id. at 50, 466 A.2d at 75. Banks was convicted in a jury trial following the voiding of a plea agreement of second degree murder and sentenced to thirty years in prison. Under the plea agreement, the maximum sentence he would have received was ten years. Id. at 42-43, 466 A.2d at 71.
94. The presiding judge had stated that: I was told that the defendant had been convicted of armed robbery in 1967, but that there were no convictions, no arrests, in 9 years. It was because of that that I accepted this guilty plea . . . . I was not told, however, that the defend-
not have agreed to the plea agreement had they known the extent of appellant's record. As a result, the judge repudiated his acceptance of the bargain.95

The court distinguished the instant case from other cases in which a defendant was specifically asked about a prior record or other information and lied about the facts.96 The defendant truthfully answered all questions at an open court hearing. The lack of information simply resulted from the fact that he was not asked about his prior record. As a general rule, once the judge has accepted a guilty plea and bound a defendant to it, the judge cannot refuse to carry through the bargain that induced the plea, unless it was obtained by the defendant through fraud.97 In Banks, the defendant did not procure his plea bargain fraudulently.

Stressing the importance of the “certainty” aspect that plea bargaining injects into the criminal system,98 the court stated that both sides must be able to rely on the plea agreement.99 Once a court has accepted a guilty plea pursuant to an agreement, specific enforcement of the plea agreement is the appropriate remedy if the defendant so elects.100 It is unfair for the State to create and then destroy a defendant's expectations when the defendant fulfills his end of the bargain, even if the bargain turns out to be a bad one in the State's eyes. The extraordinary power of a state and the critical nature of promises concerning criminal consequences cause this ob-

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95. Id. at 45, 466 A.2d at 72.
96. Id. at 46, 466 A.2d at 72-73.
98. 56 Md. App. at 52, 466 A.2d at 76. “If the prosecutor cannot rely upon a plea bargain, the potential 'chilling effect' upon the very institution of plea bargaining could be devastating.” Sweetwine v. State, 42 Md. App. 1, 12, 398 A.2d 1262, 1269 (1979), aff'd, 288 Md. 199, 421 A.2d 60, cert. denied, 449 U.S. 1017 (1980). Similar results could ensue if the defendant is unable to rely upon the bargain.
99. 56 Md. App. at 52, 466 A.2d at 76.
ligation to apply especially to plea agreements. Although some jurisdictions allow a judge to repudiate a plea agreement if he allows the defendant to withdraw the guilty plea, Maryland courts will not void a plea agreement to the detriment of a defendant, unless he procured it through fraud.

In *State v. Brazle*, the Court of Appeals considered the scope of a plea agreement in which the defendant agreed to plead guilty and the State agreed to make no recommendation as to sentencing. Finding that the agreement did not require the judge in the trial court either to inform the defendant that it was not bound to follow a pre-sentence report recommending probation or to tell her explicitly that she could go to jail for two years, the court upheld the judgment of the trial court.

The issue raised in *Brazle* was whether a guilty plea is voluntarily and intelligently entered when the trial judge does not specifically advise the defendant that the court is not bound to follow a pre-sentence recommendation. Maryland Rule 731(c), which governs the acceptance of guilty pleas, states that, before a guilty plea can be accepted by the court, it must determine that the plea is made voluntarily and with an understanding of its nature and consequences. This rule does not require a trial judge to follow a fixed procedure in determining whether a guilty plea has been made voluntarily and intelligently. Rather it "can be determined only by considering all of the relevant circumstances surrounding it." Applying the "totality of the circumstances" test, the court determined that the defendant's plea was given intelligently and voluntarily, despite defendant's mistaken impression that the judge was bound to follow the pre-sentencing recommendation. This case

101. 56 Md. App. at 51-52, 466 A.2d at 75-76.
105. Id. at 381, 463 A.2d at 801.
106. Id. at 384, 463 A.2d at 803.
107. Id. at 385, 463 A.2d at 803.
108. Md. R.P. 731(c) (Supp. 1983) (recodified at Md. R.P. 4-242(c)) (although language is changed, the rule is substantively the same).
111. 296 Md. at 384, 463 A.2d at 803. Defendant was told that the maximum sentence was three years. Further, defendant stated that the only promise that had been made to her was the State's agreement to make no recommendation as to sentencing. Finally, defendant had a twelfth grade education, was sober, and was not under the influence of any drugs.
demonstrates that Maryland will continue to apply the "totality of the circumstances" test in determining the voluntariness of guilty pleas.

2. Withdrawal of guilty plea.—In Harris v. State (Harris II)\textsuperscript{112} the Court of Appeals held that a trial judge may consider a defendant's motion to withdraw a guilty plea when an appellate court has remanded the case for resentencing. Harris pled guilty to first degree murder, two counts of armed robbery, and a handgun violation. After Harris waived his right to a jury sentencing proceeding,\textsuperscript{113} the trial judge imposed a death sentence for the first degree murder. On its automatic review of the death sentence,\textsuperscript{114} the Court of Appeals in Harris I\textsuperscript{115} affirmed the verdict against Harris, but remanded the case for resentencing on the ground that the appellant's jury waiver was not knowing and voluntary.\textsuperscript{116}

On remand, prior to the resentencing proceeding, Harris filed a motion to withdraw his guilty pleas.\textsuperscript{117} He based the motion largely on allegations that he lacked effective assistance of counsel at the time of his pleas.\textsuperscript{118} The trial judge denied the motion because he believed he lacked authority to consider its merits.\textsuperscript{119} First, he considered the voluntariness of the pleas settled by Harris I.\textsuperscript{120} He also ruled that the ineffective assistance of counsel issue could only be raised in a post conviction proceeding.\textsuperscript{121} Finally, the trial judge said that the remand in Harris I permitted only a resentencing proceeding.\textsuperscript{122}

The Court of Appeals in Harris II vacated the order denying Harris' motion to withdraw his guilty pleas and remanded the case to the trial court for an evidentiary hearing on the competency of

\textsuperscript{113} He was entitled to a jury sentencing proceeding because this was a death penalty case. See Md. Ann. Code art. 27, § 413(b) (1982).
\textsuperscript{114} See id. § 414.
\textsuperscript{115} Harris v. State, 295 Md. 329, 455 A.2d 979 (1983).
\textsuperscript{116} Id. at 338-40, 455 A.2d at 984.
\textsuperscript{117} He filed the motion pursuant to former Md. R.P. 731(f)(1) (Supp. 1983) (recodified at Md. R.P. 4-242(f)), which provided: "When justice requires, the court may permit a defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty at any time before sentencing." The recodification is largely identical.
\textsuperscript{118} Harris was represented by new counsel at this point. Harris II, 299 Md. at 514, 474 A.2d at 891.
\textsuperscript{119} Id. at 515, 474 A.2d at 891-92.
\textsuperscript{120} Id., 474 A.2d at 892.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
counsel. The court ruled that *Harris I* only settled the voluntariness of the pleas under the standards of Maryland Rule 731(c), without considering the effect of possible counsel incompetency. In addition, the court held that its decision in *Harris I* to remand for a new sentencing proceeding "had the effect of placing Harris in the same position he had been after being found guilty of murder but prior to initial sentencing." For reasons of judicial economy, the Court of Appeals considered it desirable for the trial court, because it was in a position to do so, to resolve the claims of counsel incompetency upon remand instead of delaying the matter until a post-conviction proceeding. The court's ruling makes clear that a remand for resentencing returns a case from the appellate stage to the post-conviction, pre-sentencing phase of lower court proceedings.

**D. Grand Jury**

Appeals in a series of cases stemming from the Attorney General's investigation into Medicaid fraud gave the Maryland Courts of Appeals and Special Appeals the opportunity to consider several issues related to grand jury subpoenas. Chief among these issues was the question of whether a denial to quash a subpoena duces tecum is an immediately appealable decision.

123. *Id.* at 519, 474 A.2d at 894.
124. *Id.* at 516-17, 474 A.2d at 892; see also *supra* note 117.
125. 299 Md. at 516-17, 474 A.2d at 892.
126. *Id.* at 516, 474 A.2d at 892.
127. Among the circumstances which the Court of Appeals considered relevant in determining that the trial court was in a position to rule on the motion were that the defendant had made a detailed evidentiary proffer that his counsel was ineffective and that he was misled into pleading guilty, that the defendant was represented by new counsel, and that the defendant's former attorney was available to testify concerning the prior representation. *Id.* at 518, 474 A.2d at 893.
129. **Related Developments**

In *Jones v. State*, 297 Md. 7, 464 A.2d 977 (1983), the Court of Appeals held that a defendant is entitled to inspect the record of a grand jury testimony of a State witness after the direct examination of that witness. The court found that the defendant's need to prepare for cross-examination of the witness is a "particularized need" that justifies lifting the veil of secrecy that normally lies over grand jury proceedings. On reconsideration, the court explained that *Jones* does not mandate the recording and transcription of all grand jury proceedings, but if a transcript exists, then courts may apply the long-established common law rule that a defendant's "particularized need" can override the secrecy of grand jury proceedings. *Id.* at 22, 464 A.2d at 984. For an in-depth discussion of this important case, see Recent Decision, *Jones v. State—Defendants Gain Access to Grand Jury Testimony*, 43 Md. L. Rev. 612 (1984).
The general rule is that a denial of a motion to quash a subpoena duces tecum is an interlocutory decision, not a final one, and is therefore not subject to appeal.\textsuperscript{130} Consequently, a party whose motion to quash has been denied is normally faced with a harsh choice: Either he must surrender the documents or invite a contempt charge by continuing his refusal to do so.\textsuperscript{131}

The Court of Appeals, in \textit{In re Special Investigation No. 244},\textsuperscript{132} rejected the general rule and held that a denial to quash is immediately appealable. A party no longer needs to wait until he is found in contempt before appealing. In a later case, however,\textsuperscript{133} the court held that the trial judge retains the authority to issue a contempt charge even if the party is in the process of appealing the denial. Thus, the procedural refinement that emerged in \textit{No. 244} does not result in any substantive change. Whether a denial of a motion to quash a subpoena is considered to be an interlocutory or a final decision, a party still risks contempt if he refuses to comply with the subpoena.

In \textit{No. 244}, a subpoena duces tecum was issued to the custodian of records of a joint venture that provided Medicaid-funded health care to qualified Maryland residents.\textsuperscript{134} The custodian moved to quash the subpoena; the motion was denied. He sought to appeal that denial. In considering the issue of whether the subpoena party should be allowed to appeal the denial of the motion to quash the subpoena, Judge Smith, writing for the majority, focused on the particular facts of the case. Because the custodian was not clearly one of the targets of the Medicaid fraud investigation, it would be unreasonable to force him to risk contempt if he wished to test the subpoena's validity. Additionally, the term of the grand jury had since expired, and there was now no one to whom the subpoena could be


\textsuperscript{131} The Supreme Court has allowed a few narrow exceptions to this rule. See, e.g., United States v. Nixon, 418 U.S. 683, 690-91 (1983) (appeal of denial of motion to quash allowed when alternative would be contempt citation against the President); Perlman v. United States, 247 U.S. 7, 38 (1918) (one can appeal denial to quash when items subpoenaed are in possession of a third party, because the third party may not wish to invite contempt by contesting the decision himself).

\textsuperscript{132} 296 Md. 80, 459 A.2d 1111 (1983).

\textsuperscript{133} \textit{In re} Special Investigation No. 281, 299 Md. 181, 473 A.2d 1 (1983).

\textsuperscript{134} 296 Md. at 82, 459 A.2d at 1112.
Beyond these particular facts, Judge Smith also found a policy reason for overturning the traditional rule. "It is fundamentally inconsistent to force a citizen to commit a crime [contempt] in order to preserve his right to an appeal, while at the same time affording civil litigants access to the courts, [by use of declaratory judgments]." The court then held that the denial of a motion to quash the grand jury subpoena is an appealable final order.

In a factually similar case, In re Special Investigation No. 249, the court followed the holding of No. 244. Chief Judge Murphy issued a strong dissent, arguing the position of the majority of jurisdictions. That view is that a denial of a motion to quash should not be directly appealable because this practice would have "a devastating effect on the grand jury system," possibly halting grand jury proceedings if critical testimony and records were withheld.

In a subsequent case, In re Special Investigation No. 281, the court issued a ruling that seems to respond to Judge Murphy's concerns. No. 281 involved the issuance of a subpoena to the custodian of records of a Medicaid provider. The motion to quash the subpoena was denied by the trial judge and an appeal was filed with the Court of Special Appeals. Before the appeal was heard, the trial judge issued a contempt order against the custodian. Again writing for the court, Judge Smith said that the trial judge had the power to issue the contempt order because the trial court retained "fundamental jurisdiction" over the subject matter of the case.

It is difficult to reconcile the outcome of No. 281 with the reasoning and holding in No. 244. Clearly the court was concerned that appeal of denials to quash could have an effect on grand jury func-

135. Id. at 86, 459 A.2d at 1114.
137. Id.
139. Id. at 212, 461 A.2d at 1088 (Murphy, J., dissenting). Murphy's position was forcefully stated by Judge Friendly in United States v. Fried, 386 F.2d 691, 695 (2d Cir. 1967):

With the number of appeals having increased almost 70% in the last five years, as against the much smaller growth in district court litigation, this is no time to weaken the historic rule putting a witness' sincerity to the test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to the appellant here.
141. Id. at 188, 473 A.2d at 4-5.
142. Id. at 202, 473 A.2d at 11-12.
tioning. If the court now finds that its decision to allow such appeals was erroneous, it should overrule No. 244, rather than leaving the subpoenaed party in the puzzling state of being allowed to appeal the denial but being subject to contempt even if he appeals.

The Medicaid fraud cases also provided the court with the opportunity to reemphasize the wide scope of authority that is given to grand juries in their investigative role. One aspect of this authority is broad subpoena powers. In No. 244, the court held that the power may reach witnesses and documents located outside the county where the offense occurred and outside the county in which the grand jury is sitting.\textsuperscript{143} In another case, \textit{In re Special Investigation No. 249},\textsuperscript{144} the court resisted an attempt to limit subpoena power, declining to impose a rule that would have required the State to show that subpoenaed items are relevant, within the grand jury’s jurisdiction, and not sought primarily for another purpose.\textsuperscript{145} And in a further affirmation of the broad latitude afforded the grand jury in its proceedings, the Court of Special Appeals, in \textit{In re Special Investigation No. 227},\textsuperscript{146} refused to apply an exclusionary rule in grand jury proceedings. The court found it irrelevant that the detailed description of items sought in a subpoena was the fruit of an earlier invalid search.\textsuperscript{147}

In additional cases the courts resisted particular challenges to grand jury subpoena power. The Court of Appeals, in \textit{In re Special Investigation No. 236},\textsuperscript{148} held that the accountant-client privilege did not shield an accountant’s records from a grand jury subpoena. The court ruled that the subpoena was encompassed by the statutory exception to the privilege, which says the privilege may “not affect the

\textsuperscript{143} 296 Md. at 88, 94, 459 A.2d at 1115, 1118.
\textsuperscript{144} \textit{In re Special Investigation No. 249}, 296 Md. 201, 461 A.2d 1082 (1983).
\textsuperscript{145} \textit{Id.} at 206-08, 461 A.2d at 1085. The court, in \textit{In re Special Investigation No. 281}, 299 Md. 181, 193, 473 A.2d 1, 7 (1984) stated that a subpoena duces tecum will not be considered to be overbroad as long as the items sought “are relevant to the investigation, are noted with reasonable particularity, and cover only a reasonable period of time . . . .” It is up to the party challenging the subpoena, the court added, to show that “the subpoena impermissibly infringed upon the constitutional rights of the witness . . . .” \textit{Id.}
\textsuperscript{147} \textit{Id.} at 652, 466 A.2d at 49. The court followed United States v. Calandra, 414 U.S. 338 (1974). In \textit{Calandra}, the Supreme Court ruled that “[q]uestions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.” \textit{Id.} at 354.
\textsuperscript{148} 295 Md. 573, 458 A.2d 75 (1983).
criminal laws of the State."149 In *In re Special Investigation No. 258*,150 the Court of Special Appeals applied established law to rule that a bank customer may not successfully invoke the fourth amendment or the due process clause to challenge a grand jury subpoena for bank records.151

As the Medicaid fraud cases indicate, Maryland courts will continue to resist attempts to limit the power of the grand jury. The Court of Appeals statement in *No. 281* summarizes the position of the courts: "[W]e recognize and intend to uphold the broad scope of authority granted to the grand jury in investigating violations of criminal law."152

149. *Id.* at 575-77, 583, 458 A.2d at 76-77.


(a) **Privilege.**—A certified public accountant, public accountant, or any person employed by him may not disclose the contents of any communication made to him by a person employing him to examine, audit, or report on any book, record, account, or statement nor may he disclose any information derived from the person or material in rendering professional service unless the person employing him or his personal representative or his successor in interest permits it expressly.

(b) **Exception.**—This privilege does not affect the criminal laws of the State or the bankruptcy laws.

The court interpreted this statute by looking at its history and at the development of the grand jury at common law and in Maryland, and concluded that historically a grand jury has been concerned chiefly with criminal matters. 295 Md. at 583, 458 A.2d at 79. Thus, grand jury functions would fall under § 9-110(b).


On the other hand, Maryland's statutes concerning the privacy rights of bank customers, *Md. Fin. Inst. Code Ann.*, §§ 1-301 to -305 (1980 & Supp. 1984), have been hailed as the most progressive in the nation, balancing the privacy interest against that of law enforcement. See Comment, *supra*, at 284-85. Section 1-302 requires that the privacy of the customer be maintained unless the subtitle expressly provides otherwise. Section 1-304(b), however, permits a fiduciary institution to comply with a subpoena if notice is also given to the customer or waived by the court for good cause. The *No. 258* court correctly dismissed as absurd appellants' contention that they had a due process right to challenge the exercise of the waiver notice, "as it presupposes the notice the waiver provision was intended to obviate." 55 Md. App. at 125, 461 A.2d at 37.

E. Speedy Trial

In 1984 the Maryland Court of Appeals granted certiorari in eighteen cases in which the sole issue was whether the defendant was entitled to dismissal of criminal charges because of the State's alleged failure to comply with Maryland Annotated Code article 27, section 591 and Maryland Rule 746. Section 591 and rule 746 require that a criminal trial be held within 180 days of defendant's arraignment or his attorney's first appearance. Under section 591 and rule 746 trial may be postponed beyond the 180-day period only by order of the administrative judge of the court in which the matter is pending, upon a showing of good cause.

Enacted in 1971, the original section 591 required trial within six months of defendant's arraignment or his attorney's appointment, whichever came first, and prohibited postponement except

(a) Within two weeks after the arraignment of a person accused of a criminal offense, or within two weeks after the filing of an appearance of counsel or the appointment of counsel for an accused in any criminal matter, whichever shall occur first, a judge or other designated official of the circuit court in which the matter is pending shall set a date for the trial of the case, which date shall be not later than 180 days from the date of the arraignment of the person accused or the appearance or the appointment of counsel for the accused whichever occurs first. The date established for the trial of the matter shall not be postponed except for good cause shown by the moving party and only with the permission of the administrative judge of the court where the matter is pending.
(b) The judges of the Court of Appeals of Maryland are authorized to establish additional rules of practice and procedure for the implementation of this section in the various circuit courts throughout the State of Maryland.

154. Md. R.P. 746 (1977) states:
(a) General Provision
Within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 723, a trial date shall be set which shall be not later than 180 days after the appearance or waiver of counsel or after the appearance of defendant before the court pursuant to Rule 723.

(b) Change of Trial Date
Upon motion of a party made in writing or in open court and for good cause shown, the county administrative judge or a judge designated by him may grant a change of trial date.

155. The purpose of § 591 and rule 746 is not solely to implement the defendant's constitutionally protected right to a speedy trial, but to protect society from the harms of unnecessarily delayed criminal trials and to make efficient use of judicial resources by avoiding unjustified postponements. Larsen v. State, 55 Md. App. 135, 461 A.2d 543 (1983), cert. denied, 298 Md. 707 (1984).
for “extraordinary cause.”\footnote{Act of Apr. 29, 1971, ch. 212, 1971 Md. Laws 500 (current version at Md. Ann. Code art. 27, § 591 (1982)).} In 1972, in \textit{Young v. State},\footnote{Id. at 212, 1971 Md. Laws at 212 (current version at Md. Ann. Code art. 27, § 591 (1982)).} the Maryland Court of Special Appeals held that the requirements of that statute were “directory” and not “mandatory.”\footnote{157. 15 Md. App. 707, 292 A.2d 137, summarily aff'd, 266 Md. 438, 294 A.2d 467 (1972), \textit{overruled}, State v. Hicks, 285 Md. 310, 403 A.2d 356 (1979).} In 1977, rule 746\footnote{158. \textit{Id.} at 710, 292 A.2d at 139. Had the court held that the requirements of § 591 were mandatory, noncompliance would have resulted in dismissal of the indictment. Instead, the court found that compliance with § 591 was directory and that the requirement was only one factor to be considered in evaluating whether the defendant's right to a speedy trial under the sixth amendment of the United States Constitution and article 21 of the Maryland Declaration of Rights had been violated. \textit{Id.} at 710-11, 292 A.2d at 139.} was adopted, which in purpose and effect\footnote{159. \textit{Id.} at 710, 292 A.2d at 139.} superseded section 591. The rule reduced the time period within which a trial must be held from six months to 120 days, and redefined the events that trigger the running of that time.\footnote{160. The court quotes article IV, § 18(A) of the Constitution of Maryland as its authority for promulgating a rule which in effect supercedes a statute. The provision, according to the court, vests it with authority “to make rules, having the force of law governing 'practice and procedure in the administration of the . . . courts.'” State v. Hicks, 285 Md. 310, 318, 403 A.2d 356, 360 (1979). The court states that its intent in adopting rule 746 was “to supercede the provisions of § 591(a) and put teeth into a new regulation governing the assignment of criminal cases for trial.” \textit{Id.}} Two years later, in \textit{State v. Hicks},\footnote{161. \textit{Id.} at 318, 403 A.2d at 360. The court distinguished its earlier adoption of the Court of Special Appeals opinion in \textit{Young}, which held that § 591(a) was directory in nature. In support of the \textit{Young} holding, the \textit{Hicks} court stated that § 591 is “plainly a declaration of legislative policy designed to obtain prompt disposition of criminal charges,” a policy that generally recognizes the detrimental effects to the criminal justice system caused by the postponement of trials. According to the \textit{Hicks} court, the \textit{Young} court's finding was necessary because of the failure of § 591 to expressly provide dismissal as the sanction for administrative noncompliance. \textit{Id.} at 316, 403 A.2d at 359. But, because the language of rule 746 mirrors the language used in § 591(a), the \textit{Hicks} holding necessarily overruled \textit{Young}. \textit{Id.} at 334, 403 A.2d at 368 (per curiam on motion for reconsideration).} the Court of Appeals held that the requirements of rule 746 were mandatory and that the appropriate sanction for failure to comply was dismissal.\footnote{162. \textit{Id.} at 318, 403 A.2d at 360. The court distinguished its earlier adoption of the Court of Special Appeals opinion in \textit{Young}, which held that § 591(a) was directory in nature. In support of the \textit{Young} holding, the \textit{Hicks} court stated that § 591 is “plainly a declaration of legislative policy designed to obtain prompt disposition of criminal charges,” a policy that generally recognizes the detrimental effects to the criminal justice system caused by the postponement of trials. According to the \textit{Hicks} court, the \textit{Young} court's finding was necessary because of the failure of § 591 to expressly provide dismissal as the sanction for administrative noncompliance. \textit{Id.} at 316, 403 A.2d at 359. But, because the language of rule 746 mirrors the language used in § 591(a), the \textit{Hicks} holding necessarily overruled \textit{Young}. \textit{Id.} at 334, 403 A.2d at 368 (per curiam on motion for reconsideration).} The court noted, however, that dismissal was inappropriate in two circumstances: first, if the trial is held within 120 days but the “thirty day” rule for setting the trial date is violated,\footnote{163. \textit{Id.} at 318, 403 A.2d at 360. The court distinguished its earlier adoption of the Court of Special Appeals opinion in \textit{Young}, which held that § 591(a) was directory in nature. In support of the \textit{Young} holding, the \textit{Hicks} court stated that § 591 is “plainly a declaration of legislative policy designed to obtain prompt disposition of criminal charges,” a policy that generally recognizes the detrimental effects to the criminal justice system caused by the postponement of trials. 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to” a trial beyond the statutory period.\textsuperscript{165} After Hicks, the legislature amended section 591, increasing the time period to 180 days and substituting “good cause” for “extraordinary cause.”\textsuperscript{166} The dismissal sanction was not altered. In 1982 the court reaffirmed the dismissal sanction in Goins v. State.\textsuperscript{167} The cases considered by the court in the following year, when taken together, establish guidelines for compliance with the speedy trial statute and narrow the availability of the dismissal sanction.

1. Procedure for Dismissal.—In State v. Frazier,\textsuperscript{168} the first of the series of cases, the Court of Appeals developed a general procedural framework for dealing with speedy trial motions.\textsuperscript{169} Frazier establishes first that the trial court may entertain a defendant’s oral motion to dismiss based on the state’s alleged noncompliance with section 591 and rule 746.\textsuperscript{170} An appellate court may not reverse this decision to entertain an oral motion except for abuse of discretion.\textsuperscript{171} Next, in deciding a motion to dismiss, Frazier requires the court to look to the “critical” postponement, that is, the postponement order having the effect of postponing trial date beyond 180 days.\textsuperscript{172} It is this “critical” order that must violate section 591 and date be done within 30 days of the appointment or waiver of counsel, or after the appearance of counsel, whichever occurs first. See Md. R.P. 746 (1977).

\textsuperscript{165} Hicks, 285 Md. at 335, 403 A.2d at 369 (per curiam on motion for reconsideration).

\textsuperscript{166} Act of June 1, 1982, ch. 820, \textsection 1, 1982 Md. Laws 4390, 4400 (codified at Md. ANN. CODE art. 27, \textsection 591 (Supp. 1984)). The amendment was made in response to the Hicks decision, in order to expand the circumstances constituting “cause” for postponement of trials. State v. Frazier, 298 Md. 422, 458-60, 470 A.2d 1269, 1288-89 (1984). The sponsor of the bill to change the statute argued that the purpose of the “good cause” language was to give the trial courts greater latitude in ordering postponements. Id. at 460-61, 470 A.2d at 1289 (citing testimony of Del. Pica before the House Judiciary Committee, Feb. 12, 1980 (on file with the Dep’t of Legislative Reference)).

\textsuperscript{167} 293 Md. 97, 442 A.2d 550 (1982).

\textsuperscript{168} 298 Md. 422, 470 A.2d 1269 (1984).

\textsuperscript{169} In Frazier the Court of Appeals consolidated four criminal cases. The Criminal Court of Baltimore had dismissed each case at the pretrial stage on the ground that the defendant had not been tried within the 180-day period. The State appealed in all four cases, raising similar issues about the operation of \textsection 591 and rule 746. The court issued writs of certiorari prior to argument in the Court of Special Appeals and directed that the cases be heard together. The cases which were consolidated under Frazier were State v. Frazier, State v. Weems & Patton, State v. Shaw and State v. Richardson. Id. at 425, 470 A.2d at 1271.


\textsuperscript{171} 298 Md. at 436 n.11, 470 A.2d at 1277 n.11.

\textsuperscript{172} Id. at 428, 470 A.2d at 1272; accord State v. Beard, 299 Md. 472, 474, 474 A.2d 514, 514-15 (1984); State v. Harris, 299 Md. 63, 66-67, 472 A.2d 467, 469 (1984) (per
rule 746 or there can be no dismissal.\textsuperscript{173}


173. Just how "critical" this postponement is was made clear in Farinholt v. State, 299 Md. 32, 472 A.2d 452 (1984). In Farinholt a postponement was granted because the defendant wished to call a co-defendant as a witness and the co-defendant would not testify until he had been sentenced. At that time, the defendant indicated his consent to a trial beyond the 180-day period. The trial was rescheduled for a date six days before expiration of the 180-day period, but on that date the co-defendant was still unavailable and the trial was again postponed. This second postponement pushed the trial date beyond the 180-day deadline. Again, the defendant indicated consent to a trial date beyond the 180-day period. There was a third postponement of the trial date, which was requested by the State because the victim was on vacation. On the scheduled trial date, the defendant's motion to dismiss for violation of § 591 and rule 746 was granted. The Court of Special Appeals reversed, finding that § 591 and rule 746 were not violated. The Court of Appeals affirmed, rejecting the defendant's main argument that the dismissal sanction is applicable to a subsequent postponement even though an earlier order postponing the trial beyond the 180-day deadline had complied with the statute. The court held that "the dismissal sanction has no relevance to subsequent postponements of the trial date unless the defendant's constitutional speedy trial right has been denied." \textit{Id}. at 40, 472 A.2d at 456.

In Barker v. Wingo, 407 U.S. 514 (1972) the Supreme Court adopted a four-part balancing test to determine when a defendant's constitutional speedy trial right has been violated. The court should consider four factors: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his right; and 4) the extent of prejudice to the defendant. \textit{Id}. at 530. None of these four factors is a necessary or sufficient condition; rather, they are related factors that should be considered together. The length of delay is to some extent a "triggering mechanism;" before the court will inquire into the other factors, there must be some delay that is "presumptively prejudicial." \textit{Id}. In Maryland, the Court of Appeals has ruled that a delay of one year and 15 days was "presumptively prejudicial," triggering application of the \textit{Barker} balancing test. Epps v. State, 276 Md. 96, 111, 345 A.2d 62, 72 (1975). In Epps the court stated that the State must make a diligent, good faith effort to bring the defendant to trial. The court also described a "presumptively prejudicial" delay as one where the "passage of time [is] beyond that which is obviously within the requirements of orderly procedure." \textit{Id}. at 110, 345 A.2d at 72 (quoting State v. Lawless, 13 Md. App. 220, 230, 283 A.2d 160, 169 (1972)).

In a 1984 case the Court of Appeals considered the question of whether a defendant's constitutional speedy trial right had been denied. State v. Gee, 298 Md. 565, 471 A.2d 712, \textit{cert. denied sub nom}. Gee v. Maryland, 104 S. Ct. 3519 (1984). The court noted that the speedy trial right is not relevant until the "putative defendant in some way becomes an 'accused.'" \textit{Id}. at 568, 471 A.2d at 713 (quoting State v. Marion, 404 U.S. 307, 313 (1971)). "A person becomes an 'accused' only upon his arrest or the filing of an indictment, information or other formal charge against him." \textit{Id}. The principal issue in Gee was whether a document consisting of a warrant for arrest and statement of charges upon which the warrant was based is a "formal charge" for speedy trial purposes. The court held that it was. \textit{Id}. at 574, 471 A.2d at 716. Finally, the court found that a delay of approximately six months between the time Gee became an accused and the date of trial was not of constitutional dimension and thus did not trigger the \textit{Barker} balancing test. \textit{Id}. at 578-79, 471 A.2d at 718-19.

The Court of Appeals will not apply the dismissal sanction to subsequent postponements when the "critical" postponement complied with the statute, unless the de-
2. Grounds for Dismissal.—Under section 591 and rule 746, a motion to dismiss may be granted by a trial judge based on a finding that the motion to postpone was granted by the administrative judge without a showing of good cause. Frazier held that a trial judge may not make a de novo determination of whether good cause existed, absent a showing of "clear abuse of discretion" on the part of the administrative judge who ruled on the postponement motion.174 The Court of Appeals reasoned that the general principle that one trial judge may consider de novo a prior ruling of another judge in the same case does not apply if a statute or rule reflects a different intent. That intent is evident in section 591 and rule 746, which grant to the administrative judge sole authority to postpone a criminal trial.175 Thus, the decision of the judge entrusted to make a finding of good cause should not be disturbed unless there is a clear abuse of discretion.176

Under Frazier the defendant has the burden of demonstrating a "clear abuse of discretion."177 This burden is met by showing that the administrative judge's reason for postponement was not, as a matter of law, sufficient cause for postponement, or that the reason was not sufficient in the circumstances. In each of the cases consolidated in Frazier the court considered whether the defendants met this burden, that is, whether the postponements were supported by good cause.

In two of the four cases consolidated in Frazier, the trials were postponed beyond the 180-day period because no courtroom was
available on the date set for trial.\textsuperscript{178} The defendants argued that "docket congestion" could not, as a matter of law, constitute good cause for postponement.\textsuperscript{179} The Court of Appeals rejected this argument, reasoning that the 1980 amendment of section 591 changing "extraordinary cause" to "good cause" was intended to expand those circumstances furnishing the requisite cause for postponement in order to allow the courts greater leeway in allowing cases to go forward rather than imposing the harsh sanction of dismissal.\textsuperscript{180} The court recognized that some docket congestion was unavoidable, even in the most efficient court system, and emphasized that Baltimore City had made substantial progress toward alleviating the problems of docket congestion.\textsuperscript{181} Thus, the court refused to find that docket congestion could never, as a matter of law, constitute good cause for postponement.

The court’s reasoning suggests that docket congestion may be insufficient cause for postponement when little or no effort has been made to remedy overcrowded docket conditions that prevent criminal cases from being heard within 180 days. When, however, the state has made a good faith effort to try every criminal case within 180 days, docket congestion generally will be sufficient cause for postponement.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{178} Unavailability of a courtroom refers to the lack of a trial judge and not the absence of a physical facility. \textit{Id.} at 436 n.10, 470 A.2d at 1276 n.10.
\item \textsuperscript{179} \textit{Id.} at 455, 470 A.2d at 1286.
\item \textsuperscript{180} \textit{Id.} at 459-61, 470 A.2d at 1288-89.
\item \textsuperscript{181} \textit{Id.} at 458, 470 A.2d at 1287-88. For an extensive discussion of the Baltimore City criminal assignment system, see \textit{id.} at 430-35, 470 A.2d at 1273-76.
\item \textsuperscript{182} \textit{Id.} at 455-57, 470 A.2d at 1286-87. Judge Davidson in her dissent argued that this finding was not in accord with the purpose of § 591 and rule 746. \textit{Id.} at 464, 470 A.2d at 1291 (Davidson, J., dissenting). The mandatory dismissal sanction under § 591 and rule 746 is, according to Judge Davidson, "'a prophylactic measure designed to insure compliance with the requirements imposed on the State regarding prompt trials of criminal cases.'" \textit{Id.} at 470, 470 A.2d at 1294 (quoting Hicks, 285 Md. at 337, 403 A.2d at 370). Judge Davidson argued that both the statute and the rule serve to protect the defendant’s right to a speedy trial and society’s interest in the prompt disposition of all criminal charges. By allowing chronic court congestion in and of itself to justify delay beyond the 180-day deadline, the purpose of § 591 and rule 746 is seriously undermined. \textit{Id.} at 468-72, 470 A.2d at 1293-95.
\item Judge Davidson did recognize that docket congestion, even chronic congestion, under certain circumstances, can constitute good cause for postponement. The unavailability of a court resulting from "nonchronic court congestion" ordinarily would constitute good cause. \textit{Id.} at 465, 470 A.2d at 1291. She defined "nonchronic court congestion" as congestion arising from "unique, nonrecurring events" such as riots or the illness or death of a prosecutor, defense counsel or judge on the day a trial is scheduled, which create a particular scheduling problem or produce an inordinate number of cases for court disposition. \textit{Id.} at 466-67, 470 A.2d at 1292. Since the unavailability of a court in two of the cases decided in \textit{Frazier} did not arise from "unique, nonrecurring
In the other two cases consolidated in *Frazier*, postponement beyond 180 days was not due to docket congestion, but rather to mistakes by court personnel. In the *Weems & Patton* case, clerical personnel failed to record a new trial date after trial was initially postponed. Consequently, the computer did not generate the paperwork necessary to place the case on the docket, issue summonses, send notices to counsel and writs to assure that defendants were brought from jail. On the date set for trial, the defendants were not present, only one defense attorney appeared, none of the witnesses were present, and no court was available to hear the case. The case was reset for a date four days beyond the 180-day limit. It was later discovered that court personnel had not followed standard procedure to determine if the new date was within the 180-day period.\textsuperscript{183}

In the *Richardson* case, the defendant, Mark Richardson, was in the custody of the Division of Corrections pending trial. There were two other Mark Richardsons in the Division's custody at the time. On the day of the trial, court officials brought the wrong Mark Richardson to the courthouse. Corrections officials were unable to ascertain who was the correct Mark Richardson and the trial was postponed to a date twenty-six days beyond the expiration of the 180-day period.\textsuperscript{184}

In both cases, defendants argued that mistakes by court personnel could not constitute good cause for postponement. The Court of Appeals rejected this argument, holding that occasional, isolated mistakes that prevent the case from being tried within 180 days may constitute good cause.\textsuperscript{185} As in *Frazier* and *Shaw*, the decision as to whether there was an illegal postponement turns on whether the de-

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\textsuperscript{183} Id. at 437-38, 470 A.2d at 1276-77.

\textsuperscript{184} Id. at 444-46, 470 A.2d at 1281-82.

\textsuperscript{185} Id. at 462-63, 470 A.2d at 1290. The dissent rejected this decision as tantamount to a finding that the State's negligence and breach of its duty to bring a defendant to trial can constitute good cause for postponement. Id. at 481-83, 470 A.2d at 1299-300 (Davidson, J., dissenting).
fendant has met his burden of demonstrating a "clear abuse of discretion" in the issuance of the postponement order. The court found no "clear abuse of discretion" in either Weems & Patton or Richardson.

Under Frazier, dismissal of criminal charges for lack of good cause will be less frequent. The Court of Appeals has considerably expanded the circumstances furnishing requisite good cause for postponement, by suggesting that, as long as the State makes a good faith effort to try every criminal case within 180 days, good cause generally will be found. In addition, the court has stated that the defendant has the burden of showing lack of good cause. Given the court's interpretation of what will constitute good cause, the defendant's burden is heavy. For example, in a case such as Frazier or Shaw the defendant might meet this burden by showing that there was, in fact, a courtroom available on the assigned trial date or that the case was not set for the earliest available date. In cases such as Weems & Patton and Richardson, the defendant might meet the burden by showing that court personnel have made frequent mistakes, but such information about the status of the dockets or the competence of court personnel will not be readily available to most criminal defendants. Unless the State blatantly disregards its duty to try each defendant within 180 days, following Frazier, it will be difficult for defendants to meet the burden of showing lack of good cause.

In addition to finding that overcrowded dockets and court personnel errors were not insufficient as a matter of law for postponement, the court in other cases during the period upheld postponement on other grounds. In Satchell v. State, one codefendant requested postponement because he needed time to secure counsel. The defendant objected to the postponement, but the administrative judge found good cause to postpone defendant's case because it would be "inconvenient to try it separately." The court held that a decision to postpone in order to try the defendants together was not insufficient cause.

In McFadden v. State charges against four defendants were based upon a single incident in which all four allegedly participated. On the date set for trial, the case could not be reached because no courtroom was available. Three of the four co-defendants agreed to a trial date beyond the 180-day period; McFadden objected. The

187. Id. at 44, 472 A.2d at 458.
188. Id. at 46, 472 A.2d at 459.
administrative judge postponed the trial, over McFadden's objections, in order not to sever the cases. The Court of Appeals held that the postponement order was proper as "a matter within the discretion of the administrative judge, and we perceive no clear abuse of discretion." 190

In Morgan v. State191 the State sought to introduce evidence that was allegedly newly discovered; the defendant moved to exclude the evidence. The trial judge denied the motion to suppress and sua sponte ordered postponement to allow the defendant time to "look into" the evidence.192 The next assigned trial date was fourteen days beyond the expiration of the 180-day time period. At the trial, the defendant argued that the case should be dismissed, alleging that there had not been good cause to postpone because the State's representation that the evidence was "newly discovered" was not accurate. The motion was denied, the trial was held, and the defendant was convicted. The Court of Appeals affirmed the conviction,193 holding that "[w]hen the 'good cause' question concerns the need for postponement . . . this 'clear abuse of discretion' standard of review necessarily relates to what is before the administrative judge . . . at the time the postponement is ordered."194 The court stated that the fact that some of the State's representations may have been inaccurate was "simply irrelevant" to the good cause question.195

The good cause necessary to sustain a postponement and avoid a dismissal involves not only good cause to postpone but also good cause for the length of the postponement. If the critical postponement complies with section 591 and rule 746, the defendant may still challenge the postponement on the ground that there was not good cause for the length of delay between the date the postpone-

190. Id. at 58, 472 A.2d at 465.
192. Id. at 484, 474 A.2d at 519. The defense did not ask for a postponement but rather sought to exclude the evidence. Id. at 483, 474 A.2d at 519.
193. Id. at 485-86, 474 A.2d at 520.
194. Id. at 488, 474 A.2d at 521.
195. Id., 474 A.2d at 521-22. See also Green v. State, 299 Md. 72, 472 A.2d 472 (1984) (per curiam). In Green, the State believed that a guilty plea had been arranged with the defendant. On the assigned trial date, the State went forward without its witnesses, but the defendant apparently changed his mind and decided to plead not guilty. The administrative judge postponed the trial because the State could not proceed without its witnesses. The Court of Appeals found that the administrative judge had shown no clear abuse of discretion in granting the postponement. Id. at 75, 472 A.2d at 743. This case is different from the other postponement cases because the defendant's own act, backing out of the plea agreement, was the "cause" for the postponement.
ment was sought and the new date set for trial. Generally, the defendant has the burden of demonstrating lack of good cause for the delay. Frazier, however, suggests that a case might arise in which an "inordinate length of time" between postponement and the new trial date will itself be prima facie evidence of undue delay, shifting the burden to the State to show justification for the delay. The Court of Appeals addressed the question of what might constitute an "inordinate length of time" in Pennington v. State. In Pennington there was a delay of 168 days between the date the postponement order sought by the defendant was issued and the new trial date. On the date set for trial, defendant's attorney moved to dismiss the charges for violation of section 591 and rule 746, alleging that there was not good cause for the length of the delay. The trial court denied the motion to dismiss and held that the heavy caseload in Harford County was sufficient reason for delay; the Court of Special Appeals upheld that denial. The defendant appealed, contending that the court's justification for the delay, docket congestion, was not shown by the record and further, as a matter of law, docket congestion does not furnish good cause for delay. Citing Frazier, the Court of Appeals rejected the defendant's contention that docket congestion could not furnish good cause. However, the court did find that the 168-day delay was "sufficiently long to place the burden upon the State to offer some evidence, both in terms of what happened in the instant case as well as the nature of the criminal case scheduling in Harford County"; the 168-day delay was thus considered to be inordinate. The court found it appropriate to

196. 298 Md. at 448, 470 A.2d at 1282-83.
197. Id. at 452, 470 A.2d at 1285.
198. Id. at 462, 470 A.2d at 1290.
200. Id. at 27, 472 A.2d at 449. The Court of Special Appeals based its decision on two grounds. First, defendant's failure to file a written motion to dismiss precluded him from seeking dismissal under § 591 and rule 746. Id. The Court of Appeals rejected this ground because Frazier establishes that an oral motion to dismiss may be proper. Id. at 28, 472 A.2d at 449. Second, since the defendant sought the latest postponement he must file "a motion to compel compliance with the 180 day rule" or take "some affirmative action . . . if he insists on strict conformity with the rule . . . ." Id. at 27, 472 A.2d at 449 (quoting Pennington v. State, 53 Md. App. 538, 544, 454 A.2d 879, 883 (1983)). The Court of Appeals also rejected this finding. Id. at 28-29, 472 A.2d at 450. Although Hicks established that the dismissal sanction is inappropriate when the defendant "seeks or expressly consents to" a trial date beyond the 180-day period, 285 Md. at 335, 403 A.2d at 369, the Pennington court held that the defendant's "mere silence . . . or his dilatory conduct contributing to a delay, does not ordinarily constitute express consent. . . ." Pennington, 299 Md. at 28, 472 A.2d at 450.
201. 299 Md. at 29-30, 472 A.2d at 450-51.
remand the case and instructed that upon remand the State should present and the court could consider this evidence.\textsuperscript{202}

In \textit{State v. Harris}\textsuperscript{203} there was a 105-day delay between the date of the critical postponement and the new trial date. Shortly after the critical postponement, a five-day hearing was held on defendant's motion to suppress evidence. The hearing concluded twenty-seven days before expiration of the 180-day deadline; at that time the administrative judge found it necessary to prepare a written opinion dealing with the suppression issues. The opinion, denying the motion to suppress, was filed forty-three days after expiration of the 180-day deadline. The trial date was postponed once more and trial was held eighty-four days after expiration of the 180-day deadline. The trial judge denied defendant's motion to dismiss for violations of section 591 and rule 746 and the defendant was convicted. The defendant appealed, contending that charges should have been dismissed\textsuperscript{204} and the Court of Special Appeals agreed with the defendant.\textsuperscript{205} The Court of Appeals, however, held that there were no violations of section 591 or rule 746. In addressing the question of whether there was good cause for the length of the delay, the court found that, although the delay was substantial, it was justified by the need for "extensive proceedings" and an opinion on the defendant's motion to suppress evidence.\textsuperscript{206}

In \textit{Harris} the court did not address the question of whether this delay was so "inordinate" as to shift the burden of justification to the State, as was done in \textit{Pennington}. It is not clear whether this is because the court would not consider a delay of less than 168 days "inordinate" or because the delay was easily explained by the need for hearings on the suppression motion. The court has considered

\textsuperscript{202} \textit{Id.} at 30-31, 472 A.2d at 451.
\textsuperscript{203} 299 Md. 63, 472 A.2d 467 (1984) (per curiam).
\textsuperscript{204} The defendant also contended that the suppression motion should have been granted. This issue was not reached by the Court of Special Appeals inasmuch as the case was decided under § 591 and rule 746. The Court of Special Appeals therefore remanded the case for consideration of the suppression issue. \textit{Id.} at 67, 472 A.2d at 469.
\textsuperscript{205} The Court of Special Appeals found, in an unreported opinion, that the 180-day violation "more directly stemmed from the administrative postponements than from the time required to adequately consider the suppression motion." \textit{Id.} at 66, 472 A.2d at 469 (quoting the Court of Special Appeals unreported opinion). Since the critical postponement was due to unavailability of a courtroom, the Court of Special Appeals held that it was not supported by good cause. The Court of Appeals rejected that finding. The court stated that the unavailability of a court, per se, does not constitute a lack of good cause for postponement. Rather, "the test is whether the defendant has met the burden of establishing that the administrative judge's decision to postpone . . . and the length of delay . . . represent a clear abuse of discretion." \textit{Id.} at 67, 472 A.2d at 469.
\textsuperscript{206} \textit{Id.} at 67, 472 A.2d at 469.
at least one other case with a protracted delay, but did not consider the issue of good cause for the delay. In Green v. State\textsuperscript{207} the delay between the critical postponement and the date of trial was 127 days. In Green the good cause issue was never raised and there is nothing in the opinion to explain why there was a four-month delay. Like the defendant in Pennington, the defendant in Green was responsible for the critical postponement. It is possible that, if the defendant in Green had challenged the existence of good cause for the length of delay, the court might have found a four-month delay "inordinate" and required the State to show good cause for that delay. But, while the court has made it clear that a delay of 168 days will be considered "inordinate" unless, as in Harris, the delay is easily explained, the question of whether and under what circumstances a shorter period of delay will be considered "inordinate" is left open.

In several other cases during this period, the court considered another ground for dismissal under the statute. A defendant may seek dismissal on the ground that the State violated the statute when his trial was postponed without the order of an administrative judge. In two cases the court addressed the question of what constitutes an order by an administrative judge.

In Calhoun v. State\textsuperscript{208} the defendants' trial was postponed to a date five days before the expiration of the 180-day period in order to allow for Calhoun's mental examination pursuant to an insanity plea. Several weeks before the trial, and over Calhoun's objections, the court granted his co-defendant's motion for severance. On the date assigned for trial, both defendants appeared. The State chose to proceed with the trial of the co-defendant on an unrelated matter and, without seeking a postponement order, the State suggested that by necessity Calhoun's trial would have to be postponed. Calhoun and his attorney were excused. Five days after expiration of the 180-day deadline, Calhoun filed a motion to set a trial date and requested a hearing on the motion. At a hearing ten days later, the administrative judge found that the need to sever defendant's case constituted good cause for postponement. The trial court refused defendant's motion to dismiss, assuming that the administrative judge had approved of the reasons for the postponement.\textsuperscript{209} Calhoun was convicted and appealed. The Court of Special Appeals agreed that the need for a severance constituted good cause and held that "the dismissal of counsel on August 4th in order to try the

\textsuperscript{207} 299 Md. 72, 472 A.2d 472 (1984). See discussion supra note 195.
\textsuperscript{208} 299 Md. 1, 472 A.2d 436 (1984).
\textsuperscript{209} Id. at 5, 472 A.2d at 438.
codefendant constituted a de facto order of postponement by the trial judge pending approval by the Administrative Judge."\(^{210}\) The Court of Appeals reversed, holding that failure to obtain an administrative judge’s approval for postponement is a violation of section 591 and rule 746 requiring dismissal, even though good cause may have existed for postponement. An "after-the-fact ratification" by an administrative judge is not an "order" that complies with section 591 and rule 746.\(^{211}\)

In Carey v. State,\(^{212}\) in response to defendant’s insanity plea, an administrative judge signed and filed an order directing defendant Carey to undergo a psychiatric examination. The case was called for trial several weeks before the due date for the psychiatrist’s report. On the date assigned for trial, the defendant was not present, presumably because the examination had not been completed. The trial judge “direct[ed] the case to be reset pending mental examination.”\(^{213}\) The report was filed on time and Carey’s case was set for trial, but the trial date was twenty-four days after the expiration of the 180-day period. At the trial, the defendant moved to dismiss, arguing that the order that postponed the trial was the trial judge’s direction that the case be reset,\(^{214}\) not an order entered by an administrative judge and therefore not in compliance with the statute. Carey’s dismissal motion was denied, he was convicted, and he appealed on the basis that motion to dismiss should have been granted.\(^{215}\) The Court of Appeals rejected this argument, holding that the administrative judge’s order directing the mental examination constituted an order postponing the trial within the meaning of section 591 and rule 746. Because the trial could not proceed until the results of the examination were received, the administrative judge’s order necessarily postponed the trial.\(^{216}\) The trial judge’s direction that the case be reset “merely reiterated to the clerical personnel that a new trial date would have to be assigned because of

\(^{210}\) Id. (quoting Calhoun v. State, 52 Md. App. 515, 522, 451 A.2d 146, 150 (1982)).

\(^{211}\) Id. at 9, 472 A.2d at 440.


\(^{213}\) Id. at 19, 472 A.2d at 445 (quoting the trial court docket entry).

\(^{214}\) In Frazier the court established that the court may entertain an oral motion to dismiss. 298 Md. at 436 n.11, 470 A.2d at 1277 n.11.

\(^{215}\) 299 Md. at 19-20, 472 A.2d at 445. The Court of Special Appeals affirmed Carey’s conviction, finding that the motion to dismiss should have been denied because Carey failed to file a written motion to dismiss. The Court of Special Appeals did not consider the merits of defendant’s contentions under § 591 and rule 746. The Court of Appeals affirmed but rejected the ground upon which the Court of Special Appeals disposed of the case. Id. at 20, 23, 472 A.2d at 446, 447.

\(^{216}\) Id. at 22, 472 A.2d at 447.
[the administrative judge's] order for a mental examination." Based on Carey and Calhoun, it seems that the court will be generous in deciding what constitutes an order by an administrative judge, but will not find an order when there is no indication the administrative judge took any action.

3. Waiver of Dismissal Sanction.—In three cases the Court of Appeals discussed the circumstances under which a defendant may waive his right to invoke the dismissal sanction. In Farinholt v. State the defendant sought the critical postponement and, on two occasions, indicated consent to a trial date beyond the 180-day limit. Relying on its finding in Hicks that the dismissal sanction is inappropriate when the defendant "seeks or expressly consents to" a trial date beyond the 180-day deadline, the Court of Appeals held that the defendant, by his conduct, was precluded from challenging either the existence of good cause for postponement or the existence of a postponement order by an administrative judge.

In Rash v. State the court considered more precisely the issue of what action by the defendant constitutes a waiver. In Rash, the trial was postponed beyond the 180-day deadline because neither a judge nor a jury was available. The defendant's attorney neither affirmatively consented to nor objected to this postponement. At trial, the court denied defendant's oral motion to dismiss. The Court of Special Appeals affirmed, holding that defendant had waived his right to call for the dismissal by failing to object to the postponement. Although the Court of Appeals affirmed the judgments of the lower courts denying defendant's motion to dis-

217. Id. at 21-22, 472 A.2d at 446.
218. Cf. Grant v. State, 299 Md. 47, 53, 472 A.2d 459 (1984) (holding inter alia that failure to show the administrative judge's approval of the postponement at the very least constitutes a prima facie case of noncompliance with § 591 and rule 746).
219. 299 Md. 32, 472 A.2d 452 (1984), discussed at supra note 149.
220. Id. at 39-40, 472 A.2d at 455-56. Note that in Farinholt, none of the three postponements was ordered by an administrative judge as required by § 591 and rule 746. The court acknowledged this noncompliance with the section and the rule. However, the issue of compliance was not properly before them because the defendant waived the section and the rule as grounds for dismissal by seeking or expressly consenting to a postponement that resulted in a trial date in violation of the 180-day rule. Id. at 37-38 n.2, 39-40, 472 A.2d at 454 n.2, 455-56. Therefore, by seeking or expressly consenting to a postponement that results in a trial date in violation of the 180-day rule, the defendant forfeits any argument that he might have had, such as a postponement granted without good cause, postponement ordered by someone other than the administrative judge or a postponement that resulted in an inordinate delay.
222. Id. at 70, 472 A.2d at 471. The Court of Special Appeals also found that the dismissal sanction was inappropriate because defendant had failed to file a written mo-
miss, it rejected the reasons used by the Court of Special Appeals, finding instead that the defendant had failed to establish that the dismissal represented an abuse of discretion. In rejecting the Court of Special Appeals' reasoning, the court noted that a defendant's "mere failure to object" is not a waiver.\textsuperscript{223}

Addressing another aspect of the waiver issue, the court in \textit{Morgan v. State}\textsuperscript{224} held that a defendant may waive his right to challenge noncompliance with the statute by not asserting each specific ground on which the motion to dismiss could be based.\textsuperscript{225} At trial, the defendant moved for a dismissal on the basis that section 591 and rule 746 were violated because there was not good cause for postponement. The trial court denied the defendant's motion,\textsuperscript{226} the trial continued and the defendant was convicted. Before the Court of Special Appeals, as part of the argument that the trial court erred in denying the motion to dismiss, the defendant introduced the additional argument that the trial judge was not vested with the authority to issue a continuance, since only the administrative judge possessed such power.\textsuperscript{227} In an unreported opinion, the Court of Special Appeals affirmed the trial court's action.\textsuperscript{228} The Court of Appeals upheld that affirmation on the ground that there was good cause for postponement, rejecting the defendant's argument that there had been no order by an administrative judge. Although the Court of Appeals stated that the record could be read to establish a prima facie case of violation of section 591 and rule 746 on the ground that the postponement was not ordered by the administrative judge, the court ruled that the defendant could not raise the absence of a proper postponement order for the first time on

\textsuperscript{223}This has been expressly overruled by \textit{Frazier}. See supra text accompanying note 170.

\textsuperscript{224}299 Md. at 70-71, 472 A.2d at 471.

\textsuperscript{225}299 Md. 480, 474 A.2d 517 (1984), discussed at supra text accompanying notes 191-95.

\textsuperscript{226}Id. at 484-85, 474 A.2d at 520.

\textsuperscript{227}Id. at 485-86, 474 A.2d at 520-21.

\textsuperscript{228}The court did so on several grounds. First, it held that there was good cause for the postponement. Next, the court noted that the defendant had the burden of proving that the trial judge was not the authorized administrative judge, and implied he had not done so. An alternative holding was that the "'dismissal sanction is not appropriate when an otherwise valid continuance is granted by a judge other than an administrative judge or his designee.'" Id. at 486, 474 A.2d at 520-21 (quoting the unreported Court of Special Appeals decision). This latter holding is wrong because § 591 and rule 746 vest the postponement authority exclusively in the administrative judge or his designee. The court also should not have considered the latter two grounds at all since they were raised for the first time on appeal.
appeal.\footnote{229}

The absence of a postponement order issued by an administrative judge is now perhaps the easiest route to dismissal under section 591 and rule 746. This is because the defendant need only show that the postponement was not ordered by an administrative judge or his designee. However, it is probable that this ground for dismissal is the least likely to occur.

4. Nol Pros and Speedy Trial.—In two cases decided in 1984, the Court of Appeals looked at the interaction of nol pros\footnote{230} of criminal charges and the statutory speedy trial sanction. In Curley v. State,\footnote{231} counsel for the defendant entered his appearance on September 22, 1980; the 180-day period therefore expired on March 23, 1981. A trial date was set for November 20, 1980, but on November 12, 1980 the defendant’s counsel requested a postponement. Although the postponement was granted, the case was never assigned.\footnote{232} On March 23, 1981, the date the 180-day period expired, the state entered nol pros\footnote{233} but the charges were refiled on June 26, 1981. Curley’s defense counsel filed three motions to dismiss for noncompliance with section 591 and rule 746, and all three were denied.\footnote{234}

The defendant was convicted and appealed to the Court of Special Appeals. Pursuant to rule 1015\footnote{235} the Court of Special Appeals certified the case to the Court of Appeals. The Court of Appeals accepted the certification application and issued a writ of certiorari.

Generally in Maryland, a nol pros terminates the charges. If the charges are refiled the “speedy trial clock” begins to run anew with the second charges.\footnote{236} However, where the nol pros of the first

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\textbf{229.} 299 Md. at 489-90, 474 A.2d at 522-23.  
\textbf{230.} A nol pros, formally known as a nolle prosequi, is a formal entry on the record, by the prosecuting officer, in which he declares that the case will not be prosecuted further. BLACK'S LAW DICTIONARY 945 (5th ed. 1979).  
\textbf{232.} Id. at 452-53, 474 A.2d at 503-04. The court noted that the record does not disclose why a new trial date was not assigned. Id. at 453 n.4, 474 A.2d at 504 n.4.  
\textbf{233.} The prosecuting attorney informed the defense counsel that he entered the nol pros because the family of the victim requested the State not to prosecute and because a key piece of evidence was apparently inadmissible. Id. at 453, 474 A.2d at 504.  
\textbf{234.} Id. at 453-54, 474 A.2d at 504.  
\textbf{235.} Md. R.P. 1015(a) provides for certification of a question of law or the entire controversy to the Court of Appeals.  
\textbf{236.} 299 Md. at 459-60, 474 A.2d at 506-07. The court discussed the approaches to the nol pros/speedy trial problem taken in other jurisdictions. These approaches fall into three broad categories. The first category consists of cases in which the statutory period is neither tolled nor ended by the entry of a nol pros. If charges are refiled, the statutory period runs from the date of the original charging document. Id. at 455-56,}
charges has the purpose or effect of circumventing the requirements of section 591 and rule 746,\textsuperscript{237} the speedy trial clock will run from the date of the first charges.\textsuperscript{238} In \textit{Curley}, the necessary effect of the nol pros was to circumvent section 591 and rule 746, since dismissal would have been mandated because trial could not have been held within the 180-day period.\textsuperscript{239}

In \textit{State v. Glenn},\textsuperscript{240} the charging documents were defective and the defendant’s attorney indicated that he would object to any amendment. The charges were nol prosed on the date scheduled for the trial, which was approximately two months before the expiration of the 180-day deadline. The charges were refiled on the same day. Approximately one month after the expiration of the 180-day deadline and about one month before the scheduled trial date, the defendant filed a motion to dismiss on the ground that section 591 and rule 746 had been violated. The circuit court granted the motion to dismiss, with prejudice.\textsuperscript{241} The Court of Appeals reversed, holding that the speedy trial clock would run anew with the filing of the second charges because, in this case, the necessary effect and purpose of the nol pros was not to circumvent the requirements of section 591 and rule 746.\textsuperscript{242} \textit{Glenn} can be distinguished from \textit{Curley} because in the former case the defendant could have been tried within the statutory period at the time the nol pros was entered, whereas in \textit{Curley} this would not have been possible.\textsuperscript{243}

A related issue was considered by the Court of Appeals in \textit{State v. Phillips}.\textsuperscript{244} In \textit{Phillips}, the court granted defendant’s motion to

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dismiss on the ground that the charging document was defective; the motion was granted approximately four months before the expiration of the 180-day period. Phillips was reindicted on the same charges about one month after the original charges were dismissed. Two days after the original 180-day period expired, the defendant moved to dismiss the second prosecution because the State failed to comply with section 591 and rule 746. The circuit court granted the motion, holding that the State is not "'free to indict on a new indictment unless that is done within the time limits imposed by'" the statute and the rule. 245 The Court of Special Appeals affirmed in an unreported opinion. The Court of Appeals reversed, holding that, in such a case, the speedy trial period begins to run anew with the filing of the second charges. 246 The court reasoned that, where the defendant sought dismissal, he was not entitled to the benefit of the 180-day period, as he might be in a case where the State nol prosed the original charges.247 Moreover, the court indicated that the decisions in Glenn and Curley were dispositive.248

Glenn, Curley and Phillips together indicate that, if the original charges against a defendant are dismissed on defendant’s motion or a nol pros is entered for legitimate reasons, and if a second indictment is then issued, section 591 and rule 746 will operate as if the prior prosecution had not been initiated.

F. Right to Jury Trial

In Kawamura v. State,249 the Court of Appeals held that the Maryland Declaration of Rights entitled a defendant charged with petty theft to a jury trial in the first instance.250 Kawamura was brought before a Maryland district court and charged with the theft of goods having a value of less than $300, a misdemeanor punishable by a period not to exceed eighteen months and/or a fine not to exceed $500.251 Kawamura requested a jury trial, and the district

245. Id. at 470, 474 A.2d at 512 (quoting the circuit court dismissal order).
246. Id. at 471, 474 A.2d at 513.
247. Id.
248. Id. at 472, 474 A.2d at 513.
court judge denied his request.\textsuperscript{252} A criminal defendant in Maryland is normally entitled by statute to a jury trial in circuit court for any offense punishable by more than ninety days imprisonment.\textsuperscript{253} If, however, the prosecutor in district court recommends and the judge agrees to a sentence of less than ninety days, as happened in Kawamura, by statute the district court is allowed to retain jurisdiction and deny the defendant a jury trial in the first instance.\textsuperscript{254} Kawamura argued that this statutory loophole, (often called the Gerstung rule)\textsuperscript{255} denied him his right to jury trial.

The Court of Appeals looked at whether the application of this provision, in this case, would be unconstitutional under the Maryland Constitution.\textsuperscript{256} The court considered the State's argument,

\begin{itemize}
\item \textsuperscript{252} 299 Md. at 279, 473 A.2d at 440.
\item \textsuperscript{253} Md. CTS. \\& JUD. PROC. CODE ANN. § 4-302(d)(2)(i) (1984).
\item \textsuperscript{254} Id. § 4-302(d) provides:
\begin{enumerate}
\item (d) Jury trial.—(1) The District Court is deprived of jurisdiction if a defendant is entitled to and demands a jury trial at any time prior to trial in the District Court.
\item (2)(i) Except as provided in subparagraph (ii) of this paragraph, unless the penalty for the offense with which the defendant is charged permits imprisonment for a period in excess of 90 days, a defendant is not entitled to a jury trial in a criminal case.
\item (ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, the presiding judge of the District Court may deny a defendant a jury trial if:
\begin{enumerate}
\item The prosecutor recommends in open court that the judge not impose a penalty of imprisonment for a period in excess of 90 days, regardless of the permissible statutory or common law maximum;
\item The judge agrees not to impose a penalty of imprisonment for a period in excess of 90 days; and
\item The judge agrees not to increase the defendant’s bond if an appeal is noted.
\end{enumerate}
\item (iii) The State may not demand a jury trial.
\end{enumerate}
\item \textsuperscript{255} The rule is so labelled because Judge Robert J. Gerstung of the Baltimore City District Court developed the concept behind the rule.
\item \textsuperscript{256} The court's analysis focused entirely upon the defendant's rights under the Maryland Declaration of Rights. See infra note 258. Maryland's system meets the federal constitutional requirements because, despite the § 4-302(d)(2)(ii) loophole, trial by jury is guaranteed in the de novo appeal to circuit court. See supra note 250. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Supreme Court upheld a similar Massachusetts statutory scheme, reasoning that the two-tier system absolutely guaranteed "trial by jury to persons accused of serious crimes" and that the system was "fair and not unduly burdensome." Id. at 630. The Massachusetts system was considerably harsher than Maryland's; Massachusetts permitted denial of a jury trial in the first instance even in cases involving felonies with maximum sentences up to, and in some cases over, five years. Id. at 620. Furthermore, unlike the Maryland statute, the Massachusetts statute did not allow a de novo trial following a guilty plea at the district court level, although the Court emphasized the fact that an accused in district court could save himself the burdens of the first trial by simply declining to contest the charges against him and
that the provision limited the possible sentence to ninety days and thus crimes subject to the provision and District Court jurisdiction are automatically petty offenses, and the argument that any right to jury trial a defendant might have in such a case is fully satisfied by his statutory right to a jury trial in a de novo trial on appeal to the circuit court following conviction in District Court. Although the

"admitting sufficient findings of fact," upon which admission, he would be convicted and could then receive a jury trial if he chose to appeal. Id. at 620-22.

The Ludwig Court did a particularly unconvincing job of distinguishing the prior Supreme Court case on the subject. In Callan v. Wilson, 127 U.S. 540 (1888), the Court struck down the District of Columbia's two-tier trial system. Justice Harlan, writing for a unanimous court, said:

But the argument, made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted—even for crimes punishable by confinement in the penitentiary—such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution.

Id. at 556-57.

The Ludwig Court distinguished this case on two somewhat dubious grounds. First, the Court noted that the federal right to jury trial might be greater than the state right because U.S. CONST. art. III, § 2, cl. 3 requires that "[t]he trial of all crimes . . . shall be by jury." 427 U.S. at 630. This seems to be a distinction without a difference. Certainly the Callan Court's holding was not based exclusively on article III; that holding rested on a broad fundamental right to jury trial, a right which the fourteenth amendment has extended to state criminal proceedings. Duncan v. Louisiana, 391 U.S. 145 (1967). Second, the Ludwig Court claimed that the defendant's option of "admitting sufficient findings of fact" (and thus essentially submitting to a conviction based on probable cause) removes the unconstitutional burden of a requirement that an accused first be tried without a jury. 427 U.S. at 630. Justice Stevens, dissenting for himself and three other Justices, points out that the Court's assumption that this conviction is virtually meaningless is totally unjustified. Id. at 634-38 (Stevens, J., joined by Brennan, J., and Stewart, J., and Marshall, J., dissenting). In Maryland, the accused could at least avoid the prejudice that would come from going through the form of an initial trial by simply pleading guilty. But a guilty plea and resulting conviction at the initial trial stage seem a heavy price to pay for the right to a jury trial in the first proceeding. Nevertheless, Ludwig is the law, and under Ludwig, Maryland's system clearly meets the requirements of the Federal Constitution.

257. 299 Md. at 286-87, 473 A.2d at 444.
court conceded that the broad language of the Maryland Declaration of Rights does not afford a jury trial to defendants accused of certain minor offenses, a class which the court declined to define, the state constitutional right to jury trial does attach, according to the court, to crimes that have historically been tried before juries and to any infamous offenses or offenses subject to infamous punishment. The court reasoned that, in determining whether an offense is serious enough to warrant a jury trial, a relevant

258. The Maryland Declaration of Rights guarantees the right to jury trial in several places. Article 5 provides "[t]hat the inhabitants of Maryland are entitled to . . . trial by jury . . . ;" article 21 provides "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty," and finally, article 23 provides that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass on the sufficiency of the evidence to sustain a conviction."

259. 299 Md. at 291, 473 A.2d at 447. The court has held that there is no right to jury trial under the Maryland Declaration of Rights in prosecutions for a number of minor crimes. See, e.g., Dougherty v. Superintendent, 144 Md. 204, 124 A. 870 (1923) (knowingly operating or occupying a stolen motor vehicle); Norwood v. Wiseman, 141 Md. 696, 119 A. 688 (1922) (selling liquor without a license); State v. Loden, 117 Md. 373, 83 A. 564 (1912) (operating a moving picture machine without a license); Crichton v. State, 115 Md. 423, 81 A. 36 (1911) (speeding); State v. Ward, 95 Md. 118, 51 A. 848 (1902) (violation of local game regulations); State v. Glenn, 54 Md. 572 (1880) (vagrancy and habitual disorderliness).

260. 299 Md. at 291, 473 A.2d at 447. In Danner v. State, 89 Md. 220, 42 A. 965 (1899), which the Kawamura court found controlling, the defendant, like Kawamura, received a non-jury trial in district court, where he was convicted of petty larceny (stealing a dollar's worth of corn). The justice of the peace sentenced Danner to thirty days in the county jail. The statute conferring jurisdiction on the district court, Acts of 1896, Ch. 128, was similar to the present statute. It provided for a jury trial in the circuit court if the defendant prayed for one and also for a de novo appeal to the circuit court with a right to jury trial following a final conviction by the justice of the peace. On appeal, the circuit court held that Danner had waived his right to pray a jury trial. Id. at 222, 42 A. at 965. Danner appealed, and the Court of Appeals overruled the circuit court, holding that Danner's right to jury trial was violated by the district court proceeding, because his offense being an infamous one, he was entitled to a jury trial at the initial proceeding. Moreover, Danner had not effectively waived this right because the alternative was to wait a matter of weeks or months until there was room on the circuit court docket and this amounted to duress, forcing him to choose to be tried by the district court. Id. at 228-29, 42 A. at 968.

In Baum v. Warden of Jail, 110 Md. 579, 73 A. 294 (1909) and later in State v. Stafford, 160 Md. 385, 153 A. 77 (1931), the court found a state constitutional right to jury trial at the initial trial level in cases involving assault and battery.

Most recently, the Court of Appeals held that a defendant accused of driving while intoxicated has the right to a jury trial in the first instance. Fisher v. State, No. 84-89 (Md. Jan. 10, 1984) (per curiam order); see The Daily Record, Jan. 29, 1985, at 1, col. 1 ("Court of Appeals holds jury trial right attaches at 'first instance' in DWI cases").

It may be difficult to draw a clear distinction between these cases, in which the court found a right to jury trial at the first trial, and the cases mentioned in supra note 259 in which the court did not. The court has repeatedly refused to draw any sharp lines in this area.
consideration is not the maximum sentence or place of incarceration determined by the court in a particular case, but rather the maximum sentence and place of incarceration established by the legislature for the offense charged.\textsuperscript{261} If there is a constitutional right to jury trial, the right attaches the first time the defendant is tried; it cannot be satisfied simply by providing a subsequent de novo trial in the circuit court on appeal. The court determined that Kawamura's alleged crime was serious enough to warrant a jury trial. Therefore, the application of the Gerstung rule violated his right to jury trial under the Maryland Declaration of Rights.\textsuperscript{262}

The court's decision could be interpreted as a narrow application of existing precedent. Certainly the court was careful not to strike down section 4-302(d)(2)(ii) explicitly. The court, however, based its decision on an expansive view of the right to jury trial. The court might well consider any offense carrying a penalty of more than ninety days imprisonment sufficiently serious enough to warrant a jury trial. If this is so, the court has eviscerated the Gerstung rule.

In response to this decision, requests for jury trial by defendants brought before the district courts have jumped dramatically.\textsuperscript{263} Some prosecutors believe that allowing so many jury trials will prove administratively unworkable, and that most requests for jury trials by district court defendants are simply attempts to buy time, to gain leverage in plea negotiations, or to judge-shop.\textsuperscript{264} Kawamura has generated great confusion. The Court of Appeals needs to resolve this confusion by giving some clear, consistent guidelines as to the scope of the right to jury trial under the Maryland Constitution.

\textbf{G. Trial Procedures}

1. \textit{Access to Pretrial Hearings}.—In \textit{Buzbee v. Journal Newspapers},\textsuperscript{265} the Court of Appeals considered the relationship between the public's right of access to judicial proceedings and a criminal accused's right to a fair trial. The court joined a number of other jurisdictions holding that the public has a qualified right of access to pretrial judicial proceedings in criminal cases.\textsuperscript{266} The court found that the deci-

\textsuperscript{261} 299 Md. at 295-96, 473 A.2d at 448.
\textsuperscript{262} Id. at 297, 473 A.2d at 449.
\textsuperscript{263} The Daily Record, Jan. 29, 1985, at 1, col. 3 ("Are jury requests actually for delay, judge-shopping?").
\textsuperscript{264} Id.
\textsuperscript{265} 297 Md. 68, 465 A.2d 426 (1983).
\textsuperscript{266} Id. at 70, 465 A.2d at 427. See United States v. Chagra, 701 F.2d 354 (5th Cir. 1982) (bail reduction hearing); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982)
sion to allow access in a particular case should be made by weighing the qualified right of access against the probability of prejudice to the defendant that would impair his right to a fair trial, and adopted the test for "probable prejudice" used by the United States Supreme Court in Gannett Co. v. DePasquale. In Buzbee, the court applied this analysis and determined that the defendant would not be prejudiced by allowing the public to exercise right of access to his pretrial suppression hearing. In reaching its decision, the court noted that, while the record reflected a finding of extensive publicity, there was no finding that an impartial jury could not be found.

The defendant had been accused of being the man responsible for a series of rapes committed between March, 1981 and November, 1982 in the Aspen Hill area of Montgomery County, rapes that appeared to have been committed by the same person. The crimes and the subsequent arrest of the defendant received considerable media attention, and in the days that followed the defendant's arrest, the media focused extensively on his background.


267. 297 Md. at 80-82, 465 A.2d at 433.
268. 443 U.S. 368, 393 (1979). See 297 Md. at 80-81, 465 A.2d at 433.
269. 297 Md. at 70, 465 A.2d at 427.
270. Id. at 83, 465 A.2d at 434.
271. Id. at 71, 465 A.2d at 428.
272. Id. at 72, 465 A.2d at 428.
After the grand jury returned indictments for seven rapes, the defendant filed two motions to suppress evidence and, at the same time, applied for restrictive orders to exclude the public, including the press, from the suppression hearing, to enjoin involved persons from making statements about the case, and to seal certain court records. Journal Newspapers, publishers of three newspapers, intervened to oppose the restrictions on access. The trial court issued restrictive orders, limited in scope and duration, but, under accelerated appeal to the Court of Special Appeals, the orders were vacated. The Court of Appeals granted Buzbee's petition for certiorari, in which he sought reinstatement of two of the restrictive orders.

The question raised on appeal was "whether the [newspapers] have any right to attend, and thereby report on, a pretrial suppression hearing." The court held that the public's qualified right of access to criminal trials extends to pretrial proceedings, basing the right of access on the first and fourteenth amendments to the United States Constitution and on article 40 of the Maryland Declaration of Rights. Noting that the United States Supreme Court has not spoken directly on the subject of a constitutional right of access to pretrial proceedings, the Court of Appeals found that

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273. Id. at 70, 465 A.2d at 427.
274. Id. at 70-73, 465 A.2d at 428.
275. Id. at 71, 465 A.2d at 428. The trial court had issued a closure order excluding the public from the suppression hearing, a gag order enjoining statements about the case, and had sealed certain records. When the Court of Special Appeals vacated the orders, no stay was issued, so the previously sealed records became available to Journal Newspapers.
276. Id. at 73, 465 A.2d at 429.
277. U.S. CONST. amend. I provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." This provision has been incorporated into the fourteenth amendment and applied to the states. See Gitlow v. New York, 268 U.S. 652 (1925).
278. MD. CONST. DECL. OF RTS. art. 40 provides: "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."
279. In Gannett Co. v. DePasquale, 443 U.S. 368, 394 (1979) the Court held that the press and the public had no sixth amendment right of access to a pretrial suppression hearing when the parties and the court had agreed to a closure order. However, the Court of Appeals of Maryland stated that the Supreme Court in Gannett Co. had "assumed that there was a right of public access under the First and Fourteenth Amendments to pretrial proceedings and held that the assumed right had not been violated." 297 Md. at 81, 465 A.2d at 433. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion), the Court held that the press and public had a first amendment right to attend state criminal trials. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982) a majority of the Court struck down, on first amend-
some historical and institutional features of the criminal justice system that grant first amendment protection to a right of access to criminal trials also apply to pretrial judicial proceedings.\textsuperscript{280}

The court analogized from the reasoning of two recent Supreme Court decisions finding a qualified right of access to attend criminal trials,\textsuperscript{281} and determined that the presumption of openness that has historically characterized criminal trials also extends to pretrial proceedings.\textsuperscript{282} Although the history of open pretrial hearings is not as well entrenched as that of criminal trials, the experience thus far is that they are presumptively open.\textsuperscript{283} The court found that the practice in Maryland accords with that experience, and the party seeking to restrict openness has the burden of obtaining an order to alter the regular procedure.\textsuperscript{284}

The court then examined the institutional features of our criminal justice system that encourage open trials, identifying a number of "societal interests" that require open court proceedings, such as an educative interest in the judicial process and an interest in assuring that the proceedings are conducted fairly.\textsuperscript{285} The court con-
cluded that the institutional reasons for having open trials apply to pretrial hearings as well.\textsuperscript{286}

Since the right of access is not absolute,\textsuperscript{287} a trial court decision on closure involves a balancing of the interests of the moving party and the societal interest in public access.\textsuperscript{288} When the defendant's interest is to be tried by an impartial jury, a closure decision involves a weighing of the probability of prejudice to that interest against the public's interest in open proceedings.\textsuperscript{289} The court adopted a "'reasonable probability of prejudice'" standard, approved in Gannett Co. v. DePasquale,\textsuperscript{290} to assess which interest should prevail, and adopted the three pronged test, proposed by Justice Blackmun, to analyze that "probability" standard.\textsuperscript{291} The defendant must (1) show that irreparable harm to his right of a fair trial will ensue without closure, (2) that alternatives to closure would be ineffective and (3) that closure will effectively protect against the perceived harm. Therefore, before a trial court can close a pretrial hearing, he must first find that there is a reasonable probability of prejudice and determine the nature and extent of the threatened prejudice.\textsuperscript{292} Next, the court must determine the efficacy of alternatives short of complete closure, and, if some restriction is found to be necessary, the court must adopt the least restrictive alternative.\textsuperscript{293}
Applying this test to the facts of the instant case, the Court of Appeals noted that the record only reflected a finding of extensive publicity and that there was no finding of a probability of prejudice at all. Moreover, there was neither an express finding that an impartial jury could not be impaneled nor any likelihood, given the population of Montgomery County, that an impartial jury would not be impaneled. Therefore, the Court affirmed the Court of Special Appeals' decision to vacate the trial court's restrictive order.

_Buzbee_ clearly stands for the proposition that there is a right of public access to pretrial criminal proceedings absent a showing by an interested party that there is a reasonable probability of substantial prejudice to another right. Although the standard for determining reasonable probability imposes a difficult burden on the party seeking closure, the strict standard recognizes the importance of pretrial proceedings in the "modern administration of criminal justice" and the great societal interests in keeping those proceedings open to the public. The difficult burden may appear unfair to one accused of highly publicized crimes, but there are many alternatives open to the defendant to protect his interests in a fair trial. And, there are no alternatives that can adequately protect society's interest in public access.

2. Right to Counsel.—(a) Custodial Interrogation.—The Court of Appeals decided two cases in which the police obtained inculpatory statements from suspects who previously had asserted their right to counsel. Generally, inculpatory statements made by a suspect in custody are subject to the protection of _Miranda v. Arizona_ if they result from interrogation. In _Edwards v. Arizona_ the Supreme Court held that "the prosecution may not use [inculpatory] statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." _Id._ at 444. The safeguards suggested by the Court are well-known: the suspect must be advised "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." _Id._

294. _Id._ at 83, 465 A.2d at 434.
297. _See supra_ note 285.
298. For example, change of venue, deferment of pretrial hearings until after the jury is selected, trial continuance, partial closure of pretrial hearings, use of voir dire, sequestration, and admonition of the jury.
299. 384 U.S. 436 (1966). The Supreme Court held that "the prosecution may not use [inculpatory] statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." _Id._ at 444. The safeguards suggested by the Court are well-known: the suspect must be advised "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." _Id._
300. _Id._ In Rhode Island v. Innis, 446 U.S. 291 (1980), the Supreme Court defined "interrogation," for _Miranda_ purposes, to include not only "express questioning," but
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Court held that "an accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The Edwards standard required the Court of Appeals in these two cases to decide the scope of the ban on further interrogation and to determine what conduct by an accused constitutes the initiation of further communication.

In applying Edwards in Radovsky v. State, the Court of Appeals determined that the ban on further custodial interrogation subsequent to a request for counsel is not limited to questioning about the specific crime with which a suspect is charged, but extends at least to questioning about any related crimes. Radovsky was arrested and charged with attempted burglary. Upon being advised of his Miranda rights, he specifically requested the assistance of counsel. Later, two detectives approached Radovsky and stated that they wished to discuss any involvement he might have in a series of unsolved burglaries. After indicating that he would talk, Radovsky signed a form waiving his rights to remain silent and to have counsel present. According to the detectives' testimony, the subsequent interrogation concerned recent burglaries generally, not necessarily including or excluding the specific burglary with which Radovsky was initially charged.

The Court of Appeals reversed Radovsky's conviction because the trial court failed to suppress the evidence obtained after Radovsky's request for counsel. Relying on Edwards, the court held that the police clearly violated Radovsky's previously invoked right to counsel when the two detectives initiated their interrogation before...
Radovsky’s attorney was present.\textsuperscript{307} The court did not find persuasive the State's argument that the interrogation concerned unsolved burglaries in general, rather than the specific burglary with which Radovsky was charged.\textsuperscript{308} The detectives' actions in Radovsky clearly did not comport with the Edwards rule\textsuperscript{309} that "when an arrestee expresses his desire to have counsel present all interrogation must cease 'unless the accused himself initiates further communication.'"\textsuperscript{310}

In contrast, Bowers v. State\textsuperscript{311} is an example of a case in which inculpatory statements obtained after the accused expressed a desire for counsel were held admissible because the accused initiated communication with the police.\textsuperscript{312} Bowers, while in custody on a charge of credit card fraud, signed a written waiver of his Miranda rights. Following police questioning concerning the credit cards, which had belonged to a murder victim, Bowers asked to use the telephone. Upon returning to the police interview room, Bowers stated that he needed a lawyer. He then proceeded without pause to give the police a lengthy self-incriminating statement.\textsuperscript{313}

The Court of Appeals held that because Bowers initiated the conversation, "'[t]here was no interrogation within the meaning of Miranda.'"\textsuperscript{314} Absent a police-initiated interrogation,\textsuperscript{315} "'[n]othing prohibited the police from merely listening to what [the accused]
had to say.”

Thus, the Court of Appeals declined to require that the police terminate all communication, irrespective of who initiates it, once a suspect invokes his right to counsel.

(b) At Trial.—In Spence v. State the Court of Appeals held that a defendant’s constitutional right to the assistance of counsel includes an absolute, nonviolable right to have counsel present closing argument prior to verdict. At the conclusion of all the evidence in Spence’s nonjury trial on charges of robbery, burglary, assault and theft, defense counsel moved for an acquittal. The next day, the trial judge denied the motion and continued without pause in announcing his verdicts of guilty on all charges. When defense counsel objected to his lack of opportunity for summation prior to the verdicts, the trial judge struck the verdicts and directed counsel to present his summation. After considering counsel’s arguments, the judge reinstated his previously announced verdicts.

The Court of Appeals reversed the convictions in a 4-3 decision. Both the majority and the dissent recognized that the opportunity for summation prior to verdict is part of the constitutionally protected right to counsel in nonjury as well as jury trials. The Court of Appeals first recognized that this guaranty of closing argument applied to nonjury trials in Yopps v. State. In that case, defense counsel was given no opportunity for closing argument because the trial judge indicated such argument would not change


316. 298 Md. at 129, 468 A.2d at 108.

317. The difficult question of what constitutes an initiation of communication is one that must be examined on a case-by-case basis. See, e.g., Oregon v. Bradshaw, 103 S. Ct. 2830, 2835, 2839 (1983), in which the plurality and the dissent disagreed as to whether a suspect’s inquiry, “Well, what is going to happen to me now?,” constituted an initiation of communication within the meaning of Edwards.


319. The right to counsel is guaranteed by article 21 of the Maryland Constitution Declaration of Rights and by the sixth amendment to the United States Constitution as applied to the states through the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145 (1968).

320. 296 Md. at 424, 463 A.2d at 812.

321. Id. at 418-19, 463 A.2d at 809. Defense counsel presented his closing argument only after the court denied his motion for a mistrial.

322. Id. at 419, 463 A.2d at 809; id. at 432, 463 A.2d at 815-16 (Murphy, C.J., dissenting).

his mind.\textsuperscript{324} \textit{Spence} raised the distinguishable issue of whether a trial judge, after pronouncing a verdict in violation of the right to summation, may correct the error by striking the verdict and permitting argument thereafter.\textsuperscript{325}

The Court of Appeals held that such a corrective measure is insufficient to comply with a defendant's right to have counsel present argument.\textsuperscript{326} In reaching its holding, the majority fashioned "a \textit{per se} rule which requires a new trial whenever the trial judge announces a verdict before the defendant has either made or waived closing argument."\textsuperscript{327} The three dissenting judges would have preferred a more flexible rule allowing a good faith exception when the premature verdict was "inadvertent" rather than "intentional."\textsuperscript{328}

\textit{(c) Waiver of Right to Counsel.\textemdash} In \textit{Colvin v. State}\textsuperscript{329} the Court of Appeals clarified when a court must inquire into a defendant's waiver of counsel. Former Maryland Rule 723(c) required that the court conduct an inquiry prior to accepting the waiver whenever "a defendant indicates a desire or inclination to waive counsel."\textsuperscript{330} Colvin, who was seeking to replace the public defender with an attorney of his own choice at state expense, also requested that he be allowed "to defend himself 'to a degree.'"\textsuperscript{331} The trial court denied both of these motions, the latter without conducting an inquiry concerning waiver of counsel.\textsuperscript{332}

Previously, in \textit{Snead v. State},\textsuperscript{333} the Court of Appeals had held that "any statement by the defendant from which the court could reasonably conclude that the defendant desired self-representation

\begin{footnotes}
\item[324] 228 Md. at 206, 178 A.2d at 881.
\item[325] 296 Md. at 421, 463 A.2d at 810.
\item[326] \textit{Id.}
\item[327] \textit{Id.} at 426, 463 A.2d at 813 (Murphy, C.J., dissenting).
\item[328] \textit{Id.} at 437, 463 A.2d at 818 (Murphy, C.J., dissenting).
\item[330] Former Md. R.P. 723(c) (1977) (rescinded July 1, 1984) provided in part: "When a defendant indicates a desire or inclination to waive counsel, the court may not accept the waiver until it determines, after appropriate questioning on the record in open court, that the defendant possesses the intelligence and capacity to appreciate the consequences of his decision . . . ." That provision has been superseded by Md. R.P. 4-215(b), which provides in part: "If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until it determines, after an examination of the defendant on the record . . . that the defendant is knowingly and voluntarily waiving the right to counsel."
\item[331] 299 Md. at 99, 472 A.2d at 958 (emphasis in original).
\item[332] \textit{Id.}
\end{footnotes}
would be sufficient” to trigger an inquiry into waiver of counsel.\textsuperscript{334} The Colvin court determined that, because Colvin modified his self-representation request with the phrase, “to a degree,” the threshold inquiry required by Snead had not been triggered.\textsuperscript{335} This holding construes Snead very narrowly. In effect, nothing less than an unequivocal statement by the defendant that he wants to represent himself would seem sufficient to trigger the Snead inquiry.\textsuperscript{336}

Because new Maryland rule 4-215(b) modifies the language of the former waiver-of-counsel provision, the precise issue raised in Colvin may be moot. The new rule requires that the court conduct a waiver inquiry only “[i]f a defendant who is not represented by counsel indicates a desire to waive counsel.”\textsuperscript{337} Colvin, who was represented by a public defender, albeit one with whom he was dissatisfied, apparently would not meet the prerequisite for an inquiry under the new rule. A defendant may request, as Colvin did, appointment of a different attorney,\textsuperscript{338} but regardless of the ruling on that request, the defendant remains represented by counsel for purposes of rule 4-215(b). Thus, under the new rule, a defendant in Colvin’s position may not be entitled to a waiver inquiry even if his expressed desire to waive counsel is unequivocal.\textsuperscript{339}

3. Privilege Against Self-Incrimination.—In Mann v. State’s Attorney\textsuperscript{340} the Court of Appeals found that, under the circumstances of the case, the defendant, who was found incompetent to stand trial, was also incompetent to waive his constitutional privilege against

\textsuperscript{334} Id. at 127, 406 A.2d at 101. There, Snead had asked for a continuance in order to find his own attorney to replace the assigned public defender, with whom Snead was dissatisfied. When the court refused to grant the continuance, Snead stated, “I don’t want no attorney then.” Id. at 125-26, 406 A.2d at 100. The Court of Appeals concluded that Snead’s declaration was sufficient to require an inquiry as to whether he truly wanted to represent himself. Id. at 132, 406 A.2d at 103.

\textsuperscript{335} 299 Md. at 101, 472 A.2d at 959. The court noted that Colvin was at best seeking “hybrid” representation, rather than complete self-representation. Id.

\textsuperscript{336} Judge Davidson, in dissent, interpreted Snead less rigidly, saying an unequivocal statement is not necessary to trigger the inquiry. Id. at 128-29, 472 A.2d at 973-74 (Davidson, J., dissenting).

\textsuperscript{337} Md. R.P. 4-215(b) (emphasis added).

\textsuperscript{338} A defendant may also seek to discharge counsel, as provided in Md. R.P. 4-215(d). If the court permits the discharge and the defendant then indicates a desire to waive counsel, the court must conduct a waiver inquiry.

\textsuperscript{339} It is difficult to accept such an interpretation. A represented defendant who unequivocally expresses a desire to waive counsel is, in effect, stating that he wishes to discharge present counsel. The relevant inquiry thus may become the rule 4-215(d) inquiry concerning requests to discharge counsel. The Colvin holding may be applied in determining when that inquiry is triggered.

self-incrimination. Mann was charged in a seventy-five-count indictment of crimes including multiple murder, assault with intent to murder, and use of a handgun in the commission of crime of violence, and faced a possible death sentence. At a pretrial hearing he was adjudged incompetent to stand trial. The State’s Attorney and a reporter subsequently requested permission to interview Mann. Mann apparently wanted to be interviewed and, following a hearing on motions seeking permission to interview him, the trial court ordered that the interviews could take place. The trial court noted that, as Mann was not competent and thus could not waive his Miranda rights, any statement made during the interview would be inadmissible in a trial.

Mann’s public defender appealed the order and the Court of Appeals, finding that it was an appealable final order, granted certiorari. The court considered competing constitutional arguments. Mann’s public defender argued that he was not competent to waive his fifth amendment privilege against self-incrimination; the State’s response was that such a privilege claim was premature. At the same time, the reporter raised his first amendment right to speak with Mann, and argued that Mann had right to exercise his first amendment rights.

The court, in addressing these arguments, looked to the nature of Mann’s incompetency. The trial court’s finding that Mann was incompetent to assist in his legal defense meant also that Mann was not competent “to consider the legal implications of his proposed actions;” the court observed that Mann’s statements could destroy his own defense. Accordingly, the court held that, in this case, Mann was not competent to waive his privilege against self-incrimination.

341. See U.S. Const. amend. V.
342. 298 Md. at 162, 468 A.2d at 125.
343. Id. at 162-63, 468 A.2d at 125.
344. Id. at 166-67, 468 A.2d at 127.
345. Id. at 163-65, 468 A.2d at 126. The court found the order to be appealable under the “collateral order exception.” Using the recently defined criteria in Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A.2d 483 (1983), the court noted that the order to allow the interview clearly determined a disputed question, which was an important issue, and that the issue would be unreviewable on appeal because it would be too late to undo damage done by the interviews. 298 Md. at 164-65, 468 A.2d at 126.
346. 298 Md. at 167-68, 468 A.2d at 128.
347. The court found that the privilege claim was not premature and so considered the substantive issues. Id. at 170-71, 468 Md. at 129.
348. Id. at 170, 468 A.2d at 129.
349. Id. at 169, 468 A.2d at 129.
In assessing the reporter’s first amendment claim, the court found that because of Mann’s incarceration in Perkins State Hospital, a maximum security facility for the criminally insane, the reporter had no first amendment claim. The court found *Saxbe v. Washington Post Co.*, which holds that there is no right of access for newsmen to visit prison inmates, to be controlling. Analogizing from *Saxbe*, the court held that newsmen had no right of access to Mann while he was hospitalized and thus, no first amendment rights of the reporter were abridged. And as to Mann’s first amendment rights, the court held that because he had been adjudicated incompetent, his counsel could object to the interview even if Mann desired it.

Finding no constitutional reasons to allow Mann to be interviewed, and compelling reasons to prohibit the interview, the court reversed the trial judge’s order granting the interview.

4. Joinder.—In *Graves v. State*, the court was presented with an issue of first impression relating to joinder. The question before the court was whether former Maryland rule 745 dealing with joint and separate trials applies to both court and jury trials. The court held that the rule did so apply and upheld the trial court’s ruling that the trials of a defendant indicted for two similar but un-

351. 298 Md. at 171-72, 468 A.2d at 129.
352. *Id.* at 172, 468 A.2d at 130. This holding was narrowly restricted to the circumstances of this case, which were that Mann was found to be suffering from paranoia and was incompetent to stand trial, and there had been no reconsideration of his competence. Moreover, Mann’s conduct indicated his continuing inability to assist in his own defense. *Id.* at 169-70, 468 A.2d at 129. This decision presumably may not be read to mean that a finding of incompetency to stand trial automatically results in a finding of incompetence to waive rights.
353. *Id.* at 173, 468 A.2d at 130. The court noted that no one but Mann knew what he desired to say, and that what he might reveal might “well prove to be devastating to the defense of the case, either as to guilt or innocence or to an insanity defense.” *Id.* at 170, 468 A.2d at 129.
355. Former Md. R.P. 745 (1977) was incorporated into Md. R.P. 4-253, Joint and Separate Trials, without change. Rule 4-253 provides in pertinent part:

(b) Joint Trial of Offenses.—If a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges. In ruling on the motion, the court may inquire into the ability of either party to proceed at a joint trial.

(c) Prejudicial Joinder.—If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.
related offenses may be joined.356

To reach this decision, the court had to consider whether possible prejudice should prohibit joinder. In *Graves*, evidence was submitted in regard to each offense, which would not have been mutually admissible at separate trials. In prior cases under rule 745, the court had held that, in jury trial cases, the defendant is entitled to separate trials if evidence submitted for each offense is not mutually admissible.357 The reason for allowing the severance is to avoid the prejudice that would occur if a jury, in a joint trial, disregarded instructions on the use of each piece of evidence. The court in *Graves* ruled, however, that joinder does not prejudice a defendant, as a matter of law, in cases in which the trial court is the trier of fact.358 The court then looked to see if the facts in *Graves* indicated any prejudice, and found that the defendant was not prejudiced because he was not embarrassed or confounded in his defense. Also, the court concluded that the trial court had reached its decision on each offense only upon the evidence relevant to each individual charge.359 Thus, the court ruled that joinder had not prejudiced the defendant.360

*Graves* extends to joinder the general rule that certain practices may be allowed in court trials that would not be allowed in jury trials, because of the distinction between a judge and a jury as trier of fact. After *Graves*, joinder of similar offenses with evidence that is not mutually admissible may be permitted in court trials, if the facts so allow, while *McKnight* still compels separate jury trials, as a matter of law.

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356. 298 Md. at 549-50, 471 A.2d at 705.
358. 298 Md. at 549-50; 471 A.2d at 705. The court used the standard for assessing prejudice that it had used in a related case tried before a jury, in which the evidence likewise would not have been mutually admissible at separate trials. See generally McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977). In *McKnight* the court noted that, in a case of similar offense joinder, the likely prejudice caused by the joinder must be weighed against considerations of judicial economy. Id. at 609-10, 375 A.2d at 554-55. The *McKnight* court held that in a case tried before a jury "a defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials." Id. at 612, 375 A.2d at 556.
The *Graves* court noted that the rationale behind the *McKnight* holding was that a jury would be unable to set aside the likely prejudice caused by the joinder. 298 Md. at 545-46, 471 A.2d at 702-03. The court found that the *McKnight* rationale did not apply to a situation in which the judge was the trier of fact, and thus prejudice would not be assumed as a matter of law.
359. 298 Md. at 549, 471 A.2d at 704-05.
360. Id. at 550, 471 A.2d at 705.
of law, in such situations. Additionally, Graves makes it clear that the Maryland rule allowing joinder pertains to both jury and court trials.

5. Witnesses.—In Colter v. State, the Court of Appeals considered the application of former Maryland rule 741(d)(3), which required timely disclosure of information about witnesses by the defendant so that the State may make beneficial use of it. The court held that a trial judge applying the rule must consider alternatives before excluding a defendant’s alibi witness for violation of the rule.

The defendant in Colter sought to offer a witness who would testify that, at the time and place of the crime, the defendant was elsewhere with him. The prosecution objected because the defendant had failed to furnish the witness’ identity until the day before the trial. Sustaining the objection, the trial judge excluded the witness, without considering viable alternatives, such as granting a continuance to permit the prosecution to investigate the witness’ background and the credibility of the alibi. The defendant was convicted, and the conviction was affirmed by the Court of Special Appeals.

On a writ of certiorari, the Court of Appeals reversed the defendant’s conviction and remanded for a new trial, holding that the trial judge had erred in excluding the witness without considering alternatives. In reaching this determination, the court looked to Taliaferro v. State, which described the several factors that

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361. Id. at 545-46, 471 A.2d at 702-03.
362. Id. at 549, 471 A.2d at 704-05.
364. Former Md. R.P. 741(d)(3) (1977) states that “[u]pon request of the State, the defendant shall . . . furnish the name and address of each witness . . . whom the defendant intends to call as a witness to show he was not present at the time, place and date designated by the State . . . .” This requirement now appears unchanged in Md. R.P. 4-263(d)(3).
365. 297 Md. at 430, 466 A.2d at 1290.
366. Id. at 424, 466 A.2d at 1287. Several reasons have been advanced for the notice of an alibi defense, including: 1) to prevent surprise at trial, 2) to deter false alibis, and 3) to save taxpayer dollars through pretrial investigation. Epstein, Advance Notice of Alibi, 55 J. Crim. L., Criminology & Police Sci. 29, 31-32 (1964).
367. 297 Md. at 430, 466 A.2d at 1290.
368. Id. at 430-31, 466 A.2d at 1290.
370. These factors include: 1) the technical or substantial nature of the disclosure violation, 2) the timing of the ultimate disclosure, 3) the reason for the violation, 4) the degree of prejudice to the parties offering and opposing the evidence, 5) the ability to
should be considered before a witness is automatically excluded under Maryland rule 741(d)(3). The court in Colter affirmed the use of these factors, and affirmed that decisions to impose sanctions for failure to comply with the rule are within the discretion of the trial judge.

Thus it is now clear that, under rule 741(d)(3), a trial judge may not use exclusion as a sanction for violating the rule's notice provisions, unless the facts and circumstances of the case so warrant. Exclusion is retained as a possible sanction, but, to apply the sanction, the trial judge must have explored the reason for the failure to comply with the rule, and have considered whether less harsh sanctions would be warranted.

In Jones v. State the Court of Special Appeals held that the trial judge abused his discretion in failing to require the State to justify the nondisclosure of its informant. The defendant, who had been convicted of several drug-related charges, successfully argued that he was entitled to disclosure under this court's ruling in a similar case, Hardiman v. State.

Under Hardiman a trial judge may order disclosure of information regarding the informant only after hearing evidence demonstrating relevancy and necessity, and then weighing this evidence against the State's reasons for nondisclosure. In Jones the defendant proffered the necessary evidence, but was denied disclosure when the trial judge summarily denied the motion without the benefici
fit of rebuttal evidence by the State.  

The court in Jones held that the defendant's proffer, which detailed the informant's integral role in his arrest, shifted the burden to the State to explain why the disclosure was unnecessary to a fair adjudgment of the case. Further, the court found that without the benefit of any evidence from the State, the trial judge could not have declared that disclosure would endanger the informant. Moreover, the fact that the informant witnessed defendant's drug sale could have been sufficient to indicate that the information about the informant would be useful in proving defendant's entrapment defense. The court reiterated the standard in Hardiman as crucial to decisions requiring disclosure of information about informants:

Absent some evidence of danger to the life or lives of the informant (or others) threatened by the revelation of the identity, there is a very small auncel on the State's side of the scale. The right to produce one's only defense must predominate over protecting the State's flow of information—as important as that purpose may be.

Thus Jones emphasizes that nondisclosure of an informant's identity is not guaranteed, particularly when his identity may be crucial to the accused's defense.

6. Jury Instructions—In Rhoades v. State, the Court of Special Appeals held that failure to give the Lord Hale instruction, which cautions jurors to scrutinize carefully the testimony of a complainant in a sex offense case, is not an abuse of discretion. Although

377. 56 Md. App. at 112, 466 A.2d at 900. The trial judge denied disclosure for three reasons: 1) protection of the informant, 2) the State's lack of knowledge of informant's whereabouts, and 3) insufficient evidence to indicate that, simply because informant witnessed the crime, disclosure is necessary and relevant to a fair defense on the merits. Id.

378. Id.

379. 50 Md. App. at 109, 436 A.2d at 929 (quoting Roviaro v. United States, 353 U.S. 53, 63 (1957)).

380. 56 Md. App. at 113, 466 A.2d at 901 (quoting 50 Md. App. at 109, 436 A.2d at 929 (citation omitted)).


382. Lord Hale observed:

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.


383. 56 Md. App. at 610, 468 A.2d at 655.
Lord Hale's instruction originated nearly 300 years ago, this is only the second case in Maryland appellate jurisprudence to discuss the instruction. In the first case, Brooks v. State, the court held that the instruction may be given in a sex offense prosecution only when issues of corroboration, malice or consent have been raised. The Brooks court tempered this holding, however, by stating that the matter rested within the trial judge's discretion.

In Rhoades, the court reaffirmed the discretionary nature of the Lord Hale instruction, even when the issue of consent is raised. In this case the evidence clearly corroborated the victim's lack of consent and failed to demonstrate any pre-existing malice or motive for revenge. The Court of Appeals confirmed that, in these circumstances, the trial court did not abuse its discretion by refusing the instruction.

The court also noted that the inclusion in Brooks of corroboration as one of the elements that might trigger the Lord Hale instruction conflicts with a concept firmly entrenched in Maryland law—that a rape victim's testimony need not be corroborated to sustain a conviction. Accordingly, the issue of lack of corroboration alone, absent evidence of the victim's consent or malice toward the accused, does not permit a trial judge to give the instruction. Moreover, even when these issues are generated, the giving of the instruction remains discretionary.

H. Judgment

1. Finality.—In Jones v. State the Court of Appeals held that the State's appeal from the trial court's ruling dismissing one count of an indictment was premature because the State filed its appeal

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384. There is no paucity of appellate decisions in other jurisdictions on this issue. For a complete survey and discussion, see Annot., 92 A.L.R.3d 866 (1979).
386. Id. at 296, 452 A.2d at 1291.
387. Id. at 295, 452 A.2d at 1291.
388. 56 Md. App. at 607, 468 A.2d at 653.
389. Id. at 608, 468 A.2d at 653.
391. Id., 468 A.2d at 655.
393. There were four charges: first degree rape, kidnapping, robbery, and assault and battery. The defendant argued that, since the essential element of the rape count, vaginal intercourse, occurred in Washington D.C., the Maryland court had no subject matter
before final judgment was entered on the other counts. The court stated that for a case to be ripe for appeal, judgment must be final and, in a criminal case, the imposition of a sentence, and not the return on a verdict, is a final judgment. Noting that the State's right to appeal in criminal cases is limited and may only be exercised when authorized by statute, the court held that all counts must be disposed of before an appeal can be taken.

When a final verdict has been entered against a defendant in a criminal case the double jeopardy provisions of the United States Constitution and Maryland common law prohibit that defendant's retrial. The issue before the Court of Appeals in Smith v. State was what constitutes a final verdict for double jeopardy purposes.

To support the point that no appeal lies from the entry of a verdict, the court cited Eastgate Assoc. v. Apper, 276 Md. 698, 350 A.2d 661 (1976), a civil action, wherein the court stated, "[i]t is indisputably clear that there is no right to appeal from a verdict." Id. at 701-02, 350 A.2d at 664. (quoting Montauk Corp. v. Seeds, 215 Md. 491, 502, 138 A.2d 907, 912 (1958)). In Eastgate, the court found that the plaintiff's appeal from an instruction granting a directed verdict was premature since the court's instruction was a verdict and not a final order. 276 Md. at 701, 350 A.2d 663-64. See also Happy 40, Inc. v. Miller, 57 Md. App. 589, 471 A.2d 333 (1984) (civil defendant could not appeal from a jury verdict for plaintiff because the trial court never entered any judgments after granting motions for summary judgment and a directed verdict on other counts); Hughes Automotive Co., Inc. v. Polyglycoat Corp., 54 Md. App. 80, 456 A.2d 386 (1983) (grant of defendant's motion to dismiss is not an entry of judgment and does not constitute an appealable order).


Since the appeal was premature, the Court of Special Appeals never had jurisdiction. Thus, the Court of Appeals ruled that the lower court's judgment must be vacated. Id. at 638, 471 A.2d at 1057.
In *Smith*, the defendant was charged with three separate crimes; a mistrial was declared when the jury was unable to reach a unanimous verdict on each charge. On retrial, the defendant was found guilty of two of the charges. He appealed the convictions, asserting that there had been final verdicts of not guilty on two of the charges and thus the retrials subjected him to impermissible double jeopardy.

Following established law, the court declared the general principle to be that the verdict may be altered until it is removed from the jury's province. The court noted that "[t]here was an aura of confusion hovering over the attempt to receive the verdicts of the jury." Reviewing that confusion, the court found that verdicts initially announced by the forelady were not final and were undermined by a subsequent polling. The court also found that it was not an abuse of discretion for the judge to poll a juror a second time, despite an apparent acquittal on two of the charges on the first poll, when that second poll was conducted because a juror was hesitant. In essence, the court held that the verdicts never left the jury's province, so there was no final verdict and hence double jeopardy did not attach.

2. Collateral Estoppel/Res Judicata/Double Jeopardy.—The Maryland courts considered several criminal cases involving the doctrines

402. *Id.* at 162, 472 A.2d at 989-90. The defendant was charged with first degree murder, robbery with a deadly weapon, and using a handgun in the commission of a crime.

403. *Id.*, 472 A.2d at 990. The jury forelady initially announced verdicts of not guilty of the murder and robbery charges and guilty of the weapons charges. She was polled and verified her verdicts, with hesitancy; the other jurors were polled and agreed with the two acquittals but were split on the weapons charge. The forelady was polled a second time because of her hesitancy; she then changed her mind. The jury later resumed deliberations but could not reach agreement, and a mistrial was declared. *Id.* at 171-77, 472 A.2d at 994-97.

404. *Id.* at 163, 472 A.2d at 990.

405. *Id.* at 163 n.1, 472 A.2d at 990 n.1.

406. *Id.* at 168, 472 A.2d at 992-93. The court explained the steps by which a verdict becomes final. There must be some process by which the verdict is given and verified as correct. That process may be "hearkening," see, e.g., *Givens v. State*, 76 Md. 485, 25 A. 689 (1893) (foreman gives verdict, officer records, then secures jurors' assent that verdict is correct), or it may be jury polling. 299 Md. at 166, 472 A.2d at 991; see also *Givens*, 76 Md. at 487, 25 A. 689. The jury may be polled at any time prior to discharge. 299 Md. at 167, 472 A.2d at 992; see also *Md. R.P.* 4-327(d).

407. 299 Md. at 179, 472 A.2d at 998.

408. *Id.* at 178, 472 A.2d at 998.

409. *Id.* at 179, 472 A.2d at 998.

410. *Id.* See also *Heinze v. State*, 184 Md. 613, 616-17, 42 A.2d 128, 130 (1945) (verdict of jury has no effect in law until recorded and finally accepted by the court).
of res judicata, collateral estoppel, and double jeopardy. The courts essentially confirmed existing law in this area.

In *Bowling v. State*, the Court of Appeals considered whether collateral estoppel could be invoked to bar a criminal prosecution following a civil suit. The court held that when a Child in Need of Assistance (CINA) proceeding ended in a final judgment adverse to the State, the doctrine of collateral estoppel prevented the State from bringing criminal sex offense charges against the defendant based upon the same alleged conduct.

The doctrine of collateral estoppel applies to criminal as well as civil proceedings. Maryland courts have developed a set of requirements that must be met in order for collateral estoppel to apply. First, the earlier proceeding must have ended with a final judgment on the issue. Second, the defendant must have been a party to both proceedings. Third, the issue must be one that necessarily was resolved in order to reach the decision in the first case. In *Bowling*, the court concluded that these requirements had been met, finding that there was a final judgment terminating the CINA proceeding; that the defendant was a party to the CINA proceeding since sanctions and fines could have been imposed upon him; and that the question of whether the defendant committed the alleged offense was an ultimate issue of fact resolved at the CINA proceeding.


412. A CINA proceeding is initiated when it appears that the parents are unable or unwilling to give proper care to the child. See Md. Cts. & Jud. Proc. Code Ann. § 3-801(e) (1984).

413. The Court of Appeals has repeatedly recognized that the doctrine of collateral estoppel operates as follows: "If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case." MacKall v. Zayre Corp., 293 Md. 221, 227-28, 443 A.2d 98, 101-02 (1982) (emphasis in original) (quoting Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393 (1954), cert. denied, 350 U.S. 875 (1955)). See also F. James & G. Hazard, Civil Procedure § 11.3, at 532 (2d ed. 1977).

414. 298 Md. at 403, 470 A.2d at 800.


416. Cousins v. State, 277 Md. 383, 398, 354 A.2d 825, 834, cert. denied, 429 U.S. 1027 (1976); see also Carbaugh v. State, 294 Md. 329, 329, 449 A.2d 1153, 1156 (1982) (assuming that the payment of a traffic ticket was a final judgment that determined the issue that the defendant was the driver of the vehicle).

417. 294 Md. at 330, 449 A.2d at 1156.

418. Powers v. State, 285 Md. 269, 279, 282, 401 A.2d 1031, 1037, 1038-39, cert. denied, 444 U.S. 937 (1979); see also Cousins, 277 Md. at 398, 354 A.2d at 834; Scarlett, 201 Md. at 318, 93 A.2d at 757.
proceeding.\textsuperscript{419}

The court's decision in \textit{Bowling} followed established law and well-settled policy. A defendant who is acquitted at a civil hearing should not then be subject to a criminal trial based on the same alleged conduct.

In \textit{Beatty v. State},\textsuperscript{420} the Court of Special Appeals considered the application of the doctrines of res judicata,\textsuperscript{421} collateral estoppel, and double jeopardy\textsuperscript{422} as they relate to crimes committed by a defendant in two different jurisdictions, when the defendant had already been convicted in the first jurisdiction of one set of charges.

Defendants Beatty and Jones kidnapped and raped a woman in Prince George's County and then transported her to St. Mary's

\textsuperscript{419} 298 Md. at 403, 470 A.2d at 800. The criterion that an issue must necessarily have been resolved by the final judgment may be interpreted broadly by the trial court. See generally \textit{Powers}, 285 Md. at 277-87, 401 A.2d at 1036-41. In \textit{Powers} the court considered the general approach used to determine whether a prior judgment was necessarily based on the issue that a defendant in a criminal case seeks to foreclose:

\begin{quote}
This approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."
\end{quote}

\textit{Id.} at 278, 401 A.2d at 1037 (citations omitted) (quoting \textit{Ashe} v. \textit{Swenson}, 397 U.S. 436, 444 (1970). Although both \textit{Powers} and \textit{Ashe} involved two criminal proceedings and \textit{Bowling} involved a civil and a criminal proceeding, the Supreme Court has implicitly acknowledged that the doctrine is to be treated similarly in each setting: "'It cannot be said that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from liability in a debt.' \textit{Ashe}, 397 U.S. at 443 (quoting \textit{United States v. Oppenheimer}, 242 U.S. 85, 87 (1916)).


\textit{421} The Court of Appeals has stated that:

\begin{quote}
[U]nder the doctrine of res judicata . . . a final and valid judgment rendered in one proceeding between two parties operates as a bar in a second proceeding between them on all matters that have been or could have been decided in the original litigation, where the second proceeding involves the same subject matter as the first cause of action.
\end{quote}


\textit{422} The doctrine of double jeopardy

is designed to prevent the prosecution of a person a second time when he has already been subjected to the risk of "life and limb" in a prior trial . . . [T]he action which bars a second prosecution must be one instituted in a court which has the power to convict and punish the person prosecuted for his criminal conduct.

\textit{Moquin v. State}, 216 Md. 524, 527-28, 140 A.2d 914 (1958) (citations omitted). In Maryland, the rule against double jeopardy derives from the common law and is not established by the Maryland Constitution. \textit{Ford v. State}, 237 Md. 266, 269, 205 A.2d 809, 811 (1965).
County where they raped her again and killed her. After they were convicted of rape, kidnapping, and murder in St. Mary’s County, the Prince George’s County State’s Attorney brought numerous additional charges arising out of the same series of incidents, and the defendants sought to prevent the second prosecutions by invoking these doctrines.

In reviewing the motion to dismiss, under these doctrines, the court considered first whether res judicata barred prosecution of appellants in Prince George’s County for offenses committed there, including the first rape and the conspiracies, and concluded that it did not. The crimes that were begun and completed in Prince George’s County were separate crimes that could not properly be charged in St. Mary’s County; therefore, res judicata did not bar their prosecution.

The court also considered whether collateral estoppel barred the prosecutions. In a perfunctory and confused treatment of this issue, the court failed to note that it is normally an acquitted defendant who invokes collateral estoppel to prevent relitigation of a fact found in his favor, but in this case, a convicted defendant was seeking to use the doctrine to bar relitigation of facts found against him. Had the defendant been successful in this curious motion, the result would have been that he would have aided his own conviction. But ignoring this use of the doctrine, the court dispensed with the issue by noting, wrongly, that collateral estoppel is not applicable unless the prosecution has the authority to charge in a single docu-

423. The case was one of a number concerning the kidnap, rape and murder of Stephanie Ann Roper.
424. Defendant Beatty pled guilty to murder, rape and kidnapping pursuant to a plea bargaining agreement in St. Mary’s County. After removal to Anne Arundel County, he was sentenced. Defendant Jones was tried in Baltimore County, following removal from St. Mary’s County, and was convicted of rape, murder and kidnapping.
425. The defendants were charged in Prince George’s County with a number of different conspiracy counts, with the substantive crimes of rape, kidnapping, false imprisonment, and with various accessory crimes.
426. 56 Md. App. at 634, 468 A.2d at 667.
427. Maryland follows the common law rule that the proper venue for trial for a crime is the county of commission. McBurney v. State, 280 Md. 21, 32, 371 A.2d 129, 135 (1977). Also, authority to return the indictment rests with the grand jury in the county in which the crime was committed. In re Special Investigation No. 244, 296 Md. 80, 89, 459 A.2d 1111, 1115 (1983).
428. This is necessarily so because res judicata is invoked only for matters that were, or could have been, litigated together. See supra note 421. The court did find, however, that res judicata and double jeopardy would bar the charge of kidnapping. 56 Md. App. at 637, 468 A.2d at 668. See infra text accompanying notes 432-36.
429. 56 Md. App. at 635, 468 A.2d at 667.
ment all of the offenses committed by a defendant.\textsuperscript{430} This finding overlooks case law that holds that "the doctrine of collateral estoppel applies even when a state is precluded by law from joining all of its charges in a multicount indictment and proceeding against the accused in a single trial."\textsuperscript{431}

The court also considered defendants' double jeopardy claim, noting that double jeopardy precluded defendants from being tried twice for the same crime. In this case, double jeopardy prevented trial in Prince George's County for the crimes of kidnapping and false imprisonment, but did not preclude trial on the conspiracy and rape charges.\textsuperscript{432} In reaching that determination, the court distinguished the crime of conspiracy from the commission of the substantive offenses of kidnapping. The court found that although kidnapping is a continuing offense, the trial of that crime in St. Mary's county terminated the prosecution of it.\textsuperscript{433} Thus, although the kidnapping began in Prince George's County and ended in St. Mary's County, because a kidnapping is a single offense regardless of how far a victim is taken or how long she is detained, the former county could not prosecute for kidnapping once the latter county had.\textsuperscript{434} But the court held that the trial and conviction of defendants in St. Mary's County on charges of first-degree rape and kidnapping did not bar their prosecution in Prince George's County of conspiracy to commit those offenses.\textsuperscript{435} The commission of a substantive offense and the conspiracy to commit it are separate and distinct offenses,\textsuperscript{436} each requiring proof of different elements. The court concluded that it was possible that the defendants conspired to commit rape and other sexual offenses in Prince George's County. Thus double jeopardy did not bar that county from prose-

\textsuperscript{430} Id.

\textsuperscript{431} Powers v. State, 285 Md. at 281, 401 A.2d at 1038. See also Turner v. Arkansas, 407 U.S. 366, 368 (1972) (per curiam) (finding doctrine of collateral estoppel applicable even when State was precluded by law from joining all of its charges in a multicount indictment).

\textsuperscript{432} 56 Md. App. at 638, 468 A.2d at 669.

\textsuperscript{433} Id. at 636, 468 A.2d at 668. Since false imprisonment is merged with kidnapping, that prosecution was also barred. Id. at 637, 468 A.2d at 668.

\textsuperscript{434} See generally Hunt v. State, 12 Md. App. 286, 278 A.2d 637 (1971) (discussion of kidnapping as defined by statute and developed in case law); see also Ellingham v. State, 165 Md. 278, 280, 162 A. 709, 710 (1932) (defining continuing offense and stating rule that verdict in a trial for a continuing offense precludes second indictment for that offense).

\textsuperscript{435} 56 Md. App. at 637, 468 A.2d at 668.

cuting the conspiracy charges.\textsuperscript{437}

In a third case, the Court of Special Appeals addressed the question of when an issue is actually litigated so that collateral estoppel may be used to bar its relitigation. In \textit{Myers v. State},\textsuperscript{438} the Court of Special Appeals held that collateral estoppel\textsuperscript{439} may be invoked to prevent "a perjury prosecution for testimony in a prior trial not only where the testimony relates to an issue that was an essential element of the crime itself but also where the testimony relates to any peripheral matters that \textit{must} have been adjudicated and considered in order to reach a verdict."\textsuperscript{440}

The defendant, accused of stealing a pair of boots, was acquitted of theft due to his possession of the sales receipt.\textsuperscript{441} Subsequently, the State discovered that his testimony concerning the sales receipt was false, and attempted to prosecute him for perjury. In a decision that considered carefully the problem of perjured testimony leading to acquittals,\textsuperscript{442} the court barred the perjury prosecution, stating that the trier of fact in the theft trial necessarily found that the defendant's testimony about the receipt was truthful.\textsuperscript{443} The court noted that, even if newly-discovered evidence would have resulted in a guilty verdict, collateral estoppel is applicable, regardless of whether the trier of fact considered all relevant evidence

\textsuperscript{437} 56 Md. App. at 637, 468 A.2d at 668. The court also held that the defendants could be tried on the rape offenses that were committed in Prince George's County, as the earlier trials only convicted the defendants of rape committed in St. Mary's County. \textit{Id.} at 636, 468 A.2d at 668.


\textsuperscript{439} The court correctly considered the argument to be solely one of collateral estoppel and not double jeopardy or res judicata. \textit{Id.} at 328, 470 A.2d at 356.


\textsuperscript{441} The State sought to prove that the sales receipt was evidence of a similar purchase at the same store from which the merchandise was stolen, made hours after the defendant had been apprehended for the theft. 57 Md. App. at 331, 470 A.2d at 358.

\textsuperscript{442} \textit{Id.} at 334-36, 470 A.2d at 359-60. The court cited \textit{Adams v. United States}, 287 F.2d 701 (5th Cir. 1961), for the two opposing policy concerns when a prosecution for perjury follows an acquittal. If collateral estoppel insulates defendants from subsequent perjury prosecutions, then defendants are given a license to lie. But if prosecutors can prosecute for perjury following acquittals, they are given a "second shot" at the defendant for the same wrong. 57 Md. App. at 328, 470 A.2d at 356 (quoting \textit{Adams}, 287 F.2d at 703).

\textsuperscript{443} 57 Md. App. at 336, 470 A.2d at 360.
when it decided an issue.\textsuperscript{444} The judge, in acquitting the defendant of theft, accepted his version of the purchase; thus, the jury in the perjury case, in order to find the defendant guilty, would have to arrive at the inconsistent factual conclusion that he stole the merchandise\textsuperscript{445} and would have relitigated the same issues.

Through a correct reading of the doctrine of collateral estoppel, the court barred the prosecution of the second crime, even though that crime’s commission may have resulted in an incorrect verdict in the trial of the first crime. The court concluded that the judge in the first trial necessarily decided on the truth of the defendant’s testimony regarding the sale’s receipt. The doctrine of collateral estoppel as articulated by the court—that it bars all matters that must have been litigated—requires a judge to make a determination as to what facts necessarily must have been litigated the first time. Thus, the \textit{Myers} decision is in accordance with the accepted use of the doctrine of collateral estoppel.\textsuperscript{446}

\textbf{I. Punishment}

\textit{1. Sentencing.}—In \textit{Teasley v. State},\textsuperscript{447} the Court of Appeals examined the judicial interpretation of sentencing guidelines.\textsuperscript{448} Not-
ing that the preface of the revised Maryland guidelines states that the guidelines are not mandatory, the court found that they “complement rather than replace the judicial decision-making process or the proper exercise of judicial discretion.” Further, the court noted that the law does not require that the sentences or principles suggested by the guidelines must be applied, and that it is not an impermissible sentencing consideration for a trial judge not to apply the guidelines, or to apply them improperly.

With these considerations in mind, the court held that even if the trial judge mistakenly applied experimental sentencing guidelines, vacation of the sentence and a new sentence hearing were not required, because the sentences were lawfully imposed within statutory limits and were the end result of the good-faith exercise of the trial judge’s discretion. Thus, sentencing guidelines can be seen as a helpful tool for judges in imposing sentences but not as a rigid formula that controls their decisions.

The court also addressed sentencing issues in *Raiford v. State.* The issue before the court was whether the imposition of a mandatory sentence pursuant to article 27, section 643B(c) of the Maryland Annotated Code, the recidivist statute, was an unconstitutional deprivation of Raiford’s right to equal protection under the fourteenth amendment. offenders. The guidelines assign numerical weight to enumerated factors involving the offense and the offender; using these numbers, a sentencing score is compared to a sentencing matrix that gives ranges of sentences for the score. The purpose of the guidelines is to increase equity in sentencing, to provide information on sentencing for new or rotating judges, and to promote increased visibility and understanding of the sentencing process. *Id.* at 366-67, 470 A.2d at 338.

449. *Id.* at 367, 470 A.2d at 338.
450. *Id.* at 370, 470 A.2d at 340.
451. *Id.* at 370-71, 470 A.2d at 340. *See also* Logan v. State, 289 Md. 460, 482, 425 A.2d 632, 643 (1980). In the present case, the trial judge stated that she was going to impose a sentence in conformity with the guidelines. However, she applied these guidelines mistakenly and imposed consecutive, rather than concurrent, ten-year sentences for armed robbery and use of a handgun in the commission of a felony.

452. 298 Md. at 371, 470 A.2d at 340.
454. MD. ANN. CODE art. 27, § 643B(c) (1982) provides in relevant part:

Third conviction of crime of violence.—Any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years.

455. U.S. CONST. amend. XIV.
In 1967, Raiford, then 17, was tried and convicted as an adult under a law which exempted Baltimore City from observing the Maryland statutes that classed all youths under 18 as juveniles. This statutory exemption was subsequently held, in Long v. Robinson, to violate the equal protection and due process clauses of the fourteenth amendment, since there is no rational basis for juvenile statutes that differentiate on the basis of geographical location. In 1970, Raiford was convicted of rape. In 1981, he was convicted of robbery. The trial court imposed the mandatory sentence under the recidivist statute for three-time adult offenders.

The Court of Appeals held that the use of Raiford's 1967 conviction to enhance his punishment for his 1981 robbery conviction constituted a present deprivation of equal protection. If Raiford had been tried as a juvenile in 1967, he would not have an adult conviction for purposes of the recidivist statute and he would not be subject to a twenty-five-year mandatory sentence. Therefore, to allow Raiford's 1967 convictions to enhance his punishment would cause him to "suffer anew" from the previous denial of his right to equal protection. The court believed that "basic fairness and essential justice" compelled the application of Long within the context of use for purposes of enhanced punishment.

At first, this decision seems inconsistent with a prior Court of Appeals case, Wiggins v. State, which held that Long v. Robinson was not to be applied retroactively. However, the court distinguished the two cases in that Raiford, unlike Wiggins, did not request that the court declare his 1967 conviction a nullity and expunge all


458. Id. at 30.

459. Id. at 27.

460. 296 Md. at 290-91, 462 A.2d at 1192-93.

461. Id. at 299, 462 A.2d at 1197.


463. 296 Md. at 300, 462 A.2d at 1197.

464. Id.


466. Id. at 690-91, 344 A.2d at 81.
records of such conviction. He was merely asking that his 1967 conviction, since held unconstitutional by Long, not be used to enhance his punishment by qualifying him for a mandatory sentence. Thus, the law seems to be that Long has no effect upon the prior convictions themselves but is applicable to the ensuing consequences (such as the application of recidivist statutes) flowing from these convictions.

The Raiford case has already been of practical importance. Sentences have been vacated and cases remanded for new sentencing hearings consistent with this opinion. The proper application of the recidivist statute in sentencing was also considered in Sanders v. State. In Sanders, the Court of Special Appeals held that the trial court erred in refusing the State’s request to impose a mandatory twenty-five-year sentence pursuant to article 27, section 643B(c) of the Maryland Annotated Code. The issue before the court was whether the defendant’s prior conviction for accessory before the fact of robbery should be included in the definition of a “crime of violence.” The court found that the common law doctrine of accessoryship, which makes no distinction between a principal and an accessory, holds all parties guilty of the felony committed by the principal. The court concluded that since Maryland considers any accessory equally culpable for the principal’s act, the prior conviction of accessory before the fact of robbery is the same as a conviction for robbery. Because robbery is within the statutory definition of a crime of violence, the mandatory twenty-five-year sentence must be imposed.

2. Forfeitures.—A forfeiture is a penalty by which one loses his rights and interest in property in consequence of a default or an offense. The Court of Appeals of Maryland recently addressed issues involved in forfeiture proceedings in several cases in which money was seized incident to arrests for gambling and narcotics charges. In these cases the court had occasion to interpret and con-

467. 296 Md. at 300, 462 A.2d at 1197.
470. See supra note 454 and accompanying text.
471. 57 Md. App. at 175-76, 469 A.2d at 486.
472. Id. at 176-77, 469 A.2d at 486-87. The court noted that Maryland was the only American jurisdiction that still retains the common law doctrine of accessoryship.
473. Id. at 177, 460 A.2d at 487.
474. Id. (citing Loveday v. State, 296 Md. 226, 237, 462 A.2d 58, 63 (1983)).
strue several provisions of the two Maryland statutes that provide for the forfeiture of property used in connection with the violation of certain laws.\textsuperscript{476}

In \textit{Bozman v. Office of Finance},\textsuperscript{477} the court dealt with the effect of article 27, section 297 of the Maryland Annotated Code, which relates to the forfeiture of all money or currency found in close proximity to contraband, controlled dangerous substances, or controlled paraphernalia. The primary issue before the court was whether a final disposition of the criminal charge that occasioned the forfeiture was a condition precedent to a forfeiture proceeding.\textsuperscript{478} The court held that the final disposition was not a requirement to institution of such a proceeding.\textsuperscript{479} Similarly, the court in \textit{Office of Finance v. Previti}\textsuperscript{480} held that forfeitures are not limited to situations in which a criminal conviction against the claimant has been obtained on gambling charges.\textsuperscript{481}

\textsuperscript{476} Md. Ann. Code art. 27, §§ 264, 297 (1982 & Supp. 1984). Section 264 relates to the forfeiture and disposition of money seized in arrests for gambling violations. Section 297 relates to the forfeiture of all money found in close proximity to contraband, controlled dangerous substances, or controlled paraphernalia.

\textsuperscript{477} 296 Md. 492, 463 A.2d 832 (1983).

\textsuperscript{478} Id. at 495, 463 A.2d at 834. In \textit{Bozman}, Baltimore County Police seized $3950 in currency that was found when defendant's apartment was searched for drugs; small quantities of several drugs were seized at the same time. A year and a half after the seizures, forfeiture proceedings were conducted, and the money was forfeited to Baltimore County. \textit{Id.} at 493-94, 463 A.2d at 833. No criminal charges had been filed against Bozman at the time of the forfeiture hearing. \textit{Id.} at 494, 463 A.2d at 833.

\textsuperscript{479} Id. at 497, 463 A.2d at 835.

\textsuperscript{480} 296 Md. 512, 463 A.2d 842 (1983).

\textsuperscript{481} Id. at 513, 463 A.2d at 843. In \textit{Previti}, Baltimore County Police officers executed a search warrant at a cocktail lounge on Pulaski Highway. Previti was arrested for gambling. Pursuant to the search warrant, the police seized $3341.50 from Previti's person. A stet was entered to the criminal charge against Previti. Previti wrote to the Assistant County Solicitor requesting the return of the money, and this letter was forwarded to the district court. \textit{Id.} at 513-14, 463 at 843. A forfeiture hearing was held, and the money was ordered forfeited to Baltimore County. \textit{Id.} at 514, 463 A.2d at 844. The Circuit Court for Baltimore County reversed, holding that a conviction was necessary for forfeiture of money seized in connection with gambling under Md. Ann. Code art. 27, § 264 (1982 & Supp. 1984). 296 Md. at 515-16, 463 A.2d at 844.

For another case reaching a similar conclusion, see \textit{State v. 158 Gaming Devices}, 59 Md. App. 44, 474 A.2d 545 (1984) (dealing with the forfeiture of slot machines and other gaming devices). \textit{But see Previti}, 296 Md. at 519, 463 A.2d at 846 (Eldridge, J., dissenting) (arguing that the district court should not have reached the merits of this case). In order for a trial court to have jurisdiction over the subject matter, it is necessary for the plaintiff to file an original pleading in that court. \textit{See Montgomery County v. Ian Corp.}, 282 Md. 459, 467, 385 A.2d 80, 84 (1978). In this case, Previti sent nothing to a court, but instead wrote a letter to the Assistant County Solicitor for Baltimore County. The County Attorney sent this letter to the district court where it was treated as an original pleading. 296 Md. at 520, 463 A.2d at 846 (Eldridge, J., dissenting). Since the plaintiff did not file a statement of claim with the court, Judge Eldridge argued that
In *Director of Finance v. Cole*, the court emphasized that the proceeding to determine whether money seized in a gambling raid should be returned to the claimant is a civil in rem proceeding and is unconnected with any criminal proceeding. Therefore, the trial court, as part of its criminal proceedings, could not compel Prince George's County to release the money.

These cases are consistent with prior Maryland law, but, as Judge Eldridge points out in his dissents, there are strong grounds to challenge them. First, there is an argument that the legislature perceives section 297 as requiring a criminal conviction for forfeiture. In 1981 the General Assembly refused to amend section 297 to provide that criminal conviction was not necessary prior to forfeiture. Testimony at the time of the proposed amendments indicates that the General Assembly believed that section 297 did not allow for forfeiture if a criminal conviction was not obtained. Since those amendments failed, the presumption is that the legislature intended section 297 to require a conviction. Thus arguably the majority's reading of the forfeiture statute in *Bozman* was incorrect, and the forfeiture proceeding should not have been held. The second argument, advanced by Judge Eldridge, is that the forfeitures in *Preveti* and *Cole* both involved property that was seized in violation of the fourth amendment. Because the Supreme Court in *One Plymouth Sedan v. Pennsylvania*, held that the exclusionary rule was applicable to civil forfeiture proceedings, the money involved in both cases should not have been forfeited.

Additionally, the district court did not acquire jurisdiction over the subject matter of the controversy. Furthermore, even if the court could reach the merits, Judge Eldridge felt that a forfeiture order was not appropriate because the money was seized pursuant to an invalid search warrant.


*Bozman*, 296 Md. 629, 465 A.2d at 850.


*Preveti*, 296 Md. 509-10, 463 A.2d at 841 (Eldridge, J., dissenting).

*Plymouth Sedan* requires that illegally seized money not contraband per se must be returned unless there is independent evidence that it is contraband. Per se contraband is an object whose possession constitutes a crime. 380 U.S. at 699-700. Judge Eldridge
3. Restitution.—(a) Application of the Statute.—The Court of Appeals was asked, in one recent case, to consider the reach of a recent amendment to Maryland's criminal restitution statute. That amendment gives the court the authority to order a defendant convicted of a crime to make restitution to a third party payor, such as an insurance company, if the payor has made payment to compensate the victim for the loss caused by the defendant. In Spielman v. State, the issue was whether the ex post facto prohibitions of the federal and state constitutions bar the retroactive application of the amended statute. The question arose when the trial court, following Spielman's conviction for malicious destruction of property, ordered him to pay restitution to the property owners and their insurers. That order was entered after the restitution statute was amended; Spielman appealed the order on the grounds that retroac-

argued that the money seized in Cole was claimed to be contraband because it was seized in connection with a gambling raid, but the only evidence to prove that fact was tainted because the evidence was obtained under an illegal wiretap. Hence under Plymouth Sedan, the money should not have been subject to forfeiture proceedings. Cole, 296 Md. at 643-44; 465 A.2d at 470-71 (Eldridge, J., dissenting). Likewise in Previti, Judge Eldridge argued, the money seized could not be proven to be forfeitable contraband because the evidence necessary to prove that fact was obtained by virtue of an unconstitutional search. Previti, 296 Md. at 525-26, 463 A.2d at 849 (Eldridge, J., dissenting). Judge Eldridge also pointed out that Cole was charged with conspiracy to violate the gambling laws, an offense not included within the provisions of Md. Ann. Code art. 27, § 264(a) (1982). 296 Md. at 642, 465 A.2d at 470 (Eldridge, J., dissenting).


(b) Restitution upon conviction of crime; priority of payment.—(1) On conviction of a crime, the court may order the defendant to make restitution in addition to any other penalty for the commission of the crime.

* * *

(2) The court may order that restitution be made to:
(i) The victim;
(ii) The Department of Health and Mental Hygiene or other governmental entity; or
(iii) A third-party payor, including an insurer, which has made payment to the victim to compensate the victim for a property loss under paragraph (1)(i) of this subsection, or pecuniary loss under paragraph (1)(ii) of this subsection (emphasis added).

(3) If the victim has been fully compensated for the victim's loss by a third-party payor, the court may order restitution to the third-party payor. Otherwise, payment of restitution to the victim has priority over payment of restitution to the third-party payor.


The Court of Appeals agreed with Spielman. It found first that the amendment created a substantive right for the third party payors, and that creation of this additional payment right in turn amounted to the enhancement of a criminal penalty to be assessed against the defendant. Because restitution, whether to the victim or the third party payor, is a form of punishment, the court concluded that the amendment increased the defendant’s punishment. By thus increasing punishment from what it would have been at the time the acts were committed, the retroactive application of the amended restitution statute amounted to the use of an ex post facto law. Accordingly, the statute could only be applied prospectively.

(b) Juvenile Restitution.—At common law, a parent was not liable for the tortious acts of his child, unless it could be proved that the child was acting as the parent’s agent, with the parent’s consent, or that the parent was negligent in failing to exercise reasonable control over the child’s behavior after having been warned of the child’s dangerous tendencies. Virtually all states however, have passed statutes imposing strict vicarious liability on parents for the delinquent acts of their children. Maryland law permits the court to order a parent to pay restitution to the party wronged by the child’s wrongful act, and merges the victim’s restitution action with the juvenile proceeding. Following a finding at the adjudicatory

491. 298 Md. at 606, 471 A.2d at 732.
492. Id. at 608-09, 471 A.2d at 733-34.
493. Id. at 609-10, 471 A.2d at 734.
494. Id. at 611, 471 A.2d at 735. The court defined an ex post facto law as “‘[a] law which punishes that which was innocent when done; or adds to the punishment of that which is criminal . . . .’” (emphasis added by court) (quoting Beard v. State, 74 Md. 130, 132, 21 A. 700, 701 (1891)).
496. P. Keeton, supra note 495. Most state provisions limit liability to wilful or wanton torts of the child and limit the amount of liability. Id.
   (a) The court may enter a judgment of restitution against the parent of a child, or the child in any case in which the court finds a child has committed a delinquent act and during the commission of that delinquent act has:
      (1) Stolen, damaged or destroyed the property of another;
      (2) Inflicted personal injury on another, requiring the injured person to incur medical, dental, hospital, or funeral expenses.
   (b) Considering the age and circumstances of a child, the court may order the child to make restitution to the wronged party personally.

* * *
hearing that the child committed a delinquent act, the court at the
restitution hearing may enter a judgment against the parent, the
child, or both, in favor of the victim.\textsuperscript{498}

Although restitution may be an extremely effective correctional
device when it is used to sanction the child,\textsuperscript{499} that function of resi-
tution may be less effective when the order is directed solely to the
parent.\textsuperscript{500} The purpose of the restitution statute, however, is to en-
sure that the victim is compensated,\textsuperscript{501} and vicarious liability is
therefore imposed on the tortfeasor's parents.\textsuperscript{502} There is some
question as to whether the imposition of parental vicarious liability
is constitutional,\textsuperscript{503} but assuming that this procedure would pass
constitutional muster, Maryland's process by which restitution is or-
dered may nonetheless be inadequate to give parents a fair trial.

(d) A restitution hearing to determine the liability of a parent or a child, or
both, shall be held not later than 30 days after the disposition hearing and may
be extended by the court for good cause.

(e) A judgment of restitution against a parent may not be entered unless the
parent has been afforded a reasonable opportunity to be heard and to present
appropriate evidence in his behalf. A hearing under this section may be held as
part of an adjudicatory or disposition hearing for the child.

Unlike Maryland, most states simply provide a civil cause of action rather than merging
the restitution process into the juvenile proceeding. See Freer, \textit{supra} note 495 at 255; \textit{see also} The Daily Record, Mar. 7, 1985, at 1, col. 4. \textit{But see} Ark. Stat. Ann. \textsection 45-

the sole sanction against juvenile wrongdoers may be the most effective correctional
option).

500. Of course, even if the statute were directed solely at the child, the parent might
end up paying his child's restitution obligation simply to prevent the child's incarcera-
tion in a situation in which restitution is a condition of probation. \textit{See, e.g., In re Weiner},

Spielman \textit{v.} State, 298 Md. 602, 471 A.2d 730 (1984), \textit{discussed at supra} text compa-
nying notes 489-94 (holding that adult restitution is a form of punishment, in case involv-
ing constitutionality of retroactive application of restitution statute).


the Court of Special Appeals upheld the constitutionality of the Maryland juvenile resi-
tution statute. \textit{But see In re} Dan D., 57 Md. App. 522, 525-26, 470 A.2d 1318, 1319
(1984) (noting that the Court of Appeals has yet to rule on the constitutionality of the
(upholding constitutionality of parental vicarious liability for children's vandalism) \textit{with}
Corley \textit{v.} Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971) (striking statute because it im-
posed vicarious liability solely on the basis of the parent-child relationship and therefore
violated due process). \textit{See generally} Note, \textit{Constitutionality of Legislative Imposition of Vicarious
Imposing tort liability on parents without providing pretrial discovery or a jury trial may raise serious constitutional problems. These questions are illuminated by a recent series of cases in which Maryland courts looked at the scope and application of the Maryland juvenile restitution statute.

In *In re Dan D.* and *In re Herbert B.*, the Court of Special Appeals emphasized that the only prerequisite for an award of restitution is a finding that the juvenile committed a delinquent act and so stole, damaged or destroyed the victim’s property. In *Dan D.*, the Court of Special Appeals reversed the lower court’s award of restitution on the ground that no evidence was presented at the restitution proceeding to show that Dan D. actually committed such an act. The Court held that the record of the adjudicatory hearing, an agreed upon synopsis of it, or some other evidence must be presented at the restitution hearing to establish that the child committed the act before the question of liability can arise. Thus the Court underlined the fact that the restitution hearing, though a part of the juvenile proceeding, should be a separate and complete entity, not merely a continuation of the adjudicatory proceeding. In *Herbert B.*, the Court of Special Appeals held that the only prerequisite to an award of restitution under the statute is establishment of the fact that the child committed the act and so harmed the victim. A finding of delinquency, that is, that the child is in need of

504. See, e.g., The Daily Record, Mar. 7, 1985, at 1, col. 4 ("P.G. Circuit Court holds parents entitled to jury in juvenile restitution actions"). It could be argued that since juvenile restitution is based on the statute and the statute does not authorize a jury trial, there is no right to jury trial, and that to provide a jury trial whenever it is demanded would be administratively burdensome. But if, in fact, this action is simply a form of tort action, it is unfair to treat it differently from other tort actions, giving the defendant less protection, even when his liability is greater than at common law.


507. It is important to remember here that a finding of delinquency is more than simply a finding that the child committed a delinquent act; it is a finding that the child is in need of court assistance, guidance, treatment, or rehabilitation. In Maryland, juveniles charged with a delinquent act (crime) receive an adjudicatory hearing (analogous to a trial) in which the court determines whether the juvenile committed the act. Following this proceeding, the child receives a disposition hearing (analogous to a sentencing) in which the court determines what, if any, type of court supervision the child requires. Concurrent with or following the disposition hearing or the adjudicatory hearing, the court may hold a restitution hearing to determine whether an award of restitution to the victim is appropriate and, if so, how much it should be and who should pay it. See *Dan D.*, 57 Md. App. at 528-29, 470 A.2d at 1321.

508. *Id.* at 529, 470 A.2d at 1321.

509. 58 Md. App. at 29-30, 472 A.2d at 98.
court assistance, guidance, treatment, or rehabilitation, is not necessary.

The Court of Special Appeals also loosened the tie between delinquency and restitution in In re Trevor A.\textsuperscript{510} by holding that dismissal is too drastic a sanction for violating the rule that the restitution hearing must be held within thirty days of the disposition hearing.\textsuperscript{511} By tying restitution to the child's act rather than to a finding of delinquency, the court characterized restitution as being more a tort remedy for the victim than a correctional measure for the child or his family.\textsuperscript{512}

In Dan D., the parents raised questions regarding the basic constitutionality of the restitution statute: whether the statute can be applied to a noncustodial parent, and whether there is a right to jury trial at the restitution hearing. These issues were not addressed by the court because of its holding that the restitution order was erroneously made.\textsuperscript{513} Although the Court of Special Appeals previously has upheld the constitutionality of Maryland's juvenile restitution system,\textsuperscript{514} the fact that Court of Appeals has never reviewed the constitutionality means that questions such as these may recur.

In In re Arnold M.,\textsuperscript{515} the Court of Appeals held that the state is not a parent for the purposes of the restitution statute when the state is standing in loco parentis\textsuperscript{516} to the delinquent child. The court reasoned that the plain meaning of "parent" in the statute is a father or mother with custody of the child and that the legislature never intended to impose liability on the state.\textsuperscript{517} Since the court held in In re James D.\textsuperscript{518} that the legislature did not intend to place liability upon the father or mother of a child who commits a delinquent act while in the custody of the state, the victim in such a case has no remedy under the restitution statute. This result seems inconsistent with the idea that the restitution statute exists to provide compensation for the victim. The result does, however, allow the state to retain sovereign immunity in this area. The result may also be

\textsuperscript{511} Id. at 499, 462 A.2d at 1249.
\textsuperscript{512} See also supra note 501 and accompanying text.
\textsuperscript{513} 57 Md. App. at 527, 470 A.2d at 1320.
\textsuperscript{514} See supra note 503.
\textsuperscript{515} 298 Md. 515, 471 A.2d 313 (1984).
\textsuperscript{516} BLACK'S LAW DICTIONARY 708 (5th ed. 1979) defines in loco parentis as "In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities."
\textsuperscript{517} 298 Md. at 521, 471 A.2d at 316.
\textsuperscript{518} 295 Md. 314, 455 A.2d 966 (1983).
supported by the argument that an important purpose of the statute is to punish parents for failing to exercise control over their children, and this purpose cannot be furthered by punishing the state.

J. Death Penalty Review

1. The Maryland Death Penalty Statute.—Maryland’s current death penalty statute,\textsuperscript{519} enacted in 1978, represents the General Assembly’s most recent effort to comply with the constitutional standards established by the Supreme Court.\textsuperscript{520} The statute provides that the death sentence may be imposed only for murder in the first degree, with life imprisonment as the alternative sentence in such cases.\textsuperscript{521} When the State seeks the death sentence against a defendant convicted of murder in the first degree, other statutory requirements include: a sentencing proceeding separate from the trial at which guilt was determined,\textsuperscript{522} a finding by the sentencing authority of at least one aggravating circumstance,\textsuperscript{523} the “weighing” of any mitigating circumstances against the aggravating circumstances,\textsuperscript{524} and mandatory review by the Court of Appeals of all cases in which the death penalty is imposed.\textsuperscript{525} In conducting its automatic review of all death sentences, the Court of Appeals must determine whether the death sentence was imposed “under the influence of passion, prejudice, or any other arbitrary factor,”\textsuperscript{526} whether the evidence supports the sentencing authority’s findings concerning aggravating and mitigating circumstances,\textsuperscript{527} and whether the sentence is “excessive or disproportionate to the penalty imposed in similar cases.”\textsuperscript{528}

From the enactment of the 1978 statute until 1983, the Court of Appeals consistently overturned the death sentence in every death

\textsuperscript{521} Id. § 413(a).
\textsuperscript{522} Id. § 413(d), (f).
\textsuperscript{523} Id. § 413(g), (h).
\textsuperscript{524} Id. § 413(b) (1).
\textsuperscript{525} Id. § 413(b) (2), (3).
\textsuperscript{526} Id. § 414(e) (4).
penalty case that came before it, either by reversing the conviction or by vacating the sentence.\footnote{529} During its 1983 term, the court reversed this pattern. Although it vacated the death sentence in some cases, the court upheld imposition of the sentence in several others. In \textit{Tichnell v. State},\footnote{530} the first case in which the death sentence was upheld, the Court of Appeals reaffirmed the general constitutionality of Maryland's death penalty statute.\footnote{531} More significantly, the court in \textit{Tichnell III} and subsequent cases demonstrated a general willingness to interpret the statute broadly.

2. Interpreting the Statute.—(a) Admissibility of Evidence—Sentencing Proceeding.—In two death penalty cases, \textit{Calhoun v. State}\footnote{532} and \textit{Scott v. State},\footnote{533} the Court of Appeals interpreted the statutory provision governing the admissibility of evidence in a capital sentencing proceeding.\footnote{534} That provision, section 413(c)(1) of Maryland's death penalty statute, details the types of evidence that are admissible in such proceedings, including evidence relating to any mitigating or aggravating circumstances\footnote{535} and evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence thereof.\footnote{536} The final category of admissible evidence encompasses "[a]ny other evidence that the court deems of probative value and relevant to sentence."\footnote{537}

In \textit{Calhoun} the Court of Appeals upheld the constitutionality of section 413(c)(1). Calhoun challenged the constitutionality of Maryland's death penalty statute on the ground that the provision governing admissibility of evidence failed "to provide clear and objective standards that provide specific guidance for the sentencing authority."\footnote{538} He contended that the provision's lack of guidelines for consideration of the evidence unconstitutionally granted broad

\footnotesize{\begin{itemize}
\item 531. In doing so, the court relied on its previous discussion of the statute's constitutionality in \textit{Tichnell v. State}, 287 Md. 695, 415 A.2d 830 (1980) (\textit{Tichnell I}). The \textit{Tichnell I} court concluded that "on its face, the Maryland statutory scheme for imposition of the death penalty satisfies the requirements of the Eighth and Fourteenth Amendments to the federal constitution, and Art. 25 of the Maryland Declaration of Rights." \textit{Id.} at 729, 415 A.2d at 848, \textit{quoted in Tichnell III}, 297 Md. at 447, 468 A.2d at 8.
\item 533. 297 Md. 235, 465 A.2d 1126 (1983).
\item 534. MD. ANN. CODE art. 27, § 413(c)(1) (1982).
\item 535. \textit{Id.} § 413(c)(1)(i), (ii).
\item 536. \textit{Id.} § 413(c)(1)(iii).
\item 537. \textit{Id.} § 413(c)(1)(v).
\item 538. 297 Md. at 630, 468 A.2d at 77.
\end{itemize}}
discretion to the sentencing jury.\textsuperscript{539}

In rejecting Calhoun's argument, the Court of Appeals considered Maryland's capital sentencing statute as a whole. The court first noted that the Supreme Court's death penalty decisions permit a sentencing jury to exercise discretion "as long as that exercise is conducted within the confines and in compliance with the standards of a 'carefully drafted' capital sentencing statute."\textsuperscript{540} Referring to its previous analysis of Maryland's death penalty statute in \textit{Johnson v. State}\textsuperscript{541} and \textit{Tichnell I},\textsuperscript{542} the court concluded that the statute satisfied the Supreme Court's requirement that the law should guide the sentencing authority's discretion because the sections dealing with aggravating and mitigating circumstances provided sufficient direction to the court in its consideration of evidence relating to such circumstances. The statute also requires that the sentencing authority's determination must be in writing and, if made by a jury, unanimous, and that the sentencing authority specify the factors considered in rendering its decision.\textsuperscript{543} The Court of Appeals determined that section 413(c)(1), when considered in the context of these other provisions, did not grant unconstitutionally broad discretion to the sentencing jury.\textsuperscript{544}

The \textit{Calhoun} court also considered the constitutionality of admitting specific types of evidence. At Calhoun's sentencing proceeding, the State introduced evidence that Calhoun had assaulted an officer at the detention center where Calhoun was held while awaiting trial.\textsuperscript{545} This evidence was introduced "for the purpose of illustrating that not even incarceration of Calhoun would prevent him from engaging in future criminal acts."\textsuperscript{546} One of the mitigating circumstances that the sentencing authority in a death penalty case may consider is the unlikeliness "that the defendant will engage in further criminal activity that would constitute a continuing threat

\begin{itemize}
\item \textsuperscript{539} \textit{Id.} at 630-31, 468 A.2d at 77.
\item \textsuperscript{540} \textit{Id.} at 634-35, 468 A.2d at 79 (citing, inter alia, Barclay v. Florida, 103 S. Ct. 3418, 3424 (1983) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 192 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 258 (1976) (plurality opinion)).
\item \textsuperscript{541} 292 Md. 405, 439 A.2d 542 (1982).
\item \textsuperscript{542} 287 Md. 695, 415 A.2d 830 (1980).
\item \textsuperscript{543} 297 Md. at 635, 468 A.2d at 79-80 (citing \textit{Md. Ann. Code art. 27, § 413 (d), (h), (i), (j) (1982)}).
\item \textsuperscript{544} \textit{Id.}, 468 A.2d at 80.
\item \textsuperscript{545} \textit{Id.} at 596-98, 468 A.2d at 60-61. Calhoun squirted the officer with "a foul concoction" contained in a Wella-Balsam bottle, which turned out to be "a mixture of urine and [feces]." \textit{Id.} at 597, 468 A.2d at 60-61.
\item \textsuperscript{546} \textit{Id.} at 618, 468 A.2d at 71.
\end{itemize}
to society." The evidence concerning Calhoun’s behavior at the detention center tended to disprove the existence of that mitigating circumstance.

Calhoun contended that such evidence was “highly speculative, unreliable, and inconclusive,” and that its introduction violated his constitutional rights. The Court of Appeals rejected Calhoun’s contention, finding that such evidence satisfied the constitutional standards enunciated by the Supreme Court. Specifically, the court first noted that consideration of “particular character traits and propensities of the defendant” is “an essential feature” of any statutory scheme for imposition of the death penalty. Responding to Calhoun’s contention that the speculative nature of the evidence used against him rendered it too unreliable to predict future behavior, the court quoted Jurek v. Texas, where the Supreme Court stated: “It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made.” Relying on this language, the Court of Appeals concluded that evidence relevant to the mitigating circumstance concerning the defendant’s propensity for further criminal activity is constitutionally admissible.

In Scott v. State the Court of Appeals confronted a more complex statutory construction problem. The “catch-all” provision of the death penalty statute allows the admissibility of “[a]ny other evidence that the court deems of probative value and relevant to sentence . . . .” The court in Scott, in considering the interpretation of the provision, limited its scope by holding that, in a capital sentencing proceeding, evidence that the defendant committed other crimes (i.e., those unrelated to the murder for which the defendant is being sentenced) must be restricted to evidence of crimes of violence for which there has been a conviction, or a plea of guilty or nolo contendere. By reducing the scope of this provision, the Scott decision limits the discretion of trial courts to allow the admis-

548. 297 Md. at 617, 468 A.2d at 71. Calhoun maintained that the evidence “not only failed to establish his future dangerousness, but also served as a nonstatutory aggravating circumstance that inflamed and prejudiced the jury.” Id. at 618, 468 A.2d at 71.
549. Id. at 618-19, 468 A.2d at 71 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).
551. Id. at 274-75, quoted in Calhoun, 297 Md. at 623, 468 A.2d at 73-74.
552. 297 Md. at 623, 468 A.2d at 74.
555. 297 Md. at 248, 465 A.2d at 1133-34.
sion of evidence in capital sentencing proceedings. Arguing from the Court of Appeals' previously broad construction of that provision,\textsuperscript{556} the dissent took issue with the majority's narrow reading of the provision.\textsuperscript{557}

A jury convicted Scott of murdering a McDonald's Restaurant employee during an armed robbery in November 1980. At the sentencing proceeding, conceding that Scott had no prior convictions for "a crime of violence,"\textsuperscript{558} the State then proffered evidence to show that Scott killed two other men in separate armed robberies during November 1980. The trial judge found that this evidence satisfied the relevant and probative standards for admissibility under subsection 413(c)(1)(v).\textsuperscript{559}

The Court of Appeals, in a 4-3 decision, disagreed with the trial judge's assessment. The court examined the statutory scheme of section 413(c)(1), the section governing the admissibility of evidence in a capital sentencing proceeding, as a whole in order to place subsection (v) in context,\textsuperscript{560} focusing in particular on subsections (i) and (iii). Subsection 413(c)(1)(i) provides for the admissibility of evidence relating to any of the statutory mitigating circumstances,\textsuperscript{561} including the absence of prior convictions of any violent crimes.\textsuperscript{562} The majority reasoned that "the admission of evidence of crimes of violence for which there have been no convictions . . . may well result in the mitigating circumstance of the absence of prior convictions being outweighed or, in essence, 'wiped out' or eliminated."\textsuperscript{563} Similarly, the majority found that subsection 413(c)(1)(iii), which specifically provides for the admissibility of evidence of prior criminal convictions, pleas of guilty, and pleas of nolo contendere, precludes use of any evidence of unrelated crimes except those for which there has been a conviction.\textsuperscript{564}

Consequently, the language of subsection 413(c)(1)(v), providing for the admission of "any other evidence" which is "probative" and "relevant," should not be construed to permit the admission of evi-

\textsuperscript{557} 297 Md. at 254-58, 465 A.2d at 1136-38 (Murphy, C.J., dissenting).
\textsuperscript{558} \textit{Id.} at 237, 465 A.2d at 1128. One of the statutory mitigating circumstances which the sentencing authority in a capital proceeding must consider is the absence of prior convictions of any violent crimes. \textit{Md. Ann. Code} art. 27, § 413(g)(1) (1982).
\textsuperscript{559} See Scott, 297 Md. at 237, 465 A.2d at 1128.
\textsuperscript{560} \textit{See id.} at 245-48, 465 A.2d at 1132-34.
\textsuperscript{561} \textit{See Md. Ann. Code} art. 27, § 413(g) (1982).
\textsuperscript{562} \textit{Id.} § 413(g)(1).
\textsuperscript{563} 297 Md. at 247, 465 A.2d at 1133.
\textsuperscript{564} \textit{Id.}
dence of unrelated crimes for which there has been no conviction, or plea of guilty or nolo contendere. 565

Chief Judge Murphy’s strong dissent criticized the majority for not following the precedent established in Johnson v. State. 566 The Johnson court, in deciding the same issue, construed the relevant subsection as authorizing the trial judge to admit evidence of unrelated crimes for which there has been no conviction if it is probative and relevant to the sentencing. 567 Chief Judge Murphy regarded Johnson as controlling, and, moreover, rejected the majority’s reasoning. In his view, the majority’s holding would render subsection 413(c)(1)(v) meaningless because no evidence outside the narrow categories created in subsections 413(c)(1)(i) through (iv) would be admissible. 568

The Scott majority distinguished Johnson by stating that the Johnson court did not consider subsection (v) in terms of its interrelationship with subsections (i) and (iii) 569 because the appellant there never raised the argument that subsections 413(c)(1)(i) and (iii) restrict admissible evidence of unrelated crimes. 570

The Scott majority opinion represents a departure from the general trend toward broad construction of Maryland’s death penalty statute. The dissent, however, raises significant questions about the logic underlying the majority’s holding.

(b) Aggravating and Mitigating Circumstances.—Maryland’s death penalty statute specifies the aggravating 571 and mitigating 572 circumstances that the sentencing authority must consider 573 in its de-

565. Id. at 248, 465 A.2d at 1133-34. But see Calhoun, 297 Md. at 596-601, 468 A.2d at 60-63, where the Court of Appeals approved the admission into evidence of testimony regarding the appellant’s misconduct at the detention center where he was held prior to his trial. The court ruled that “[i]n the absence of an objection focusing on the point before the Court in Scott,” the evidence was admissible under § 413(c)(1)(v) as “‘other evidence that the court deems of probative value and relevant to sentence.’” Id. at 601, 468 A.2d at 62-63 (quoting Md. Ann. Code art. 27, § 413(c)(1) (1982). See also supra text accompanying notes 545-52, discussing the constitutional challenge to admission of that evidence.


567. Id. at 443, 439 A.2d at 563.

568. 297 Md. at 259, 465 A.2d at 1139 (Murphy, C.J., dissenting).

569. 297 Md. at 245, 465 A.2d at 1132.

570. Id. The Scott majority characterized the discussion of § 413(c)(1)(v) in Johnson as “dicta,” id. at 243, 465 A.2d at 1131, a characterization which Chief Judge Murphy found objectionable, see id. at 256-57, 465 A.2d at 1137-38 (Murphy, C.J., dissenting).


572. Id. § 413(g).

573. In Bowers v. State, 298 Md. 115, 468 A.2d 101 (1983), the Court of Appeals established that the sentencing authority must, as a matter of law, consider whether,
liberations. In two cases, *Calhoun v. State* and *Colvin v. State*, the Court of Appeals considered the constitutionality of the statutory provision that labels as an aggravating circumstance the finding that "[t]he defendant committed [a] murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree." Both *Calhoun* and *Colvin* contended that this provision of the statute articulated an overbroad aggravating circumstance, which would result in the mandatory application of the death penalty in every sentencing proceeding involving a defendant convicted of felony murder.

In *Calhoun* the court rejected the overbreadth argument, reasoning that the provision is limited by its own terms and that other provisions also limit it. First, the court noted that this particular aggravating circumstance does not automatically follow from every conviction of felony murder. While Maryland's felony murder statute lists a broad range of felonies, the contested aggravating circumstance applies only to felony murder convictions when the felony is robbery, arson, rape, or a first degree sexual offense. And accomplices to a felony who did not actually commit the murder are not subject to the provision since it requires that the defendant be "a principal in the first degree." In light of such distinctions between the felony murder statute and the section based upon a preponderance of the evidence, certain specified mitigating factors exist. The *Bowers* court vacated the appellant's death sentence because the jury failed to find a mitigating circumstance which the State conceded did exist. *Id.* at 151-52, 468 A.2d at 119-20.

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577. *Calhoun*, 297 Md. at 624, 468 A.2d at 74; *Colvin*, 299 Md. at 122-23, 472 A.2d at 970. Under Maryland law, felony murder is murder in the first degree, Md. Ann. Code art. 27, §§ 408-410 (1982), and is subject to the death penalty. *Id.* § 412(b). In both *Calhoun* and *Colvin* the sentencing juries found as an aggravating circumstance that the defendants committed murder during the perpetration of a robbery, a felony murder under Maryland law. *Id.* § 410.
578. 297 Md. at 624, 468 A.2d at 74.
579. Md. Ann. Code art. 27, §§ 408-410. The felonies listed in § 410 include, among others: "any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping . . . , storehouse breaking . . . , or daytime housebreaking . . . ."
580. *Id.* § 413(d)(10).
581. 297 Md. at 624, 468 A.2d at 74. The requirement referred to is found in Md. Ann. Code art. 27, § 413(e)(1) (1982); see also Stebbing v. State, 299 Md. 331, 373, 473 A.2d 903, 924 (1984) (holding that requirement of being a principal in the first degree relates to murder which is the subject of the sentencing proceeding and not to aggravating felonies).
413(d)(10) aggravating circumstance, the Court of Appeals deemed Calhoun's claim of overbreadth "unfounded." 582

The Court of Appeals also rejected the contention raised in both Calhoun and Colvin that this section resulted in a mandatory application of the death penalty. The court pointed out the obvious flaw in that argument: Any aggravating circumstance, even if found automatically, is limited by the possible existence of mitigating circumstances. 583 Moreover, the court emphasized that a jury making a sentencing decision uses the entire statutory scheme; 584 thus, no single aggravating circumstance could mandate the death penalty in any case. Accordingly, the court upheld the constitutionality of section 413(d)(10).

In Stebbing v. State 585 the Court of Appeals held that the underlying felony that serves as the basis for a first degree murder conviction may be considered as an aggravating circumstance in a capital sentencing proceeding. 586 Stebbing was convicted of first degree murder based exclusively on the felony murder rule. 587 There was no finding of premeditation and deliberation. In previous cases in which the Court of Appeals had upheld consideration of the pertinent aggravating circumstance, 588 the murder conviction had been based, in part, on a finding of premeditation and deliberation. Stebbing argued that, when the murder conviction for which the death penalty was being sought was based solely on the commission of the underlying felonies, those felonies should not be considered as an aggravating circumstance in the death penalty sentencing. 589 The court disagreed, based on the observation that Maryland's death pen-

582. 297 Md. at 626, 468 A.2d at 75.
583. Id. at 624, 468 A.2d at 74; Colvin, 299 Md. at 123, 472 A.2d at 970. See also Md. ANN. CODE art. 27, § 413(h) (1982).
584. 299 Md. at 123, 472 A.2d at 970; see also Calhoun, 297 Md. at 624, 468 A.2d at 74.
586. Id. at 360, 473 A.2d at 917.
587. Id. at 358, 473 A.2d at 916. See Md. ANN. CODE art. 27, § 410 (1982) (Maryland’s felony murder rule); see also id. § 407 (defining first degree murder generally).
589. The trial court imposed sentence only on the first degree murder conviction and not on any of the underlying felony convictions. 299 Md. at 358, 473 A.2d at 916. The Court of Appeals implied that there might be a double jeopardy problem involved if a defendant is sentenced both for felony murder and for an underlying felony and the felonies themselves are used as a basis for the murder sentence. See Newton v. State, 280 Md. 260, 373 A.2d 262 (1977); cf. Bowers v. State, 298 Md. 115, 140-43, 468 A.2d 101, 114-16 (1983) (no double jeopardy violation in separate murder and felony convictions if murder conviction based on premeditation, not felony murder). For a further discussion of this double jeopardy issue, see infra notes 617-624 and accompanying text.
alty statute "makes plain the legislative intent that the commission of certain felonies, underlying a felony murder conviction, is to be considered an aggravating circumstance in the capital sentencing proceeding." The fact that the murder occurred in the commission of section 413(d)(10) felonies "does not disappear or lose legal significance" simply because the conviction is based on felony murder rather than premeditation and deliberation.

The Court of Appeals in Stebbing also clarified a statutory interpretation issue involving section 413(e)(1) of the death penalty statute, which provides that the terms "defendant" and "person," as used in the death penalty statute, "include only a principal in the first degree." Although a principal in the first degree in the murder for which she had been convicted, the appellant in Stebbing acted as a principal in the second degree in the underlying felonies of first degree rape and sexual offense. She contended that because section 413(e)(1) requires the defendant to be a principal in the first degree, the sentencing judge erred in finding the aggravating circumstances that the murder was committed during the commission of a section 413(d)(10) felony. The Court of Appeals rejected that contention, holding that "the requirement of being a principal in the first degree, as embraced in the definition of 'defendant' and 'person,' relates to the murder which is the subject of the sentencing proceeding and not to the aggravating crimes listed in [section] 413(d)(10)."

Addressing another issue involving the consideration of aggravating circumstances, the Court of Appeals in Calhoun held that the sentencing authority in a capital sentencing proceeding may consider individually the multiple aggravating circumstances that may arise from a single occurrence. The jury that sentenced Calhoun found three of the statutory aggravating circumstances:

- that the victim was a law enforcement officer who was murdered while in the performance of his duties;
- that the defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful cus-

590. 299 Md. at 359, 473 A.2d at 917.
591. Id. at 360, 473 A.2d at 917.
592. Md. Ann. Code art. 27, § 413(e)(1) (1982). The statute creates an exception for the use of those terms in § 413(d)(7), which states the following aggravating circumstance: "The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration."
593. 299 Md. at 373, 473 A.2d at 924.
594. 297 Md. at 593, 468 A.2d at 58.
tody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer; and that the defendant committed the murder while committing or attempting to commit robbery. 595

Calhoun argued that submission of all three aggravating circumstances to the jury was improper because they were overlapping factors based on a single occurrence. 596

The Court of Appeals determined that the three aggravating factors submitted to the jury did not necessarily overlap because each served a different societal objective. In distinguishing the three factors, the court found that the first promotes the protection of police officers, the second is intended to deter escape attempts, and the third aggravating factor is intended to deter robbery. 597

Demonstrating its willingness to construe this portion of the death penalty statute broadly, the court concluded that, given the distinctive elements and objectives in each factor, each aggravating factor could be considered by the jury. 598

(c) Constitutionality-Proportionality Review.—The Court of Appeals in Calhoun held that its authority to review the sentencing process in a capital punishment case 599 is constitutional. 600 Calhoun argued that article 23 of Maryland’s Declaration of Rights, 601 which states that the jury in a criminal trial shall be the judges of law as well as of fact, prohibits appellate courts from passing upon the sufficiency of the evidence in a capital sentencing proceeding. Section 414 of the death penalty statute broadly, the court concluded that, given the distinctive elements and objectives in each factor, each aggravating factor could be considered by the jury. 598

595. Id. at 589-90, 468 A.2d at 57. See also Md. Ann. Code art. 27, § 413(d)(1), (3), (10) (1982).
596. 297 Md. at 590, 468 A.2d at 57.
597. Id. at 591, 468 A.2d at 57-58.
598. Id. at 593, 468 A.2d at 58. For an example of overlapping aggravating factors that may not simultaneously be submitted, see State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), which the Court of Appeals cited in Calhoun. There the overlapping factors were “that [t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest” and “that the ‘felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.’” Calhoun, 297 Md. at 591-92, 468 A.2d at 58 (quoting N.C. GEN. STAT. § 15A-2000(e)(4), (e)(7) (1980)).
600. 297 Md. at 612, 468 A.2d at 68.
601. Md. CONST. DECL. OF RTS. art. 23. Article 23 provides in relevant part: “In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”
The court upheld the constitutionality of section 414. It ruled that article 23 applies to the trial stage of a criminal proceeding; therefore, it only imposes restrictions on appellate review of "the evidence necessary to sustain a finding of guilt or innocence," not on appellate review of the findings of a jury in a death sentence proceeding.\(^6\)

\((d)\) Defining the Pool of Similar Cases.—Maryland's death penalty statute mandates that the Court of Appeals shall conduct a proportionality review of all death sentences based on "the penalty imposed in similar cases."\(^6\) In *Tichnell III*\(^6\) the Court of Appeals held that "similar cases" encompasses only first degree murder cases in which the State sought the death penalty under section 413, whether or not the death penalty was imposed.\(^6\) In reaching that conclusion, the court rejected the broader alternative that the pool of similar cases should include all first degree murder cases eligible under section 413 for imposition of the death sentence.

The court's analysis focused on the essential principle underlying proportionality review—that is, reasonable consistency in the imposition of the death penalty.\(^6\) Section 414(e)(4) serves that principle by providing a review process designed to assure that when a defendant and his crime are considered, cases with similar aggravating and mitigating circumstances will receive similar treatment.\(^6\) In the court's view, cases in which the sentencing authority considered the imposition of the death penalty are inherently dissimilar from cases in which the death penalty was never sought.\(^6\)

\(^6\) 297 Md. at 610, 468 A.2d at 67.
\(^6\) Id. at 612, 468 A.2d at 68.
\(^6\) MD. ANN. CODE art. 27, § 414(e)(4) (1982). Subsection (e)(4) provides that the Court of Appeals shall determine: "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."
\(^6\) 297 Md. at 608, 468 A.2d at 17. See also *Calhoun*, 297 Md. at 608-10, 468 A.2d at 66-67 (affirming definition of the pool of similar cases in *Tichnell III*).
\(^6\) 297 Md. at 606, 468 A.2d at 15. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion) ("proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury"); *Proffitt v. Florida*, 428 U.S. 242, 250-53 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (upholding death penalty statutes without specific proportionality review provisions as long as appellate review guarantees imposition of death sentences in a reasonably consistent manner).
\(^6\) 297 Md. at 464-65, 468 A.2d at 17-18.
\(^6\) The court noted that this interpretation of § 414(e)(4) is consistent with the im-
and a comparative review that included the latter group of cases would not be a comparison of "similar cases." 610

The Tichnell III court also determined that this definition of the pool of similar cases is not so limited as to render section 414(e)(4) unconstitutional. The court determined that the Supreme Court does not require a comparative review of death sentences to include "nonappealed capital cases where a life sentence was imposed, homicide cases where a capital conviction was not obtained, or those in which the defendant was convicted of a lesser offense." 611 Thus, the Court of Appeals found nothing unconstitutional in limiting the relevant inventory of cases available for proportionality review to those in which the death penalty was sought. 612 The court further held that the pool of similar cases would be restricted "to cases decided under constitutional death penalty statutes and to those decided under . . . [Maryland] law." 613

(e) Jury Instructions—The appellant in Calhoun raised an issue pertaining to jury instructions, requiring the Court of Appeals to interpret section 413(k)(2) of the death penalty statute, which mandates a sentence of life imprisonment if the sentencing jury is unable to reach a decision "within a reasonable time." 614 Calhoun had argued that the trial judge should have instructed the sentencing jury prior to its deliberations that a life sentence would be imposed if the

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610. 297 Md. at 465, 468 A.2d at 18. In dissent, Judge Davidson would have held that all "death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty" must be included in the inventory of relevant cases in order to achieve the goal of proportionality review—the consistent and fair application of the death penalty." Id. at 490, 468 A.2d at 30 (quoting the majority opinion) (Davidson, J., dissenting).

611. Id. at 465, 468 A.2d at 18. This was based on the court's reading of Gregg and Proffitt. For a discussion of this issue, see Gregg, 428 U.S. at 204 n. 56; Proffitt, 428 U.S. at 259 n.16.

612. 297 Md. at 465, 468 A.2d at 18. The court noted that nothing in the Maryland Constitution required a different result, but the court left open the door for any defendant whose death sentence is under appellate review to argue, with relevant facts, that designated non-capital murder cases are similar to the case being reviewed and should be considered by the Court of Appeals. Id. at 466, 468 A.2d at 18.

613. Id.

614. Md. Ann. Code art. 27, § 413(k)(2) (1982) provides: "If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life."
jury could not reach a verdict within a reasonable time.\textsuperscript{615} In rejecting this argument, the Court of Appeals reasoned that giving such an instruction might prompt a juror to hold out longer or, conversely, cause a jury to rush through its deliberations.\textsuperscript{616} Accordingly, the court adopted the State's position that the statutory mandate in section 413(k)(2) need not be included in a judge's instructions to the sentencing jury. Under the court's holding, the question of what constitutes a "reasonable time" for purposes of section 413(k)(2) remains within the discretion of the trial judge.

3. Other Death Penalty Issues.—(a) Double Jeopardy.—In Bowers v. State\textsuperscript{617} the Court of Appeals held that there was no double jeopardy violation when a defendant was convicted of first degree premeditated murder after being convicted of a felony arising from the same incident. In Newton v. State\textsuperscript{618} the court had held that an underlying felony and a felony murder "merge" for double jeopardy purposes, thereby precluding separate punishment of the two offenses.\textsuperscript{619} Bowers argued that, under Newton, the State could not try him for first degree murder because he earlier had been convicted of kidnapping, a felony which was part of the same occurrence.\textsuperscript{620} His argument assumed that no distinction existed between premeditated murder and felony murder for purposes of applying the Newton double jeopardy rule.

Rejecting this argument, the Court of Appeals distinguished Bowers and Newton. The court explained that Newton applied the merger concept only to felony murder\textsuperscript{621} and not to first degree murder "'premised upon independent proof of wilfulness, premeditation and deliberation.' "\textsuperscript{622} The court then determined that Bowers's conviction of first degree murder was premised upon such independent proof. Moreover, the State did not argue felony mur-

\textsuperscript{615} 297 Md. at 593, 468 A.2d at 59. The Calhoun jury reached its decision to impose the death sentence after a little more than four hours of deliberations.
\textsuperscript{616} 1d. at 595, 468 A.2d at 60.
\textsuperscript{617} 298 Md. 115, 468 A.2d 101 (1983).
\textsuperscript{618} 280 Md. 260, 373 A.2d 262 (1977).
\textsuperscript{619} Id. at 269, 273-74, 373 A.2d at 267, 269. The Newton court applied the "required evidence" test for determining identity of offenses. Under that test, if each offense requires proof of a fact that the other does not, the offenses are not the same and do not merge, but if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited. Id. at 268, 373 A.2d at 266.
\textsuperscript{620} 298 Md. at 140, 468 A.2d at 114.
\textsuperscript{622} 298 Md. at 141, 468 A.2d at 114 (quoting State v. Frye, 283 Md. 709, 716, 393 A.2d 1372, 1376 (1978)). See also Md. Ann. Code art. 27, § 407 (1982).
Thus, because Bowers was not convicted of felony murder, the merger principle did not apply, and the State did not violate the prohibition against double jeopardy in trying Bowers on murder charges following his kidnapping conviction.624

(b) Voir Dire Examination.—The Court of Appeals in Bowers also considered whether the trial judge erred in refusing to ask prospective jurors specific questions submitted by the defendant. The trial judge declined to ask the questions, which were designed to elicit the prospective jurors' views on capital punishment, because he believed doing so would result in the exclusion of jurors based on their opposition to capital punishment,625 a statutorily prohibited ground for exclusion.626 Instead, the trial judge inquired on voir dire whether any juror's attitude toward the death penalty would prevent him or her from making an impartial decision at the guilt-or innocence phase of the defendant's murder trial.627

The Court of Appeals ruled that it was within the trial judge's discretion to deny Bowers' proposed jury question because it would result in excluding from the jury people who, by statute, may not be excluded.628 Further, none of the capital punishment questions proposed by Bowers would provide grounds for disqualification of prospective jurors, because they would not show whether or not a juror would follow the law or "abide by his oath as a juror."629 Finding that the trial judge's general question "adequately covered the matter,"630 the Court of Appeals found no error in the trial judge's conduct of voir dire.

623. 298 Md. at 141, 468 A.2d at 114.
624. Id. at 143, 468 A.2d at 116.
625. Id. at 145, 468 A.2d at 116.
626. See Md. Cts. & Jud. Proc. Code Ann. § 8-210(c) (1984), which states: "Belief against capital punishment—A person may not be disqualified, excused, or excluded from service in a particular case as a juror of the State by reason of his beliefs against capital punishment unless such belief would prevent his returning an impartial verdict according to law."
627. 298 Md. at 144, 468 A.2d at 116.
628. Id. at 147, 468 A.2d at 118. Under current and prior procedural rules, the trial judge has broad discretion in conducting a voir dire examination. See Tichnell III, 297 Md. at 436-38, 468 A.2d at 3-4 (individual voir dire examination of prospective jurors left to discretion of trial judge); Bryant v. State, 207 Md. 565, 583, 115 A.2d 502, 510 (1955) (questions to be asked on voir dire left largely to court's discretion); see also Md. R.P. 4-312(d); former Md. R.P. 752 (Supp. 1981).
629. 298 Md. at 147, 468 A.2d at 117.
630. Id., 468 A.2d at 117-18.
K. Other Developments

1. Conflict of Interest.—In Young v. State the Court of Appeals held that an entire county's state's attorney's office should not be disqualified from prosecuting a defendant because one member had previously represented the defendant in the same action. The court adopted a rule that, when disqualification is sought under these circumstances, "the trial court must make inquiry as to whether the defendant's former counsel participated in the prosecution of the case or divulged any confidential information to other prosecutors." "

In making its decision, the court considered case law that accepted a per se disqualifying rule, and case law that rejected such a rule. The court reasoned that such a rule would be merely cosmetic, making it necessary to trust that the specially appointed prosecutor would not collaborate with the disqualified state's attorney's office. The court also considered the argument that the per se rule is too broad and " 'would result in many unnecessary withdrawals, limit mobility in the legal profession, and restrict the state in the assignment of counsel where no breach of confidentiality has in fact occurred.' "

Recognizing that this issue was one of first impression in Maryland, the court reasoned, by analogy, from two prior Maryland cases addressing related issues. In Sinclair v. State the issue was whether a state's attorney could be involved in a prosecution when

632. Id. at 298, 465 A.2d at 1155.
633. Id.
636. 297 Md. at 294, 465 A.2d at 1159 (quoting State v. Jones, 180 Conn. 443, 456-57, 429 A.2d 936, 942-43 (1980)). The Supreme Court of Connecticut did note, however, that "'[it] can be argued that the withdrawal of . . . the entire state's attorney's office, when the slightest chance of betrayal of confidential communications exists might better preserve the integrity of the judicial system.'" Jones, 180 Conn. at 456-57, 429 A.2d at 942-43. The Supreme Court of Connecticut went on to reject this argument citing the reasons set forth above.
637. 297 Md. at 296-98, 465 A.2d at 1154-55.
he had a conflicting private interest. The court articulated the principle that, if an individual prosecutor has a personal or pecuniary interest in a civil matter that would impair his ability to act impartially towards the state and the accused, he must be disqualified. In *Lykins v. State* the issue was whether an indictment should be set aside because the prosecuting state's attorney had once represented the defendant in another matter. The court in *Lykins* held that a trial court should not dismiss the indictment but rather should supplant the prosecutor. Moreover, the *Lykins* court indicated that the mere appearance of impropriety would not warrant the dismissal of the indictment.

The *Young* court, looking at the reasoning of *Sinclair* and *Lykins*, held that the appearance of impropriety was not sufficient to warrant disqualification of an entire state's attorney's office, when one member had previously represented the defendant currently under prosecution.

In a vigorous dissent, Judge Davidson argued that this marked a radical departure from the controlling principles established in *Sinclair* and *Lykins*, finding that those principles dictated that the appearance of impropriety is sufficient to disqualify the entire office. She argued that the need for public confidence in the administration of justice far outweighs the "minor practical difficulties" that would result from the application of a stricter rule.

The majority's position that automatic disqualification of an en-

639. Id. at 244, 363 A.2d at 469-70.
640. Id. at 254, 363 A.2d at 475.
642. Id. at 85, 415 A.2d at 1121. "[T]he proper action to be taken by a trial judge, when he encounters circumstances similar to those in the case at bar which he determines to be so grave as to adversely affect the administration of justice but which no way suggest the bringing of a prosecution for improper motives . . . is to supplant the prosecutor, not to bar the prosecution." Id.
643. Id. at 84, 415 A.2d at 1121.
644. 297 Md. at 298, 465 A.2d at 1155.
645. Id. (Davidson, J., dissenting). Judge Davidson argued that in *Sinclair* the court recognized that prosecutorial impartiality is "so essential to the fair and equal administration of justice" that a state's attorney must not only be impartial "but must also appear to be so." Moreover she argued that *Sinclair* establishes that a conflict of interest on the part of a state's attorney creates an appearance of impropriety and that, for policy reasons, such a state's attorney is disqualified without proof of actual prejudice to the accused. Id. at 301-02, 465 A.2d at 1157.

Likewise, Davidson felt that in *Lykins* the court had confirmed this reading of *Sinclair*. Id. at 303-04, 465 A.2d at 1158.
646. Id. at 307, 465 A.2d at 1160.
647. Id. at 307-08, 465 A.2d at 1160. Judge Davidson noted that it is not administratively difficult to appoint a special prosecutor. Id. at 307 n.7, 465 A.2d at 1160 n.7.
tire state's attorney's office is unnecessary is consistent with prior case law. However, the majority overlooks the difficulty that a trial judge would face in conducting an inquiry to determine if confidential information was divulged. On the other hand, Judge Davidson's position that the mere appearance of impropriety should disqualify the entire office seems impractical in light of the frequency with which public defenders move to the state's attorney's office and the size of those offices. In weighing the interests of a defendant against the practical aspects of administration of justice, the solution might be a rule creating a rebuttable presumption that the defendant was prejudiced. This would place the burden on the state's attorney's office, which is in the best position to know whether any confidential information has been divulged.

2. Animal Cruelty.—In Taub v. State the Court of Appeals interpreted the reach of the Animal Cruelty Act. The Court of Appeals held that the Act did not apply to the activities of a scientific researcher experimenting on laboratory animals. After tracing the history of the Maryland animal cruelty statutes, the court emphasized the fact that the "legislature has consistently been concerned with the punishment of acts causing 'unnecessary' or 'unjustifiable' pain or suffering." The language of the Act, however, expressly excludes those activities where the infliction of pain is incidental and unavoidable. Noting that the legislature recognized that there were human activities involving animals that are beyond the reach of the Act, if they only involve such incidental infliction of pain, the court concluded that the Act was not intended

648. See supra notes 637-44 and accompanying text.
649. Judge Davidson's reasoning does, however, find substantiation in the ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 3-1.2, Conflicts of Interest (1980), quoted in 297 Md. at 299 n.1, 465 A.2d at 1156 n.1.
651. MD. ANN. CODE art. 27, § 59 (1982) states in relevant part that:

Any person who

(1) . . . tortures, torments, . . . mutilates or cruelly kills; or
(2) causes, procures or authorizes these acts; or (3) having the charge or custody of an animal either as owner or otherwise, inflicts unnecessary suffering or pain upon the animal, . . . is guilty of a misdemeanor. . . . Customary and normal veterinary and agricultural husbandry practices . . . are not covered by the provisions of this section. . . . It is the intention of the General Assembly that all animals shall be protected from intentional cruelty, but that no person shall be liable for . . . normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable.

Id. (emphasis added).
652. 296 Md. at 440, 463 A.2d at 819.
653. Id. at 443, 463 A.2d at 821.
654. MD. ANN. CODE art. 27, § 59 (1982).
to apply to the type of scientific research in question. In reaching this decision, the court has effectively determined that legitimate research involving animal experimentation should be governed by relevant research regulations and not by general purpose animal welfare statutes.

Cecilia E. Cantrill
Kathryn L. Grill
Raymond A. Hein
Thomas Hoxie
Richard A. Monfred

655. 296 Md. at 444, 463 A.2d at 822.
VII. FAMILY LAW

A. Overview of the Family Law Article

1. Introduction.—As part of the continuing revision of the Annotated Code of Maryland, a new Family Law Article was enacted by the Maryland legislature and became effective October 1, 1984. The new article includes provisions on marriage, actions for breach of promise to marry and for alienation of affection, rights and obligations of spouses, domestic violence, displaced homemakers, rights and obligations of parents and children, adoption, child care, foster care, mistreatment of parents and children, single parents, divorce, property disposition in annulment and divorce, child custody and visitation, support of spouses, children and parents, and adult protective services. These provisions replace all of articles 45, 62, 72A and 89C of the Maryland Annotated Code, and portions of articles 16, 17, 27, and 88A of the Code and of the Courts and Judicial Proceedings Article.

The new Family Law Article is organized in a manner similar to the previously revised articles and includes an index, tables of comparable sections cross-referencing the old sections, and revisor’s notes after each section. An editor’s note explains that

3. Id. §§ 3-101 to -105.
4. Id. §§ 4-101 to -302.
5. Id. §§ 4-501 to -516.
6. Id. §§ 4-601 to -613.
7. Id. §§ 5-101 to -206.
8. Id. §§ 5-301 to -415.
9. Id. §§ 5-501 to -523, -550 to -557.
10. Id. §§ 5-524 to -549, -601 to -611.
11. Id. §§ 5-701 to -912.
12. Id. §§ 5-1001 to -1048.
13. Id. §§ 6-101 to -103.
14. Id. §§ 7-101 to -106.
15. Id. §§ 8-101 to -213.
17. Id. §§ 10-101 to -109.
18. Id. §§ 14-101 to -404.
21. Id. at 353.
22. The revisor’s notes are not law and are not to be considered to have been enacted as part of the Act. However, the Court of Special Appeals has used revisor’s notes

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cases cited in the notes to each provision are cases interpreting former statutes. These citations were retained if they were helpful in interpreting the new statute.

The purpose of the revision was modernization and clarification, not policy making. This was accomplished through reorganization, deletion of repetitive or obsolete provisions and general improvement of language and expression. However, the article also includes substantive changes, both because it includes legislation enacted in 1984 and because it includes some supposedly stylistic revisions that actually change the law in substantive ways.

2. **Stylistic Changes.**—Many of the changes in the new article or suggested by the Commission are purely stylistic. For example, in the title on adoption, the Commission suggests substituting the term “biological parents” for “natural parents” throughout the Family Law Article. The use of “natural parents” is considered by many to be disparaging to adoptive parents because, by implication, adoptive parents are then “unnatural” parents. Other jurisdictions have adopted the use of the terms “biological parents” or “birth parents” in legislation dealing with adoption.

In another stylistic change, the Commission substituted English words for the former Latin classifications of divorce. The Commission substituted the words “absolute” and “limited” to replace “a vinculo matrimonii” and “a mensa et thoro” throughout the article.

3. **Stylistic Changes that Make Substantive Changes.**—Some of the changes that the Commission claims are purely stylistic actually change the law in substantive ways. For instance, in the provisions...
dealing with actions for breach of promise to marry and alienation of affections, the wording is clarified to show legislative intent to bar the right as well as to prohibit the remedy. If the individual is pregnant, however, she still has an action for breach of promise to marry.

Another supposedly purely stylistic change that actually has substantive impact derives from the Commission's clarification of the definition of battered spouse. By changing the phrase "with whom he or she shares a house" to "with whom the individual resides," the Commission included apartment dwellers in the definition of a battered spouse.

4. Deletion of Unconstitutional Provisions. — While revising the Code, the Commission screened all family law provisions for obsolescence, conflict, repeal, unconstitutionality, and obvious gaps, and made recommendations to the General Assembly to correct these deficiencies. During the revision process, the Commission deleted several provisions that were clearly and explicitly unconstitutional.

The Commission deleted the statutory presumption that it is in the child's best interest to award guardianship to a child placement agency without the parent's consent, when the child has been under continuous foster care under the custody of that child placement agency for at least two years. The new standard requires proof by clear and convincing evidence that it is within the child's best inter-

31. Id. §§ 3-102, -103.
32. Id. § 3-102. Because only pregnant individuals are entitled to bring this action, this provision probably violates the Maryland Equal Rights Amendment. See Md. Const. Decl. of RTS. art. 46. The Commission chose not to delete this provision although it is apparently unconstitutional. For a discussion of provisions that the Commission did delete for unconstitutionality, see infra notes 36-40 and accompanying text.
est for the court to grant a decree of adoption or decree of guardianship without the consent of a biological parent.\(^{38}\)

The Commission also deleted the former provision which gave the mother of an illegitimate child the right to sue for the loss of services and earnings of her minor child that was caused by an injury wrongfully or negligently inflicted on the child.\(^{39}\) The exclusion of the rights of the father of an illegitimate child violated the Maryland Equal Rights Amendment.\(^{40}\)

5. **Unconstitutional Provisions That Were Not Deleted.** —Due to time constraints and the nature of the revision process, some provisions were retained that may be unconstitutional. Included among these questionable provisions are the two-year statute of limitations on paternity proceedings,\(^{41}\) the marriage license form,\(^{42}\) the ban on advertising in solicitation of performing marriages,\(^{43}\) the doctrine of necessaries,\(^{44}\) procedures to institute support payments by the father of a child,\(^{45}\) the restriction on travel as a condition of the bond

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38. **Md. Fam. Law Code Ann.** § 5-313 (1984). The revision also allows an action to terminate biological parental rights to be brought after only one year of continuous foster care in the child placement agency.


40. **Md. Const. Decl. of Rts. art. 46.** Obviously, if this right were extended to both the mother and the father of an illegitimate child, the provision would no longer violate the Maryland Constitution. However, the Commission chose to delete the right entirely because it is beyond its mandate to create new substantive rights.


42. **Md. Fam. Law Code Ann.** § 2-403 (1984). Because the form asks for the age of the intended husband, but not the intended wife, it probably violates the Maryland Equal Rights Amendment.

43. **Id.** § 2-408. The ban on advertising set out in subsection (a)(2) may infringe on first amendment rights. See Linmark Assocs. v. Willingboro, 431 U.S. 85 (1977); Donnelly Advertising Corp. v. Mayor & City Council of Baltimore, 279 Md. 660, 370 A.2d 1127 (1977).


45. **Md. Fam. Law Code Ann.** § 5-1032 (1984), allowing for a court-ordered lien on the earnings of the father of a child but not the mother is probably violative of the Maryland Equal Rights Amendment.
in a paternity proceeding,\textsuperscript{46} the continuation of a father's duty to support an illegitimate child after the father's death,\textsuperscript{47} and the power of a court to order any party to a paternity proceeding to remain in the state.\textsuperscript{48} In addition to these, provisions involving the Married Women's Property Act may raise constitutional questions.\textsuperscript{49}

6. Substantive Changes Made by Incorporation of 1984 Legislative Session Laws.—The article also incorporates many substantive changes made during the 1984 legislative session. Several of the changes strengthen a court's ability to ensure that adequate child support is provided. When issuing a support order, a court may now order a parent to add a child to an existing health insurance policy, if it can be done at a reasonable cost.\textsuperscript{50}

Pursuant to 1984 session law, the revised statutes now provide that a court may award alimony and child support beginning on the date the pleading requesting alimony or child support is filed.\textsuperscript{51} Formerly, trial judges had the discretion to award alimony and child support retroactively, for periods before pleadings were filed.

A revision codifying \textit{Haines v. Shanholtz}\textsuperscript{52} affects paternity proceedings. Affirmative blood tests\textsuperscript{53} may now be admitted into evidence, and the party who secures the appearance of the laboratory technician in court is responsible for the costs associated with the appearance.\textsuperscript{54} An exception is made, however, if that party prevails or is indigent.\textsuperscript{55}

In response to the Governor's Task Force on Child Abuse and Neglect, the 1984 General Assembly enacted several measures

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} \textsuperscript{\$} 5-1042. This provision may restrict the constitutionally protected right to travel.
\item \textsuperscript{47} \textit{Id.} \textsuperscript{\$} 5-1043.
\item \textsuperscript{48} \textit{Id.} \textsuperscript{\$} 5-1035.
\item \textsuperscript{49} \textit{Id.} \textsuperscript{\$\$} 4-202 to -301. These sections were enacted to ensure that a married woman has the same rights as an unmarried woman. The common law, which limited a married individual's rights on the basis of sex, violated the Maryland Equal Rights Amendment. It is possible that a repeal of the Married Women's Property Act may revive the common law and reopen constitutional questions. \textit{See} \textit{Md. Fam. Law Code Ann.} introductory general revisor's note to \textsuperscript{\$\$} 4-202 to -301, at 48 (1984).
\item \textsuperscript{50} \textit{Md. Fam. Law Code Ann.} \textsuperscript{\$} 12-102 (1984).
\item \textsuperscript{51} \textit{Id.} \textsuperscript{\$\$} 11-106, 12-101.
\item \textsuperscript{52} \textit{57 Md. App.} 92, 468 A.2d 1365 (1984).
\item \textsuperscript{53} The results of blood tests will be received into evidence if definite exclusion is established or the test excludes 97.3\% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3\%. \textit{Md. Fam. Law Code Ann.} \textsuperscript{\$} 5-1029(c) (1984). \textit{See} discussion of \textit{Haines v. Shanholtz}, infra notes 234-38 and accompanying text.
\item \textsuperscript{54} \textit{Md. Fam. Law Code Ann.} \textsuperscript{\$} 5-1029(g) (1984).
\item \textsuperscript{55} \textit{Id.}
\end{itemize}
strengthening sanctions against child abuse and neglect. A court may now deny custody or visitation rights to a party if he or she is reasonably suspected of past child abuse or neglect. A very strict standard is set by the new statute. If, during a custody hearing, a court has reasonable grounds to believe a child has been abused or neglected by the party seeking custody, the court must determine whether abuse or neglect is likely to recur if custody is granted. Unless the court makes a specific finding that no likelihood exists of further abuse or neglect, the court is required to deny custody or visitation rights to that party. The statute does provide that supervised visitations may be permissible as long as the child's safety is not endangered. It is unclear whether the statute includes all instances of past child abuse or only those instances of abuse directed against the child whose custody is sought.

A separate provision clarifies the procedures for the investigation of a reported child abuse. Within twenty-four hours of a report, the child's home should be visited by a representative of the local department of social services or the appropriate law enforcement agency to see the child, interview the caretaker, and decide on the safety of the child. The provision also sets out the scope of the investigation and requires that, within each county and Baltimore City, the State's Attorney, the law enforcement agencies and the Department of Social Services agree on standard operating procedures for child abuse cases. The standard operating procedures were set up in January, 1985. Although differing from county to county, all procedures require that some response be made within twenty-four hours. All investigations must be completed within ten days of the initial report of the abuse.

56. Id. § 9-101.
57. Id. § 9-101(a).
58. Id. § 9-101(b). As a practical matter, once past abuse is shown, a court would never make a specific finding that the abuse will not recur. Because the standard is so strict, it may be unconstitutional.
59. Id.
60. Id. § 5-905.
61. Id. § 5-905(a)(2).
62. Id. § 5-905(b).
63. Id. § 5-905(d).
64. Telephone interview with Olga Bruning, Assistant State's Attorney, Baltimore City (Mar. 21, 1985).
65. In Baltimore City, the police respond to child abuse calls. This procedure enables prosecutors to obtain immediate physical evidence of any abuse. Practitioners should check with their local state's attorney's office to ascertain procedure in their jurisdiction. Id.
Another provision requires the Governor to set aside budget funds to pay for emergency medical treatment for abused children.\footnote{Id. § 5-910(f).}

Related to these measures against child abuse is a new provision which provides that a spouse whose minor child is being abused now has grounds for a limited divorce.\footnote{Id. § 5-910(f).} This provision overrules \textit{Binder v. Binder,} \footnote{16 Md. App. 404, 297 A.2d 293 (1972).} which held that mistreatment of a child, in and of itself, was not sufficient justification to constitute an affirmative defense to a charge of desertion by the abusing spouse.\footnote{Id. at 413, 297 A.2d at 298.} A proposal to add similar language\footnote{Id. §§ 8-208, -210.} to the grounds for an absolute divorce was rejected by the General Assembly.\footnote{Id. §§ 8-208, -210.} Thus a spouse whose minor child is being abused may file for a limited divorce but must wait two years to obtain an absolute divorce unless other grounds satisfying the statute are present.\footnote{Id. §§ 8-208, -210.}

This provision may have little impact on divorce law, since limited divorces are rarely sought, but it does provide a court with another weapon against child abuse. The practical effect of this provision is to enable a court to get a child abuser out of the family home by awarding custody of the family home to the non-abusing parent for a period of up to three years.\footnote{Id. §§ 4-505, -506.} This provides a more long-term solution than was previously available in Maryland.\footnote{Id. §§ 4-505, -506.}

\section{Ambiguous and Conflicting Sections.}—The Commission also noted those provisions that are ambiguous or in conflict with an-
other section of the Code. For example, the definition of “natural father” allows the possibility of more than one man being the natural father of a child.\textsuperscript{76} Another provision states that “[i]f a final disposition as to alimony has been made in an agreement between the parties, the court is bound by that agreement as the agreement relates to alimony,” but fails to clarify the meaning of “final disposition” and “agreement between the parties.”\textsuperscript{77} An example of an inconsistency between sections is evidenced by the sections entitled “Special Provisions of Alimony, Annulment and Divorce”\textsuperscript{78} and “General Provisions.”\textsuperscript{79} The former requires only the oral testimony of the plaintiff in a hearing before a final decree can be entered in an action for alimony, annulment, or divorce. In contrast, the latter section provides that a court “may not enter a decree of divorce on the uncorroborated testimony of the party who is seeking the divorce.”\textsuperscript{80}

8. Conclusion.—Reorganization and collection of all family law statutes in one volume vastly improves the former system, where family law statutes were scattered throughout the Code. It is now up to the legislature to respond to Commission suggestions to ensure that all family laws are just and effective.

B. Marital Property

1. General.—In 1978, the Maryland General Assembly completely revised state law regarding distribution of property at divorce.\textsuperscript{81} The law, commonly referred to as the Marital Property Act, became effective on January 1, 1979. Prior to this date, distribution of property depended primarily on record title.\textsuperscript{82} Under pre-existing law, if a spouse did not contribute monetarily to the purchase of property, the courts could not award that spouse any portion of

\begin{itemize}
\item \textsuperscript{76} Id. § 5-310.
\item \textsuperscript{77} Id. §§ 11-101, 8-103.
\item \textsuperscript{78} Id. § 1-203.
\item \textsuperscript{79} Id. § 7-101.
\item \textsuperscript{80} Id. Other sections which are unclear or inconsistent are §§ 4-504, 5-203, 5-311, 5-1005, 6-102, 8-201, 8-202, 8-203, 8-207, 8-208, 8-210.
\item \textsuperscript{82} Comment, Property Disposition Upon Divorce in Maryland: An Analysis of the New Statute, 8 U. BALTIMORE L. REV. 377, 380 (1979).
\end{itemize}
the property held in the other spouse's name.\textsuperscript{83} No recognition was accorded to a non-working spouse's contributions to the marriage.\textsuperscript{84} During the 1970's, the rebirth of the women's movement generated widespread changes in societal attitudes about divorce and the roles of women, marriage, and family.\textsuperscript{85} These attitude changes created pressure for legislative changes as well.\textsuperscript{86}

In 1977, Governor Mandel appointed a commission to review state constitutional provisions, statutes, and case law affecting domestic relations and make recommendations for change.\textsuperscript{87} The commission's first report proposed comprehensive revision of the laws governing property disposition on divorce or annulment.\textsuperscript{88} This proposed legislation, passed on the last day of the 1978 legislative session,\textsuperscript{89} provides for recognition of the non-working spouse's contributions to the family's well-being.\textsuperscript{90}

The Marital Property Act provides a comprehensive framework for the equitable distribution of property upon divorce.\textsuperscript{91} The Act defines marital property as all property, however titled, acquired during the marriage. It excludes property acquired before marriage, property acquired by inheritance or gift, property excluded from marital property by valid agreement, or property directly traceable to one of these sources.\textsuperscript{92}

When a dispute arises concerning property distribution in a divorce proceeding, the court determines which property is marital\textsuperscript{93} and the value of that marital property.\textsuperscript{94} Although the Act specifically prohibits the court from transferring ownership of both real

\begin{itemize}
  \item \textsuperscript{83} Governor's Commission on Domestic Relations, Report Accompanying the Commission's Proposed Bill on the Disposition of Property in Connection with a Divorce or Annulment 2 (1978) [hereinafter cited as Report].
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Comment, supra note 82, at 377.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. at 383.
  \item \textsuperscript{88} Report, supra note 83, at 1.
  \item \textsuperscript{89} Comment, supra note 82, at 384-85. For discussion of the committee hearings on amendments to the original bill, see id. at 383-85.
  \item \textsuperscript{90} Id. at 386.
  \item \textsuperscript{91} In equitable distribution jurisdictions, the court recognizes the contribution of each party to the family's wealth and adjusts the equities accordingly. By contrast, in community property jurisdictions, each spouse acquires a half-interest in all property acquired during the marriage. Deering v. Deering, 292 Md. 115, 123 n.6, 437 A.2d 883, 887-88 n.6 (1981).
  \item \textsuperscript{92} Md. Fam. Law Code Ann. § 8-201(e) (1984).
  \item \textsuperscript{93} Id. § 8-203(a).
  \item \textsuperscript{94} Id. § 8-204.
\end{itemize}
and personal property, the court does have the discretion to grant a monetary award to adjust the equities between the parties. The Act enumerates ten factors to be considered in determining the amount and method of payment of any award. The law also provides for temporary use and possession of the family home and family use property, and excludes this property from marital property until the expiration of any use and possession order.

In Dobbyn v. Dobbyn, the Court of Special Appeals provided additional clarification regarding the proper application of this Act. The Dobbyn court held that marital property should always be valued as of the date of the divorce decree, although the parties may agree on an earlier date to determine which property is to be considered marital. The court also held that no distinction should be drawn between property that increased in value after separation, due to one party's activities, and property that passively increased in value. Once the date is chosen to determine which property is marital, all marital property in existence on that date is valued.

In Sharp v. Sharp, the Court of Special Appeals confirmed that the enactment of the Marital Property Act did not change the law in Maryland regarding the effect of deliberate dissipation of marital assets prior to divorce. The record sustained a finding

95. Id. § 8-202(a)(3).
96. Id. § 8-205(a).
97. These factors include the monetary and nonmonetary contributions of each spouse to the family, the value of each party's property, the economic circumstances of each party at the time the award is made, the circumstances leading to the divorce, the duration of the marriage, the age of each party, the physical and mental condition of each party, how and when specific marital property was acquired, any alimony award, and any other factors that the court deems relevant. Id. § 8-205(a)(1)-(10).
98. Id. § 8-206 to -210.
99. Id. § 8-203(c).
102. 57 Md. App. at 676, 471 A.2d at 1075.
103. Id. at 671, 471 A.2d at 1073.
104. Id. at 674, 471 A.2d at 1074. For example, investment accounts that increased in value due to one partner's active trading after the couple's separation should not be excluded from marital property on that basis. Since the accounts represented assets acquired during marriage, the statute requires that they be included in marital property. Id. at 673-74, 471 A.2d at 1074.
106. Id. at 403, 473 A.2d at 507.
that Mr. Sharp deliberately dissipated marital assets to avoid a monetary award and the payment of alimony. The Sharp court held that the trial court had correctly applied the criteria in the Marital Property Act and prior case law in determining which property was marital, its value, and the amount of the award.\textsuperscript{107} This decision also reaffirmed cases on the dissipation of marital assets issue decided prior to the enactment of the Marital Property Act.\textsuperscript{108}

Another decision of the Court of Special Appeals treated several marital property issues. In Gravenstine v. Gravenstine,\textsuperscript{109} the Court of Special Appeals considered which items of property constituted marital property. The court held that securities acquired during marriage through the investment of dividends from securities Mr. Gravenstine purchased before marriage constituted marital property.\textsuperscript{110} In a straightforward application of Maryland law,\textsuperscript{111} the court found that Ms. Gravenstine's monetary and nonmonetary contributions to the marriage made it possible for the couple to reinvest the dividends.\textsuperscript{112} In addition, the court ruled that one-half of the balance withdrawn from a joint savings account by Mr. Gravenstine prior to divorce was properly awarded to Ms. Gravenstine\textsuperscript{113} and that the portion of Mr. Gravenstine's pension that "accrued after the date of marriage" was marital property.\textsuperscript{114}

\textsuperscript{107} Id. at 394-403, 473 A.2d at 502-07. The Sharp court relied on Harper v. Harper, 294 Md. 54, 448 A.2d 916 (1982), which established that Md. CTS. & JUD. PROC. CODE ANN. § 3-6A-05 (1984) (recodified at Md. FAM. LAW CODE ANN. §§ 8-203 to -205 (1984)) required a three-step process for the equitable distribution of marital property. First, property must be characterized as either marital or nonmarital. Then, the value of marital property must be determined. Finally, the court may make a monetary award to adjust the parties' equities and interests in the marital property. 294 Md. at 79, 448 A.2d at 928.


\textsuperscript{109} Id. at 174, 472 A.2d at 1009.


\textsuperscript{112} Id. at 173-74, 472 A.2d at 1008.

\textsuperscript{113} Id. at 169, 472 A.2d at 1006. Because there was no proof of the value of the marital portion of the pension, the case was remanded to the trial court for determination of that value and equitable distribution. Id. at 171, 472 A.2d at 1007. For a
2. Monetary Awards. — In *McAlear v. McAlear*, the Court of Appeals was presented with the question of whether a lump sum monetary award granted pursuant to a divorce decree constituted a form of alimony. If the court had found that the monetary award was alimony in gross, Mr. McAlear could have been imprisoned for failure to pay the award. Because the court held that a monetary award was not alimony, failure to pay merely created a debt. Pursuant to the Maryland Constitution, Mr. McAlear could not be imprisoned for failure to pay a debt.

In spite of the close relationship between a monetary award and an award of alimony, the *McAlear* court found that the interrelationship was not enough to transform a monetary award into a form of alimony. The court held that a monetary award constituted a discussion of pension valuation, see generally infra notes 131-69 and accompanying text.

In contrast to the pension, the court found that real estate that had been totally acquired prior to the marriage was not marital property, despite the fact that property taxes were paid on it out of marital funds. 58 Md. App. at 171-72, 472 A.2d at 1007-08.

116. Id. at 324, 469 A.2d at 1258. The McAears were divorced in June, 1981. The trial court awarded the wife alimony as well as a monetary award of $64,000 to be paid in installments. Mr. McAlear failed to make the first payment. Ms. McAlear filed a petition to have Mr. McAlear held in contempt of court. The trial court determined that a monetary award was a form of alimony. Because the award was not a debt, Mr. McAlear was held to be in contempt and sentenced to ninety days. Id. at 326, 472 A.2d at 1258-59.

117. Alimony in gross is the award of a sum of money. Full payment of alimony in gross discharges the payor's obligation of support to the recipient spouse. On the other hand, after an award of permanent alimony, the payor can never discharge the obligation. Support payments must be made so long as both spouses are alive and the recipient spouse remains unmarried. A monetary award is an award wholly separate from an alimony award, designed to achieve an equitable division of property accumulated during marriage.

119. 298 Md. at 351-52, 469 A.2d at 1272.
120. Md. Const. art. IIIe, § 38, provides:

No person shall be imprisoned for debt, but a valid decree of a court of competent jurisdiction or agreement approved by decree of said court for the support of a wife or dependent children, or for the support of an illegitimate child or children, or for alimony, shall not constitute a debt within the meaning of this section. (emphasis added)

121. A monetary award granted pursuant to Md. Fam. Law Code Ann. § 8-205 (1984) and an award of alimony granted pursuant to id. §§ 11-101 to -103, -106 to -107 may resemble one another. Like a monetary award paid in installments, alimony may be granted for a definite period of time rather than over the life of the spouse. Also, courts consider similar factors in determining the amount of either the monetary award or alimony. One of the factors considered in the awarding of alimony is any monetary award received by the spouse, and the amount of any monetary award is often based on the amount of alimony being received.

122. 298 Md. at 348, 469 A.2d at 1270.
property disposition award, adjusting the marital property interests of the spouses. The court expressly stated that monetary awards are not a form of alimony.

The McAlear result is sound, given the fact that the General Assembly has consistently distinguished alimony from the disposition of property incident to a divorce. The McAlear court found that the legislative history of the Property Disposition Act, the language of the Act itself, and the Act's stated purpose evinced an intent to restrict the scope of the Act to the disposition of property acquired before and during the marriage.

Another factor warranting the conclusion that a monetary award should not be enforceable through a contempt proceeding is that Maryland, through its constitution, has expressly indicated that no individual should be incarcerated for failure to pay a debt. Given this clear indication of intent, contempt proceedings should only be utilized where expressly designated by the legislature.

It is important to note that a spouse is not without recourse merely because a monetary award is not enforceable by contempt. Monetary awards may be enforced in accordance with the Maryland Rules. In order to enforce a monetary award, courts could therefore place a lien on property, enjoin a spouse from alienating property, or require a spouse to assign property as security for the obligation.

3. **Pensions.**—Two recent decisions by the Court of Special Appeals illustrate the importance of the method used to value retire-
ment benefits when determining the amount and form of a monetary award in a divorce proceeding. In both *Cotter v. Cotter* and *Barr v. Barr*, the couples had been married for more than twenty years, and the husbands had made substantial contributions to a retirement plan during the marriage. Each case involved a determination of what portion of the pension benefits were marital property and how those benefits should be valued in calculating monetary awards. However, the methods used to value Mr. Cotter's expected pension benefits was very different from the method used to value Mr. Barr's expected pension benefits. Thus, the court made very different monetary awards. While Ms. Barr received a percentage of her husband's actual contributions, Ms. Cotter was awarded a percentage of her husband's pension reduced to its present value at the time of the divorce. The Court of Special Appeals approved the method used in each case, noting that the trial court has the discretion to select the valuation method based on the facts in each case.

Treatment of pensions as marital property is a relatively new phenomenon in Maryland. Prior to the passage of the Marital Property Act, the courts had never considered the issue. With near unanimity, however, both community property and equitable dis-

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133. See generally *Cotter*, 58 Md. App. at 536-40, 473 A.2d at 974-76; *Barr*, 58 Md. App. at 588-91, 473 A.2d at 1310-11. *Cotter* also treated briefly the need to value correctly all marital property. *Cotter*, 58 Md. App. at 535-36, 473 A.2d at 973-74. *Barr* considered a number of issues, including whether the absolute divorce was properly granted, holding that it was; whether the period of use and occupancy of the family home had been properly determined, finding it necessary to remand for a fuller determination; and whether the trial judge had abused his discretion in making a finding on the needs of the minor child and apportioning support, concluding that there was no such abuse of discretion. *Barr*, 58 Md. App. at 574-88, 473 A.2d at 1302-10.
135. *Cotter*, 58 Md. App. at 536, 473 A.2d at 975. The Court of Special Appeals approved this method of valuation. The issue of the monetary award, however, was remanded for further consideration because the trial court abused its discretion in ordering alimony and monetary award payments that exceeded Mr. Cotter's annual income. *Id.* at 541-42, 473 A.2d at 976-77.
138. Comment, supra note 82, at 400-01.
tribution states consider pensions as marital property. The Maryland Court of Appeals first considered the issue of whether pensions constituted marital property in Hill v. Hill. Relying on a recent Supreme Court decision, McCarty v. McCarty, the Hill court held that it was precluded from considering military retirement pay as marital property. The proper treatment of civilian retirement benefits was not addressed in either Hill or McCarty.

Civilian retirement benefits were first addressed in Deering v. Deering, where the Court of Appeals determined that marital property did include civilian pension benefits. The court relied on a recent Supreme Court decision, McCarty v. McCarty, where the proper treatment of civilian retirement benefits was not addressed. The McCarty decision turned on the unique character of military retirement pay and the absence of any federal legislation authorizing its division in a divorce proceeding. Public Law No. 97-252, title X, § 1002(s), 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408 (1983)), amended the military retirement statute to allow military pensions to be divided in divorce proceedings to the extent permitted by state law. Maryland subsequently amended the Marital Property Act to provide that military pensions be treated as any other pension or retirement benefits. Act of July 1, 1983, ch. 159, § 2, 1983 Md. Laws 781 (codified at Md. CTS. & JUD. PROC. CODE ANN. § 3-6A-07 (1984), recodified at MD. FAM. LAW CODE ANN. § 8-203(b) (1984) by Act of July 1, 1984, ch. 296, 1984 Md. Laws 2080).


Federal civil service pensions can also be divided by court order at divorce, see 5 U.S.C. § 8345(j)(1) (1980), as can federal foreign service pensions, see 22 U.S.C. § 4060 (Supp. 1984).

140. Jurisdictions with equitable distribution statutes, like Maryland, provide for an equitable monetary adjustment of property rights upon divorce. Id.
141. Id. at 123, 437 A.2d at 887.
146. Id. at 128, 437 A.2d at 890. The court noted that the Employment Retirement Security Act (ERISA), 29 U.S.C. §§ 1001-1381 (1975 & Supp. 1984), preempts state law with regard to private pension plans. Both plans involved in Deering were governmental and expressly exempted from compliance with ERISA, 29 U.S.C. §§ 1002(32), 1003(b)(1) (1975). Thus, the court did not reach the issue of ERISA's preemption of Maryland divorce law. 292 Md. at 125-26 n.8, 437 A.2d at 889 n.8. Public Law 98-397, the recently enacted Retirement Equity Act of 1984, clarifies that ERISA does not preempt state divorce law which allows division of pension benefits upon divorce. 116 Lab. REL. REP. (BNA) 284 (1984). Prior to the enactment of this legislation, three federal courts of appeals had also determined that ERISA did not preempt state domestic relations laws. See Savings & Profit Sharing Fund v. Gago, 717 F.2d 1038 (7th Cir. 1983); Operating Engineers' Local 428 Pension Trust Fund v. Zamborsky, 650 F.2d 196 (9th Cir. 1981); AT&T v. Merry, 592 F.2d 118 (2d Cir. 1979). In addition, the Supreme Court had dismissed the appeal of a preemption claim for want of a substantial federal question. See Carpenters Pension Trust Fund v. Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), appeal dismissed, 444 U.S. 1028 (1980).
on case law from other jurisdictions and interpreted the then new Marital Property Act in reaching its decision. The Deering court then discussed the methods of valuing this asset. In recognition of the variety of pension plans and the difficulty in valuing pensions, the Court of Appeals gave the trial court complete discretion to choose the most appropriate method in a particular case. By summarizing three different approaches approved by the Wisconsin Supreme Court in Bloomer v. Bloomer the court, by implication, directed Maryland trial courts to use any one of these three methods.

The first of the pension valuation alternatives recommended in Deering recognizes only employee contributions to the plan. If the spouse’s pension plan requires employee contributions, the court can determine the amount of such contributions, add interest, and award a portion of this sum to the other spouse. Certainly this method is simple; however, it understates the value of the pension because it ignores the employer’s contributions. Under the second valuation method endorsed by Deering, the court can calculate the present value of the retirement benefits when they vest. This calculation can be very speculative, depending on the individual’s age, duration of pension plan participation, projected future earnings, and job changes. Finally, employing the third Deering alternative, the court simply can determine what percentage one spouse should receive of any future benefits received by the other.

The Deering court recognized that pensions have become an in-


148. 292 Md. at 122, 437 A.2d at 887 (Marital Property Act represents new approach to marriage and each spouse’s contribution to the marriage).

149. Id. at 130-31, 437 A.2d at 891-92.

150. 84 Wis. 2d 124, 267 N.W.2d 235 (1978).

151. See Barr, 58 Md. App. at 590, 473 A.2d at 1311 (court summarizes three methods of determining proper allocation of retirement benefits discussed in Deering); Cotter, 58 Md. App. at 537-38, 473 A.2d at 974-75 (court quotes the three suggested methods from Deering). In determining which valuation method is most appropriate, the particular type of pension must also be taken into account. The application of the various methods to any particular situation requires expert advice. The details and calculations involved are beyond the scope of this discussion.

152. 292 Md. at 130, 437 A.2d at 891.

153. Id.

154. Id. at 130-31, 473 A.2d at 891-92.
creasingly important employee fringe benefit\textsuperscript{155} and may well represent the most valuable marital asset.\textsuperscript{156} It also characterized pensions as investments from which both partners expect support upon retirement.\textsuperscript{157} Therefore, these investments should be valued the same as any other investment—the total value at the date of divorce.\textsuperscript{158} For that reason, calculation of the present value of pension benefits clearly represents the most equitable method of valuation.

Present value calculations can be difficult. If the parties do not offer expert testimony concerning valuation, the court cannot determine the pension's present value.\textsuperscript{159} Further, if the pension has not vested\textsuperscript{160} or matured\textsuperscript{161} at the time of the divorce, the calculation of present value will be too speculative.\textsuperscript{162} In these two situations, the trial court should reject the present value method of valuation.

If the present value method of valuation is rejected, a percentage of benefits, when received, should be awarded rather than a percentage of employee contributions. This approach eliminates the problem of valuation completely. All the trial court must do is determine the appropriate percentage to which the other spouse is entitled. This approach also allows both spouses to realize the true value of the pension; employee and employer contributions as well as interest are included.\textsuperscript{163}

The remaining approach suggested by Deering, awarding a percentage of only employee contributions, should be avoided. This approach consistently underestimates the true value of a pension by ignoring employer contributions as well as interest on total contributions.\textsuperscript{164} This undervaluation frustrates the intent of the Deering court that pensions be recognized as valuable assets and treated like

\textsuperscript{155} \textit{Id.} at 122, 437 A.2d at 887.
\textsuperscript{156} \textit{Id.} at 123, 437 A.2d at 887.
\textsuperscript{157} \textit{Id.} at 125, 437 A.2d at 888.
\textsuperscript{158} See, e.g., Dobbyn v. Dobbyn, 57 Md. App. 662, 471 A.2d 1068 (1984), discussed supra notes 100-04. Dobbyn held that marital stocks and securities are to be valued as of the earlier time of either liquidation or the date the parties were granted a divorce. \textit{Id.} at 675, 471 A.2d at 1074.
\textsuperscript{159} \textit{In re} Marriage of Pea, 17 Wash. App. 728, 566 P.2d 212 (1977).
\textsuperscript{160} Pensions vest when the employee has worked the minimum number of years required to receive pension benefits. 292 Md. at 118 n.3, 437 A.2d at 885 n.3.
\textsuperscript{161} Pensions mature at the time benefits become presently payable. \textit{Id.}
\textsuperscript{162} \textit{In re} Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).
\textsuperscript{163} See Ohm v. Ohm, 49 Md. App. 392, 431 A.2d 1371 (1981) (suggesting that with this approach both spouses share the risk that no benefits will ever be received).
\textsuperscript{164} Amicus Brief for Women's Legal Defense Fund at 6, Barr v. Barr, 58 Md. App. 569, 473 A.2d 1300 (1984) [hereinafter cited as Amicus Brief].
any other investment.\textsuperscript{165}

After Deering, trial courts have complete discretion in selecting the method of pension valuation.\textsuperscript{166} Barr and Cotter illustrate the inequity in allowing such broad discretion. Expert testimony in both cases established the present value of the husbands' pensions.\textsuperscript{167} In Cotter the trial court accepted the expert's opinion and divided the pension based on its present value.\textsuperscript{168} In Barr the court rejected the present value as too speculative and chose instead to award Ms. Barr only a portion of Mr. Barr's contributions.\textsuperscript{169} Because the Barr court rejected the present value method of pension valuation, Ms. Barr received proportionately a much smaller monetary award than Ms. Cotter. Courts should take greater care to prevent such disparate treatment in the future.

\section*{C. Divorce}

\subsection*{1. Separation Agreements. —In Johnston v. Johnston,\textsuperscript{170} the Court of Appeals held that a separation agreement, with a nonmerger clause that was later incorporated by reference into a divorce decree, survived the decree.\textsuperscript{171} The trial court's approval of the agreement established its validity and precluded collateral attack.\textsuperscript{172} In 1973, Mr. and Ms. Johnston executed a separation agreement to "effect a final and permanent settlement of their respective property rights"\textsuperscript{173} on their divorce. The agreement also contained a provision that, if acceptable to the court, it would be incorporated in the divorce decree but would survive as a separate, enforceable contract.\textsuperscript{174} In 1981, Mr. Johnston filed a petition to have the agreement set aside, alleging mental incompetency at the time of

\begin{itemize}
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} 292 Md. at 130-31, 437 A.2d at 891.
  \item \textsuperscript{167} Cotter, 58 Md. App. at 539, 473 A.2d at 975; Barr, 58 Md. App. at 589, 473 A.2d at 1310. In Barr, both parties presented expert testimony which established very similar present values for Mr. Barr's pension. Amicus Brief, supra note 164, at 2.
  \item \textsuperscript{168} Cotter, 58 Md. App. at 537, 473 A.2d at 974.
  \item \textsuperscript{169} Barr, 58 Md. App. at 589, 473 A.2d at 1310.
  \item \textsuperscript{170} 297 Md. 48, 465 A.2d 436 (1983).
  \item \textsuperscript{171} Id. at 58, 465 A.2d at 441. Although recent cases have discussed the incorporation of settlement agreements into divorce decrees, these agreements did not contain nonmerger clauses. Thus, the issue of merger had not arisen previously. See Winston v. Winston, 290 Md. 641, 431 A.2d 1330 (1981); Goldberg v. Goldberg, 290 Md. 204, 428 A.2d 469 (1981).
  \item \textsuperscript{172} 297 Md. at 66, 465 A.2d at 445. Although the parties did not raise the issue of res judicata, the court believed it dispositive of the case and raised it pursuant to Md. R.P. 813(a). 297 Md. at 59, 465 A.2d at 441-42.
  \item \textsuperscript{173} Id. at 49, 465 A.2d at 437.
  \item \textsuperscript{174} Id. at 50, 465 A.2d at 437.
\end{itemize}
Relying primarily on case law from other jurisdictions, the court determined that the intent of the parties at the time of the execution of the agreement controlled. The agreement specified that it would survive the decree. Further, the trial court's approval of the agreement established its validity. The Court of Appeals emphasized that, prior to the execution of the agreement, both parties had been represented by independent counsel, and that extensive negotiations had occurred. The Johnston court also indicated that the trial court had considered the fairness of the property settlement during the divorce proceeding.

In Hamilos v. Hamilos, the Court of Appeals held that a separation agreement incorporated but not merged in a divorce decree could not be collaterally attacked. The court concluded that Ms. Hamilos' allegations of fraud, irregularity, and mistake were not sufficient to have the decree set aside pursuant to Maryland Rule 625(a). Applying the holding from Schwartz v. Merchants Mortgage Co., the Hamilos court held that, without a showing of jurisdictional mistake or a defect in the proceeding or process, an enrolled divorced decree cannot be set aside.

2. "Divisible" Divorce.—In Komorous v. Komorous, the Court of Special Appeals extended previous decisions regarding the award of permanent alimony to awards of temporary alimony. Mr. Komorous obtained a foreign ex parte divorce and subsequently filed an action in Maryland to partition or sell marital property. In response to Ms. Komorous' cross-complaint for the award of alimony, the trial

175. Id. at 50-51, 465 A.2d at 437.
176. Id. at 58, 465 A.2d at 441. The court relied primarily on McNelis v. Bruce, 90 Ariz. 261, 367 P.2d 625 (1961) and Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865 (1954). In both cases, the courts looked to the intent of the parties at the time of the execution of the agreement to determine the merger issue.
177. 297 Md. at 58, 465 A.2d at 441.
178. Id. at 66, 465 A.2d at 445.
179. Id. at 60, 465 A.2d at 437.
180. Id. In effect, the agreement was ratified and confirmed by the divorce decree. If Mr. Johnson had wanted to attack the agreement on the ground of mental incompetency, he should have done so at the divorce proceeding.
182. Id. at 104-05, 465 A.2d at 448-49.
183. Id. at 106-07, 465 A.2d at 449-50.
185. 297 Md. at 105-07, 465 A.2d 449-50.
187. Id. at 328, 467 A.2d at 1040.
The Court of Special Appeals rejected Mr. Komorous’ contention that temporary alimony could only be awarded to support a spouse during divorce proceedings and affirmed the order of temporary alimony. The court reasoned that the state’s interest in protecting its domiciliaries and prior decisions upholding awards of permanent alimony after ex parte foreign divorces justified awards of temporary alimony as well.

With this decision, Maryland joined the majority of jurisdictions fully recognizing the “divisible divorce.” Although the Supreme Court approved the concept in 1948, Maryland continued to consider foreign ex parte divorces as dispositive of support issues until 1978. In Altman v. Altman, the Court of Appeals recognized Maryland’s interest in safeguarding the economic security of its residents whose marriages had been ended by foreign divorce and upheld an award of permanent alimony. As the Komorous court recognized, this same policy consideration supported an award of temporary alimony pending the final adjudication of a claim for permanent support.

3. Antenuptial Agreements in Contemplation of Divorce. —In Frey v. Frey, the Court of Appeals overruled Cohn v. Cohn and held that

188. Id., 467 A.2d at 1041.
189. Id. at 338, 467 A.2d at 1045.
190. Id. at 330-38, 467 A.2d at 1042-45.
191. The divorce decree may be divided into provisions for support and for dissolution of the marriage. The term “divisible divorce” refers to the effect of a foreign ex parte dissolution of marriage on the support provisions of a divorce decree. BLACK’S LAW DICTIONARY 430 (5th ed. 1979).
193. Maryland is required to recognize valid foreign divorces by the full faith and credit clause of the United States Constitution, U.S. CONST. art. IV, § 1. Komorous, 56 Md. App. at 331, 467 A.2d at 1042. Prior to 1978, the Court of Appeals considered alimony an inseparable incident of marriage, extinguished by such a foreign divorce. Brewster v. Brewster, 204 Md. 501, 506, 105 A.2d 232, 235 (1954). In 1969, the Court of Appeals, in dictum, indicated that it would approve an award of alimony consistent with the divisible divorce doctrine of Estin. Dackman v. Dackman, 252 Md. 331, 346-47, 250 A.2d 60, 68-69 (1969). Finally, in Altman v. Altman, 282 Md. 483, 386 A.2d 766 (1978), the Court of Appeals recognized the injustice created by its previous decisions. The court held that the state’s interest in protecting the domiciliary spouse required support orders, even when the other spouse had obtained a foreign divorce. Id. at 493, 386 A.2d at 771-72.
195. Id. at 493, 386 A.2d at 772.
196. 56 Md. App. at 337, 467 A.2d at 1045.
antenuptial agreements waiving alimony are no longer void per se as contrary to public policy.\textsuperscript{199} The court refused to continue the traditional distinction between antenuptial agreements made in contemplation of death and those made in contemplation of divorce.\textsuperscript{200} Rather than continuing to totally prohibit antenuptial agreements made in contemplation of divorce, the \textit{Frey} court ruled that such agreements will now be treated the same as antenuptial agreements made in contemplation of death. From now on, the validity of every antenuptial agreement must be determined using traditional contract doctrines,\textsuperscript{201} as enumerated in \textit{Hartz v. Hartz}.\textsuperscript{202} With this decision, Maryland joined the majority of jurisdictions that will consider the validity of antenuptial agreements waiving alimony.\textsuperscript{203}

Prior to its decision in \textit{Frey}, the court maintained that public policy dictated disapproval of antenuptial agreements waiving alimony in the event of separation or divorce.\textsuperscript{204} This stand was based on an assumption that the state's legitimate interest in preserving marriage would be frustrated by such agreements, presumably because planning for divorce prior to marriage promoted and facilitated divorce.\textsuperscript{205} Further, agreements that allowed a husband to "buy" a divorce for less than the court would award in alimony would limit the state's ability to enforce a husband's traditional responsibility to support his wife.\textsuperscript{206}

The \textit{Frey} court determined that these concerns no longer accurately reflect public policy in Maryland. Since divorce is both more accepted and more easily obtained, the state no longer has an inter-

\textsuperscript{199} 298 Md. at 561, 471 A.2d at 710.
\textsuperscript{200} Id. at 563, 471 A.2d at 711.
\textsuperscript{201} Id.
\textsuperscript{202} 248 Md. 47, 234 A.2d 865 (1967). In \textit{Hartz}, the Court of Appeals upheld the validity of an antenuptial agreement made in anticipation of death. Both partners had children from previous marriages as well as substantial assets. Both wanted to assure that their children, not their new spouse, inherited their property. For discussion of the \textit{Hartz} criteria, see infra notes 211-12 and accompanying text.
\textsuperscript{203} 298 Md. at 561, 471 A.2d at 710. Several jurisdictions have recently reconsidered and abandoned the view that antenuptial waivers of alimony are void per se. E.g., Newman v. Newman, 653 P.2d 728 (Colo. Ct. App. 1982) (en banc); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981); Unander v. Unander, 265 Or. 102, 506 P.2d 719 (1973). At least three jurisdictions, however, still consider such waivers to be against public policy. In re Marriage of Gudenkauf, 204 N.W.2d 586 (Iowa 1973); Mulford v. Mulford, 211 Neb. 747, 320 N.W.2d 470 (1982); Duncan v. Duncan, 652 S.W.2d 913 (Tenn. Ct. App. 1983).
\textsuperscript{204} 298 Md. at 557, 471 A.2d at 707; see also \textit{Cohn}, 209 Md. at 475-76, 121 A.2d at 706 (stressing that the \textit{Cohn} decision accorded with the weight of authority).
\textsuperscript{205} 298 Md. at 559, 471 A.2d at 708; \textit{Cohn}, 209 Md. at 477-78, 121 A.2d at 706.
\textsuperscript{206} 298 Md. at 559, 471 A.2d at 708; \textit{Cohn}, 209 Md. at 477-78, 121 A.2d at 707.
est in preventing spouses from planning for separation and divorce prior to marriage.\textsuperscript{207} Further, the disapproval of such agreements rested on rigid definitions of marital roles that have little, if any, validity today.\textsuperscript{208} Whatever interest the state retains in ensuring adequate support for both parties in a divorce action can be addressed when assessing the validity of each agreement.\textsuperscript{209}

The court stressed the stringent criteria for validity described in \textit{Hartz}.\textsuperscript{210} Since the parties stand in a confidential relationship, \textquoteleft\textquoteleft[t]he real test . . . is whether there was overreaching, . . . unfairness, or inequity.'\textsuperscript{211} Full and truthful disclosure of each party's assets is essential; both the procurement and result of the agreement must be equitable. Both parties should retain counsel to ensure that the agreement is made with full understanding of its consequences.\textsuperscript{212}

\section*{D. Paternity}

\subsection*{1. Statute of Limitations. — In \textit{Frick v. Maldonado},\textsuperscript{213} the Court of Appeals reconsidered\textsuperscript{214} whether a Maryland statute imposing a two-year limitations period on paternity actions on behalf of illegitimate children denied those children equal protection of the laws.\textsuperscript{215} The court relied on two recent Supreme Court decisions, which held that one- and two-year statutes of limitations did not provide illegitimate children with an adequate opportunity to obtain support and were not substantially related to the legitimate state interest in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{207} 298 Md. at 560-61, 471 A.2d at 709-10.
\item \textsuperscript{208} Id. at 560, 471 A.2d at 709.
\item \textsuperscript{209} Id. at 559, 471 A.2d at 709. The court noted that its decision only reached agreements relating to property and financial obligations. Agreements purporting to limit the duty of support during marriage or the duty to support children after divorce may be contrary to public policy and, thus, unenforceable. \textit{Id.} at 563 n.3, 471 A.2d at 711 n.3.
\item \textsuperscript{210} Id. at 564, 471 A.2d at 711.
\item \textsuperscript{211} \textit{Hartz}, 248 Md. at 57, 234 A.2d at 871.
\item \textsuperscript{212} Id.; 298 Md. at 563, 471 A.2d at 711.
\item \textsuperscript{213} 296 Md. 304, 462 A.2d 1206 (1983).
\item \textsuperscript{214} The court had upheld the constitutionality of the two-year statute of limitations in \textit{Thompson v. Thompson}, 285 Md. 488, 404 A.2d 269 (1979), \textit{appeal dismissed}, 444 U.S. 1062 (1980).
\item \textsuperscript{215} The relevant statute stated in the pertinent part:
\begin{quote}
Proceedings to establish paternity under the subtitle 'Paternity Proceedings' and to charge the putative father of an illegitimate child . . . with their support and maintenance shall be commenced during the pregnancy of the mother thereof or within two (2) years after the birth of such child . . . .
\end{quote}
\textit{Md. Ann. Code} art. 16, § 66(e) (1973). This statute has been recodified without substantive change at \textit{Md. Fam. Law Code Ann.} § 5-1006(a), (b) (1984). The Commission to Revise the Annotated Code included this section in the new Family Law Article despite the holding in \textit{Frick}.
\end{itemize}
\end{footnotesize}
preventing the litigation of stale or fraudulent claims. Accord-
ingly, the court held that Maryland's two-year statute of limitations violated the equal protection clause of the fourteenth amendment of the Constitution.

One vital question remains unanswered after the Court of Appeals decision: how long a period of limitations, if any, is constitutional? In Mills v. Habluetzel, the Supreme Court established a two-part test for determining the constitutionality of statutes of limitations for paternity actions. First, the period must be sufficiently long to present a reasonable opportunity for those with an interest in establishing the paternity of an illegitimate child to assert a claim. Second, any time limitation placed on that opportunity must be substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims.

A child's right to paternal support is severely restricted by any statute of limitations. Societal disapproval of the pregnancy of an unwed mother presents an obstacle to her bringing a support suit on behalf of her child. Financial difficulties, continued affection for the father, a desire to avoid family and community disapproval, together with the emotional strain that often attends the birth of an illegitimate child all interact to impede the mother's filing of a paternity suit. This unwillingness to file suit underscores the fact that the mother's and the child's interests may not necessarily be congruent. The person upon whom society places the expectation and burden of protecting the child's interest may very often find those interests in direct conflict with her own. Before Frick, children incapable of protecting their legal interests were statutorily denied a legal remedy if suit had not been filed by their second birthday. The unfairness of this restriction on the child's rights becomes more obvious when one considers that Maryland tolls the statute of limitations on most other actions during a child's minority.

It is entirely possible that any statute of limitations would vio-

217. 296 Md. at 309, 462 A.2d at 1208.
219. Id. at 99-100.
220. Id.
221. MD. CTS. & JUD. PROC. CODE ANN. § 5-201(a) (1984) provides: "Extension of Time — When a cause of action . . . accrues in favor of a minor . . . , that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed."
late a child's right to a reasonable opportunity to bring suit. Under Maryland law, it is a misdemeanor for a parent to fail to support a destitute adult child who is unable to support himself by reason of mental or physical infirmity. 222 There is no rational basis for this statute to apply only to legitimate children.

Maryland inheritance laws may preclude imposition of any statute of limitations during a child's minority. Under inheritance statutes, an illegitimate child may inherit from his biological father when legitimation has occurred. 223 Moreover, the child who is legitimated subsequent to the execution of his father's will is entitled to a forced statutory share in the estate. 224 Therefore, imposition of any statute of limitations on paternity proceedings may operate to deny a child his rightful share of his biological father's estate.

Another reason that any statute of limitations may be unduly burdensome relates to the child's ability to discover the identity of his biological father. Maryland courts have held that a plaintiff need not sue until he knows or should have known that he has suffered a wrong. 225 The rationale for this rule, preserving a plaintiff's right to sue when that right has been delayed through no fault of the plaintiff, is equally applicable to paternity proceedings. If an illegitimate child does not know the identity of his biological father and, after reasonable efforts, was unable to determine his father's identity, the


223. Md. Est. & Trusts Code Ann. § 1-208(b)(1)-(4) (1974). The four methods to achieve the status of legitimation occur when the father:

1. Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings; or
2. Has acknowledged himself, in writing, to be the father; or
3. Has openly and notoriously recognized the child to be his child; or
4. Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

This legitimation also makes the child eligible for survivor benefits granted to children under the Social Security Act. Massey v. Weinberger, 397 F. Supp. 817 (D. Md. 1975).

224. Md. Est. & Trusts Code Ann. § 3-301(b)(1)-(4) (1974) provides:

b) Legacy to a Child — A child . . . is entitled to a share in the estate . . . if:

1. the will contains a legacy for a child of the testator but makes no provision for a person who becomes a child of the testator subsequent to the execution of the will;
2. the child was born, adopted, or legitimated after the execution of the will;
3. the child, or his issue, survive the testator; and
4. the will does not expressly state that the child, or issue, should be omitted.

A statute of limitations should be tolled until such time as the child should have known his father's identity.

According to the second prong of the Mills test, any time limitation placed on the opportunity to assert the child's claim must be substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. Recent developments in blood testing have substantially reduced the danger of fraudulent claims. A series of blood tests can now provide over a 90% probability of negating a finding of paternity for erroneously accused men. The Maryland legislature recently acknowledged these developments by enacting a statute which makes certain affirmative blood test results admissible at trial.

The strength of the state interest in avoiding stale or fraudulent claims is undercut by the exception in the Maryland statute that allows for the tolling of the statute of limitations when the mother is under eighteen years of age. This exception seriously undermines the state's argument that the two-year limitations period is substantially related to the state's interest in preventing the prosecution of stale or fraudulent claims. If the fear of fraudulent claims were that great, the state would not toll the statute for underaged mothers.

The state interest in avoiding stale or fraudulent claims is further undercut by the countervailing state interest in ensuring that genuine claims for child support are satisfied. The purpose of subtitle 10 of the new Family Law Article is to impose the obligations of parenthood upon both parents, by ensuring that illegitimate children will enjoy the same right of support as legitimate children. This purpose is thwarted when the child is presented with no reasonable opportunity to obtain support because of unfounded

226. 456 U.S. at 100.
229. Md. Fam. Law Code Ann. § 5-1006(a)(2) (1984) states that a proceeding to establish paternity may be brought within two years of the mother's eighteenth birthday, if the mother was a minor when the child was born.
230. One purpose of the paternity proceeding is to shift the burden of support from the taxpayers to the parents of the illegitimate child. Virginia v. Autry, 293 Md. 53, 61, 441 A.2d 1056, 1060 (1982).
fears of fraudulent claims. The Court of Appeals in *Frick*, by merely quoting Supreme Court opinions rather than presenting its own analysis, gives little guidance to the legislature regarding what period of limitations would pass constitutional muster.\(^2\)

2. Admissibility of Affirmative Blood Test Results.—Legislative changes in the statute governing the admissibility of blood test results\(^2\) presented the Court of Special Appeals with another paternity-related problem in *Haines v. Shanholz*.\(^2\) In *Haines*, the trial judge refused to admit blood test results that indicated a 98% probability that the defendant was the father of the child.\(^2\) The judge concluded that the tests were not admissible because the mother failed to satisfy the test for reliability of scientific evidence.\(^2\) The Court of Special Appeals reversed, holding that legislative recognition of the reliability of blood testing relieved the mother of the burden of proving general scientific acceptance.\(^2\)

After *Haines*, the Maryland Legislature removed a trial judge’s dis-
cretionary power regarding the admissibility of certain blood test results.\textsuperscript{238}

3. Weight of Blood Test Result Evidence. — The court in Frick v. Maldonado\textsuperscript{239} stated that “[b]ecause of its effective date, the Maryland statute [admitting affirmative blood test evidence of paternity] is not applicable to this case.”\textsuperscript{240} Seven months later, in Colgan v. Hammond,\textsuperscript{241} the Court of Special Appeals determined that the statute governing the admissibility of affirmative blood testing results was procedural in nature and, as such, applied to all actions whether accrued, pending, or future at the time the legislation became effective.\textsuperscript{242}

The Colgan court also held that affirmative blood test results, standing alone, are legally sufficient to withstand a motion to dismiss.\textsuperscript{243} However, the opinion failed to clarify how much weight should be given to the blood test results. In State v. Pernell,\textsuperscript{244} the court held that, in the absence of evidence that the tests were improperly conducted, blood test results establishing definite exclusion of paternity should be given conclusive weight. The Colgan court only held that affirmative blood test results were legally sufficient to withstand a motion to dismiss. Presumably, at trial, the mother would also have to offer something more than affirmative blood test results to establish paternity.\textsuperscript{245}

The question of whether a Maryland court could compel a defendant in a paternity proceeding to submit to blood testing has never been considered. There is no statutory provision requiring

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\textsuperscript{238} Act of Oct. 1, 1984, ch. 551, 1984 Md. Laws 2874, substituted “shall” for “may” in the introductory language of MD. FAM. LAW CODE ANN. § 5-1029(e)(1) (1984), which now provides: “The results of each blood test shall be received in evidence if:

(i) definite exclusion is established; or

(ii) the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father’s paternity is at least 97.3%.” (emphasis added)

\textsuperscript{239} 296 Md. 304, 462 A.2d 1206 (1983).

\textsuperscript{240} Id. at 309, 462 A.2d at 1208.

\textsuperscript{241} 58 Md. App. 120, 472 A.2d 497 (1984).

\textsuperscript{242} Id. at 126, 472 A.2d at 500.

\textsuperscript{243} Id. at 127, 472 A.2d at 501.

\textsuperscript{244} No. B.I. 872 (Crim. Ct. of Baltimore City 1956), cited in Comment, Conclusiveness of Blood Tests in Paternity Suits, 22 Md. L. Rev. 333, 333 n.1 (1962).

\textsuperscript{245} It would be logical also to require the mother to prove some reasonable connection between the putative father and herself. This would avoid the spectre of the random selection of putative father candidates until someone’s blood test results were admissible. Probabilistically, two out of every 100 men would fall into this category.
compulsory tests. The statute governing the request for blood tests simply permits the State's Attorney to request that the court order any person refusing to take the blood test to submit to such a test. Refusal to submit to blood tests may only be commented on by the court or by counsel. The implication of these provisions, when read together, is that the compulsory testing is not available in paternity proceedings. Because the legal sufficiency of a case may depend upon the ability to present blood test results, the capacity to compel an individual to submit to the tests is crucial.

E. Adoption

In Washington County Department of Social Services v. Clark, the Court of Appeals considered the constitutionality of a statute that created a presumption that it is in the best interest of a child who has been in continuous foster care for at least two years to terminate biological parental rights. The court held that this presumption violated a parent's right to procedural due process.

This decision and the subsequent repeal of the statute take a clearly unfair advantage away from the child placement agency. The statutory short cut, which eased agency termination of parental rights, created an unfair allocation of burden of proof between the

246. In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that compulsory blood tests do not violate an accused's privilege against self-incrimination under the fifth and fourteenth amendments. Maryland has also held that compulsory blood tests do not violate Maryland's Declaration of Rights § 22. Davis v. State, 189 Md. 640, 57 A.2d 289 (1948). These cases may be distinguished because they involved criminal prosecutions rather than civil proceedings. But at least one state has applied the Schmerber rationale to conclude that compulsory blood testing in paternity proceedings is also constitutional. Department of Social Servs. v. Thomas J.S., 100 A.D.2d 119, 474 N.Y.S.2d 322 (1984).


248. Id. § 5-1029(f).


If a child has been under continuous foster care in the custody of a child placement agency for at least two years, the court shall presume that it is in the child's best interest to award to that child placement agency a decree granting guardianship, without the consent of the parents.

The presumption has been deleted from the new Family Law Article. See Md. Fam. Law Code Ann. § 5-313 revisor's note (1984).

251. 296 Md. at 197, 461 A.2d at 1081. Massachusetts courts reached the same conclusion in Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 802-03, 452 N.E.2d 497, 503 (1983).
State and the biological parents. It is exceedingly difficult for a biological parent to prove that she is fit to raise a child for which she has not been responsible for at least two years. The statutory presumption increased the risk that erroneous terminations of parental rights would occur, by placing the burden of proof on the parent, rather than on the agency, which has greater resources at its command. The agency's interest in the welfare of the child is not impaired by requiring the agency to prove by clear and convincing evidence that termination of the biological parent's rights is in the child's best interest.

F. Child Custody

In *Kennedy v. Kennedy*, 252 the Court of Special Appeals approved a split custody award, a grant of use and possession of the family home to Ms. Kennedy, and an order for the entire family to participate in family counseling. 253 In this bitterly contested divorce, both parents petitioned for custody of their three children as well as use and possession of the family home. The trial court awarded custody of a daughter to Ms. Kennedy and custody of two sons to Mr. Kennedy. 254 The trial court also awarded the use and possession of the family home to Ms. Kennedy so that the Kennedy daughter would not suffer the unsettling loss of her familiar environment. Mr. Kennedy appealed, claiming that the award to Ms. Kennedy caused his sons to be unsettled by the loss of their familiar environment. In affirming the trial court, the Court of Special Appeals merely repeated the statutory requirements for a use and possession order, 255 offering no guidance as to how this decision should be made when custody of minor children is split between parents. 256

Split custody decisions are certainly within the power of the trial court. 257 Such decisions may be the only way for courts to

253. *Id.* at 306, 311, 462 A.2d at 1213, 1216.
254. *Id.* at 300, 462 A.2d at 1210.
255. *Id.* at 302-06, 462 A.2d at 1211-13.
256. Grant of the use and possession of the family home is supposed to ensure that children of divorce do not suffer the unsettling loss of their familiar environment. Obviously, in the case of split custody, a decision must be made as to which children of divorce will not suffer the uprooting. Clearly, some of the children will have to suffer the loss of their home.
257. See Ester, *Maryland Custody Law—Fully Committed to the Child's Best Interests?*, 41 Md. L. Rev. 225, 267-68 (1982). Maryland case law presumes that the best interests of the children are served by keeping them together. The court, however, has the discretion to determine that children should be separated and to make split custody awards. *Id.* See, e.g., *Davis v. Davis*, 280 Md. 119, 372 A.2d 231, *cert. denied*, 434 U.S. 939 (1977); *Hild v.*
resolve bitter custody battles when both parents are equally competent to care for the children.\textsuperscript{258} It seems unfair, however, to condone an arbitrary award of use and occupancy of the family home in the situation of split custody. Instead, the trial court should be required to demonstrate a rational basis for such an order. Appellate courts could then provide meaningful review of the trial court's decision rather than slavishly repeating statutory requirements.

The \textit{Kennedy} court also recognized the trial court's broad discretion to make decisions in the best interest of the children.\textsuperscript{259} The master appointed by the trial court recommended that any custody decision should be temporary, pending counseling for the entire family. According to the master, the parents' bitter fights over the terms of the divorce had affected the children to such an extent that protracted family counseling was necessary.\textsuperscript{260} In the first appellate approval of court-ordered counseling for an entire family in Maryland, the Court of Special Appeals relied on prior decisions requiring a parent to pay a child's medical expenses,\textsuperscript{261} to provide specific religious training,\textsuperscript{262} and to accommodate visitation rights of the other parent.\textsuperscript{263} The court did not examine the alleged need for counseling or the wisdom of requiring the entire family to participate.\textsuperscript{264} In addition, the court did not recognize that ordering an entire family to participate in counseling differed significantly from the issues involved in the cases cited as support for the order.\textsuperscript{265}

\textit{G. Child Neglect/Child Abuse}

In \textit{In re Jertrude O.},\textsuperscript{266} the Court of Special Appeals considered the question of the appropriate standard for removing a child from the family home.\textsuperscript{267} The court accepted the trial judge's finding that

\begin{itemize}
  \item \textsuperscript{258} For a discussion of the factors that Maryland courts consider to resolve custody issues, see Ester, \textit{supra} note 257.
  \item \textsuperscript{259} 55 Md. App. at 310, 462 A.2d at 1215. \textit{See also} Ester, \textit{supra} note 257.
  \item \textsuperscript{260} 55 Md. App. at 308, 462 A.2d 1214-15.
  \item \textsuperscript{261} Meyers v. Meagher, 277 Md. 128, 132-33, 352 A.2d 827, 829 (1976).
  \item \textsuperscript{262} Wagshal v. Wagshal, 249 Md. 143, 148-49, 238 A.2d 903, 907 (1968).
  \item \textsuperscript{263} Raible v. Raible, 242 Md. 586, 219 A.2d 777 (1966).
  \item \textsuperscript{264} Mr. Kennedy did not challenge the children's need for counseling or the court’s requirement that he pay for the counseling. He balked at the order that the family participate, as a family, in the counseling. 55 Md. App. at 309, 462 A.2d at 1215.
  \item \textsuperscript{265} \textit{See supra} notes 261-63 and accompanying text.
  \item \textsuperscript{267} \textit{Id.} at 98, 466 A.2d at 893.
\end{itemize}
Jertrude and her sisters were "children in need of assistance," but held that stronger evidence must be presented before Jertrude could be removed from her home. The court remanded the case for application of this stricter standard, with instructions to the trial judge to clearly articulate factual findings and reasons for Jertrude's removal. However, the appellate court failed to promulgate any test or offer any guidelines to determine when removal of a child is indicated.

268. A "[c]hild in need of assistance" includes a child who requires the assistance of the court because: "(1) [h]e is . . . not receiving ordinary and proper care and attention, and (2) [h]is parents, guardian or custodian are unable or unwilling to give proper care and attention to the child and his problems." Md. Cts. & Jud. Proc. Code Ann. § 3-801(e) (1984). The term "child in need of assistance" came into usage in 1975 with the redefinition of "neglected child." Act of May 15, 1975, ch. 554, 1975 Md. Laws 2670. The term "neglected child" is still used by the courts as short hand for a child in need of assistance, and is used throughout this discussion in the same manner.

269. A preponderance of the evidence standard is used for determining whether a child is in need of assistance. Md. Cts. & Jud. Proc. Code Ann. § 3-819(d) (1984). The court never expressly stated the standard to be applied when the child is to be removed from the home, but indicated that it was "far more stringent" than the standard for finding a need for assistance. 56 Md. App. at 98, 466 A.2d at 893. In Santosky v. Kramer, 455 U.S. 745 (1982), the Supreme Court ruled that before a State may sever completely and irrevocably the rights of parents in their child, due process requires that the State support its allegations by at least clear and convincing evidence. Id. at 768.

270. 56 Md. App. at 100, 466 A.2d at 894. Neglected children are not removed from the home as frequently as abused children. After a child is determined to be neglected, the court may:

1. Place the child . . . under supervision in his own home or in the custody or under the guardianship of a relative or other fit person, upon terms the court deems appropriate;
2. Commit the child to the custody or under the guardianship of the Juvenile Services Administration, a local department of social services, the Department of Health and Mental Hygiene, or a public or licensed private agency; or
3. Order the child, parents, guardian or custodian of the child to participate in rehabilitative services that are in the best interest of the child and the family. MD. CTS. & JUD. PROC. CODE ANN. § 3-820(c)(1)-(3) (1984 & Supp. 1984).

MD. ANN. CODE art. 27, § 35A(b)(7)(A) (1982) (recodified without substantial change at MD. FAM. LAW CODE ANN. § 5-901(b)(1) (1984)), defines abuse as "physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has permanent or temporary care or custody or responsibility for supervision of a minor child."

After a child is determined to be abused, the local department of social services or the State's Attorney "shall render the appropriate service in the best interests of the child, including, when indicated, petitioning the juvenile court on behalf of the child for the added protection to the child which either commitment or custody would provide." MD. ANN. CODE art. 27, § 35A(i) (1982) (recodified at MD. FAM. LAW CODE ANN. § 5-907(a) (1984)). The lack of established choices in this statute ensures that, in most cases, the abused child will be removed from the home.
Jertrude only serves to perpetuate the confusion surrounding almost every aspect of Maryland child neglect/child abuse adjudication. The court failed to distinguish between the two findings, often using the terms interchangeably.\textsuperscript{271} Child abuse and child neglect are two distinct findings. Over the years, Maryland courts have blurred the distinction between the two, and, in the process, have complicated a very sensitive area of the law.

This confusion stems from \textit{State v. Fabritz},\textsuperscript{272} in which the Court of Appeals held that a person could be criminally punished for failure to act to prevent aggravation of an injury.\textsuperscript{273} In \textit{Fabritz}, the child was brutally beaten by a friend of the mother and the mother failed to seek medical attention for the child. This omission resulted in the child's death.\textsuperscript{274} The \textit{Fabritz} court stretched the abuse statute by equating such an egregious omission with cruel and inhumane treatment. Therefore, because the court found abuse, it could criminally punish Ms. Fabritz, an option not available under the neglect statute.

In holding that the "cause" of an injury referred to in the child abuse statute included an act of omission, \textit{Fabritz} conflicted with the child neglect statute, which purported to address the consequences of a parent's omission to act.\textsuperscript{275} In the absence of an involuntary manslaughter charge,\textsuperscript{276} child neglect was clearly the proper charge.


\textsuperscript{273} Id. at 425-26, 348 A.2d at 280-81.

\textsuperscript{274} 276 Md. at 419, 348 A.2d at 277.

\textsuperscript{275} "Neglected child" means a child who has suffered or is suffering significant physical or mental harm or injury as a result of conditions created by the absence of his parents, guardian, custodian, or by the failure of that person to give proper care and attention to the child and his problems under circumstances that indicate that the child's health or welfare is harmed or threatened thereby. \textit{Md. Ann. Code art. 72A, § 4(d)} (1983) (recodified without substantive change at \textit{Md. Fam. Law Code Ann. § 5-701(g)} (1984)).

against Ms. Fabritz. However, after a finding of child neglect, the court could not criminally punish. Obviously a finding of child abuse or child neglect should not turn upon the extent of the child’s injuries. The Fabritz court, in its attempt to punish, engrafted elements of the offense of involuntary manslaughter upon the child abuse statute.

The lack of a distinction between neglect and abuse caused by Fabritz results in confusing opinions like Jertrude. At trial, doctors often cannot testify that a particular injury was intentionally inflicted. Therefore, there is often not enough evidence to sustain a finding that injuries were intentionally inflicted. In turn, the trial judge is forced to conclude that injuries were the result of an omission. Without established criteria, the judge cannot know whether the omission was an act of abuse or neglect. The judge,

care as being embraced within the scope of this language. Id. at 596, 155 A.2d at 688. In order to find an individual guilty of involuntary manslaughter for failure to seek medical attention, the State must prove gross negligence. Clay v. State, 217 Md. 577, 128 A.2d 634 (1957). There must also be a substantial causal connection between the parent’s gross negligence and the resulting death. In Craig, the Maryland court found that a lack of sufficient causal connection can be proved if the evidence is insufficient to show that by the time the need for a doctor should have become apparent, the child could have been saved. Craig, 220 Md. at 598-99, 155 A.2d at 689. It is this causal connection that was a possible problem in Fabritz. Ms. Fabritz was not present during the beating of her child. Though there was testimony that the child would have lived had an operation been performed at least 12 hours prior to death, Ms. Fabritz had been home less than eight hours before the child died. The State may have felt that there was insufficient evidence to show that the child’s life could have been saved if Ms. Fabritz had called in medical attention at the time when she should have had the knowledge of the gravity of the child’s illness.

See Katz, Howe & McGrath, Child Neglect Laws in America, 9 Fam. L.Q. 1, 4 (1975) (defining child neglect as the continued failure by adults to protect the child from known and obvious peril).

Even with the finding of child abuse, the Court of Special Appeals was reluctant to criminally punish the mother, remarking:

Our review of the record compels us to remark upon our concern that the State has been unable to apprehend and punish the execrable wretch who committed this unbelievably vicious act. [Mr. Crockett was acquitted due to a lack of evidence.] The alternative of turning to the tangentially culpable mother, whose judgment was so unwise that her child’s death may well have been the result, seems somehow unfulfilling.


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like the judge in *Jertrude*, removes the child from the home. On appeal, the court cannot determine why the trial judge removed the neglected child from the home. A trial judge cannot apply standards because he has none to apply. *Jertrude* contributed to this confusion by stating that under extreme circumstances, neglect warrants removal for the child’s safety, but offered no guidelines for determining when those circumstances exist.

The child and the family are hurt both when the child is unnecessarily removed from the home and when the child who should be removed is not, leaving the child to sustain further injuries. Additional unnecessary harm is inflicted upon families and children, who must endure three or four court decisions to determine whether removal from the home is necessary. Protracted and confusing litigation is not consistent with the stated goal of the juvenile causes subtitle: ‘‘[t]o conserve and strengthen the child’s family ties and to separate a child from his parents only when necessary for his welfare.”

The Maryland courts must clarify the difference between abuse and neglect. The confusion caused by *Fabritz* leads to situations in which children like Jertrude are harmed by laws originally designed to protect them.

**H. Other Developments**

*Boothe v. Boothe* reaffirmed prior case law which held that trial courts are given broad discretion in reaching conclusions regarding child custody. Because the trial judge was able to view the witnesses, the Court of Special Appeals did not disturb his conclusion.

*Weinschel v. Strople* reaffirmed prior case law which held that one biological parent may retain visitation rights even when the child is adopted by the other biological parent’s new spouse so long as visitation is in the best interest of the child and public policy does not prevent such visitation.

*Stern v. Stern* stands for the proposition that a parent cannot

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282. See, e.g., id. at 94, 466 A.2d at 891.
283. Id. at 99, 466 A.2d at 894.
284. See Wald, supra note 280.
287. Id. at 6-7, 466 A.2d at 61.
289. Id. at 261, 466 A.2d at 1305.
avoid his obligations to his adult destitute child merely by getting
his unsuspecting spouse to sign a separation agreement containing
no provision for the child and language to the effect that the agree-
ment could not be altered. The court admitted extrinsic evidence to
alter a very unambiguous contract, by characterizing the language as
ambiguous to prevent the parent from receiving the benefits of his
attempted manipulation of the parole evidence rule.291

In Rutherford v. Rutherford,292 the Court of Appeals held that,
when incarceration is ordered, denial of the right to appointed
counsel in a civil contempt proceeding for noncompliance with a
child support order violated both the due process clause of the four-
teenth amendment and article 24 of the Maryland Declaration of
Rights.293

In Lee v. State,294 the Court of Special Appeals held that a de-
fendant in a civil contempt proceeding for noncompliance with a
child support order had no right to a jury trial,295 but that if a de-
fendant was entitled to appointed counsel, a defendant had a right
to presentation of closing arguments by counsel.296

In Litzenberg v. Litzenberg,297 the Court of Special Appeals held
that a woman who allegedly saw her divorce settlement agreement
for the first time in court was entitled to more than an immediate
hearing on the scope of authority she had given her attorney to
make the agreement.298

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291. Id. at 292, 473 A.2d at 61-62. It does not appear that Ms. Stern attempted to set
aside the agreement on the ground of fraud, perhaps because the elements of fraud are
so difficult to prove.
293. Id. at 363, 464 A.2d at 237. For a discussion of Rutherford, see supra Constitu-
tional Law notes 220-35 and accompanying text.
295. Id. at 622, 468 A.2d at 661.
296. Id. at 624, 468 A.2d at 661. For a discussion of Lee, see supra Constitutional
Law notes 236-44 and accompanying text.
298. Id. at 314, 469 A.2d at 1285. For a comment on Litzenberg, see supra Constitu-
tional Law notes 214-19 and accompanying text.
VIII. HEALTH CARE

A. Health Services Cost Review Commission

During the past ten years, Maryland's Health Services Cost Review Commission has developed sophisticated and comprehensive cost-containment methodologies. Its "guaranteed inpatient revenue" (GIR) system establishes pre-set rates for particular diagnostic groups and provides a financial incentive for a hospital to tailor its services and hold expenses below the GIR rates. Regulated rates replace traditional cost-based reimbursement systems that provided little incentive for efficiency. In developing its rates, the Commission also utilizes a "market basket" methodology that basically involves an inter-hospital cost comparison evaluation.

These methodologies loom large in the background of two recent decisions. In Health Services Cost Review Commission v. Harford Memorial Hospital, the court addressed the issue of whether the Commission has the authority to set rates for ancillary services

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1. The Commission was established in 1971 to control rising hospital costs. Act of May 24, 1971, ch. 627, 1971 Md. Laws 1311 (codified at Md. HEALTH-GEN. CODE ANN. §§ 19-201-222 (1982 & Supp. 1984)). In its early years the Commission sought to control costs by rate disclosure; in 1974 it initiated a process of mandatory rate setting for Maryland hospitals. Rates are established based on statutory guidelines that include a determination as to the existence of a reasonable correlation between rates, costs and services. Md. HEALTH-GEN. CODE ANN. § 19-210 (1984). A hospital may not charge rates that do not conform to the Commission's review decision. Id. § 19-216. This rate setting authority was upheld in Blue Cross of Maryland, Inc. v. Franklin Square Hosp., 277 Md. 93, 352 A.2d 798 (1976). See also Health Servs. Cost Review Comm'n v. Franklin Square Hosp., 280 Md. 233, 372 A.2d 1051 (1977).


4. In 1983 the federal Medicare program switched from cost-based reimbursement to a "prospective payment system" similar to Maryland's GIR. The statutory authority for the system is 42 U.S.C.A. § 1395 ww (West 1983).

5. For a discussion of this methodology, see Brief for the Health Services Cost Review Commission at 17-19, Prince George's Doctors' Hospital v. Health Servs. Cost Review Comm'n, 302 Md. 193, 486 A.2d 744 (1985). Originally developed in 1977, this methodology has been renamed the Inter-hospital Cost Comparison Methodology (ICC). It compares a hospital's aggregate costs to "the average costs of a peer group of hospitals" within the state. Id. at 18-19 n.16.

provided by specialists in hospitals. In two previous cases, the court had said it did not. In the present case, the court distinguished the factual situations and concluded that the Commission did have such authority. The interesting part of this decision is that while the Commission had previously taken the position that it had rate-setting authority over physician fees, it reversed this position in Harford.

The facts reveal that, in June, 1981, Harford Hospital sought Commission approval of a rate increase to cover professional fees to its radiologists. The hospital had recently negotiated a contract whereby it assumed responsibility for billing, collecting, and determining the amount of patient fees. Physicians were compensated according to a “value unit” system, which guaranteed them 100% payment for actual billable procedures.

7. Id. at 18, 459 A.2d at 192.
9. In Holy Cross I the court held that fees of radiologists, pathologists and cardiologists for services delivered in-hospital are not subject to regulation by the Health Services Cost Review Commission unless the statutory phrase “total costs of the hospital” is a term of art including such specialist fees. 283 Md. at 689-90, 393 A.2d at 187. This term was at issue because the language of the authorizing statute gave the Commission regulatory authority over the costs encompassed by the term. The authorizing statute, Md. Code Ann. art. 43, § 568H (1980) stated:

(1) The purpose of this subtitle is to create a commission which will . . .
cause the public disclosure of the financial position of all hospitals . . . and the verified total cost actually incurred by each such institution in rendering health services . . . .
(2) . . . [A]n additional responsibility of this Commission is to assume all purchasers of health care hospital services that the total costs of the hospitals are reasonably related to the total services offered by the hospital [and] that the hospital’s aggregate rates are set in reasonable relationship to the hospital’s aggregate costs . . . . (emphasis added).

The court remanded the case to the trial court to decide whether this was a term of art.

11. In Holy Cross I and Holy Cross III the Commission had argued that it did have authority to regulate charges by these ancillary physicians for services delivered in hospitals. See 283 Md. at 686-87, 393 A.2d at 186; 290 Md. at 511, 514, 431 A.2d at 642. In neither case was the Commission’s argument successful. The Commission relied on the adverse decisions in its argument disclaiming the regulatory authority at issue in Harford Memorial. 296 Md. at 20, 459 A.2d at 193.
12. 296 Md. at 18, 459 A.2d at 193.
13. Id. at 21-22, 459 A.2d at 194.
The Commission maintained that the contractual arrangement between Harford Hospital and physicians essentially made the hospital a “billing agent” for the physicians and thus the costs at issue were not actual hospital costs.\(^{14}\) The Commission denied the rate increase, claiming lack of authority to regulate such fees.\(^{15}\) The hospital argued, and the Court of Appeals agreed, that the arrangement did place these fees within the “total costs of the hospital,” since the hospital had exclusive authority to establish rates and to bill and collect for services rendered.\(^{16}\)

In holding that the Commission had the authority to regulate the physician fees, the court was extending to the Commission a rate-review authority that it had earlier argued for,\(^{17}\) but now did not want. This seemingly anomalous position may be explained if one considers the Commission’s larger goal of working out effective methodologies for cost-containment. The issue here is whether the Commission can formulate an accurate “market basket” measure for aggregate hospital costs if doctors are able to “jump” in and out of hospital billing systems.\(^{18}\) The Commission’s position implies that it either wants all hospital based specialists under rate review and subject to “market basket” analysis, or none at all.\(^{19}\)

In *Health Services Cost Review Commission v. Lutheran Hospital*,\(^{20}\) the Court of Appeals had the opportunity to address directly the merits

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14. Id. at 18, 459 A.2d at 193.

The Commission argued that the court’s interpretation of the statutory language “total costs of the hospital” in *Holy Cross I* and *Holy Cross III*, see supra note 9, barred Commission regulation of the *Harford Memorial* fee system. *Id.* at 19-20, 25, 459 A.2d at 193, 196.

15. *Id.* at 19, 459 A.2d at 193.

16. *Id.* at 21-22, 25-26, 459 A.2d at 194, 196.


18. Because of their bargaining power, physicians are able to modify their contractual arrangements with relative ease. In the present case, radiologists went from a direct billing system to a “relative value unit” arrangement. 296 Md. at 18, 459 A.2d at 193. *In Holy Cross I*, the physicians went from an independent billing system to a hospital billing arrangement, triggering the controversy between the hospital and the Commission. After the Commission issued its rate order establishing what it considered to be appropriate charges, the physicians switched back to a direct billing system. *Holy Cross I*, 283 Md. at 682 n.3, 393 A.2d at 183 n.3.

19. The problem for the Commission is the lack of uniformity in billing systems among the state’s hospitals. The inclusion of these physician fees as a hospital cost in some hospitals, but not in others, skews the aggregate cost basis that is used to implement the “market basket” analysis against which individual hospitals are measured. Thus, the Commission cannot achieve its goal of developing a valid measure of average costs, to be utilized in its rate setting.

of the Commission's "market basket" and GIR methodologies, but it declined to rule on them. The case involved Lutheran Hospital's challenge to the rate order issued by the Commission, following the hospital's application for a rate increase. The trial court considered the hospital's argument that the Commission's methods of rate setting were arbitrary and capricious and in excess of its authority, and the allegation the Commission had exceeded the statutory time limit for issuing a rate order at all, and ruled for the hospital on both issues.

The Commission appealed, but neglected to include in its briefs the limitation-in-time issue. Side-stepping the substantive methodology issues, the court affirmed the lower court's decision for the hospital on the procedural ground. Curiously, the court devoted substantial time to a discussion of the substantive cost review issues it had declined to address directly. This may have indicated an acknowledgment by the court that such issues are indeed central to the Commission's cost-containment endeavors, since, within ten months, the court considered the issues on their merits, in what it apparently considered a more suitable case.

B. Health Claims Arbitration System

Maryland's appellate courts have recently issued a number of

21. Id. at 655, 472 A.2d at 57.
22. The hospital questioned the Commission's application of a "market basket" analysis to its rates. It also argued that by imposing a GIR scheme, the Commission was impermissibly regulating the quality and quantity of hospital services. Id. at 655, 657-59, nn.3-5, 472 A.2d at 58-59 nn.3-5.
23. Id. at 655-56, 472 A.2d at 57. For the time limits, see Md. HEALTH-GEN. CODE ANN. § 19-219 (1982 & Supp. 1984).
24. 298 Md. at 657-61 & nn.3-5, 472 A.2d at 58-59 & nn.3-5.
25. Although the Commission had argued that 150-day cut-off issue at the trial level, it did not include the statutory time issue in its brief to the Court of Special Appeals, its memorandum in support of petition for certiorari to the Court of Appeals, or its brief filed in that court. Id. at 661-63, 472 A.2d at 60-61.
26. Id. at 664-65, 472 A.2d at 62. The court held that the Commission waived the limitation issue by failing to appeal it, and the lower court's ruling that the Commission's rates were time barred thus allowed the hospital's own rates to prevail.
27. Id. at 657-60 nn.2-5, 662-65 nn.8-10, 472 A.2d at 58-59 nn.2-5, 61 nn.8-10.
28. In Prince George's Doctors' Hosp. v. Health Servs. Cost Review Comm'n, 302 Md. 193, 486 A.2d 744 (1985), the Court of Appeals upheld the trial court's decision that utilization of the guaranteed inpatient revenue system to establish rates is within the power of the Commission. Id. at 204-05, 486 A.2d at 750. Additionally, the court affirmed the decision that the Commission's use of the "market basket" methodology was not arbitrary or capricious. Id. at 207-08, 486 A.2d at 753.
29. Maryland's nonbinding arbitration process for medical malpractice claims was instituted in 1976, Act of May 4, 1976, ch. 235, 1976 Md. Laws 495, and is codified at
"Health Claims" opinions amidst continuing controversy over the efficacy of the system. Originally established to avert a malpractice insurance crisis, the arbitration system has been criticized by legal practitioners since its inception. More than twenty bills were introduced at the 1983 session of the General Assembly to either abolish or significantly alter the system.

One area of vulnerability highlighted by the court's recent decision in Hartman v. Cooper is the lack of a meaningful voir dire-type screening of prospective panel members to minimize the

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30. At the request of the General Assembly, the system was recently subjected to an in-depth analysis; the subsequent Commission on Health Care Providers Professional Liability Insurance issued its report in early 1984. REPORT OF THE GOVERNOR'S COMMISSION ON HEALTH CARE PROVIDERS PROFESSIONAL LIABILITY INSURANCE, January 26, 1984 [hereinafter cited as GOVERNOR'S COMMISSION REPORT]. The Commission noted a general discontent with the system, and concluded that mandatory arbitration may not have lowered insurance costs at all. It further suggested that the process may be operating actually to multiply the number of claims. GOVERNOR'S COMMISSION REPORT, supra, at 10-16.


32. The Governor's Commission noted that:

We have detected almost unanimous dissatisfaction with the functioning of the procedure on the part of counsel who must practice before the arbitration office, and substantial dissatisfaction on the part of health care providers and malpractice insurers. The Medical and Chirurgical Faculty, which originally enthusiastically supported adoption of the procedure now has adopted a position of more tempered support of its maintenance. A Special Committee of the Maryland State Bar Association composed of six attorneys representing claimants and six representing defendants has unanimously recommended its abolition.

GOVERNOR'S COMMISSION REPORT, supra note 30, at 11.

33. See, e.g., S.B. 1002/H.B. 1526 (1983) (abolish Health Claims Arbitration system); S.B. 1003/H.B. 1527 (1983) (raise $5000 threshold level; set minimum three-year bar membership to serve as attorney panel member; question prospective panel members more closely for potential conflicts; permit motions in limine and for summary judgment).


35. Prospective panel members are chosen from lists maintained by the Director of the Health Claims Arbitration Office. Five names from each of three categories (lawyer, health care provider, lay person) are submitted to claimant and defendant. Biographical data is distributed with the list of potential arbitrators. Md. ADMIN. CODE tit. 01,
possibility of bias in panel proceedings. In *Hartman* the Court of Special Appeals found that a panel member’s failure to disclose certain information prior to his selection as a Health Claims Arbitration panel member created an “appearance of bias” that fatally flawed the arbitration process.  

*Hartman* involved a medical malpractice claim in which the arbitration panel found for defendants. After the plaintiff learned that the health care provider member of the panel, Dr. Howard, had failed to disclose that he was a defendant in a pending malpractice suit and that he had also been deposed twice as a medical expert for the defense, the plaintiff brought an action to nullify the award, and by preliminary motion sought to vacate the arbitration panel’s decision, alleging evident partiality on the part of Dr. Howard. The trial judge denied the motion, thus allowing the panel’s decision to be placed into evidence with a presumption of correctness. 

On appeal, the Court of Special Appeals found that the panel decision had been “tainted” by an evident partiality and that allowing it into evidence with its presumption of correctness was clearly prejudicial to plaintiff. In concluding that the motion to

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36. § 01.03.01.07 (1976). Although the Director is required by statute “to assure himself that [prospective members] have no personal or economic relationship with any party,” Md. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(b) (1984), in reality opposing counsel are stuck with whatever outdated or inadequate information they receive. Based on this information they may make objections for cause and are also allowed two peremptory strikes from each of the three lists. *Id.* § 3-2A-04(c).


38. In order to trigger the de novo trial review, a party must file an action to nullify the panel’s award. Md. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1984).

39. While an action to nullify is merely a formal technique requesting de novo review, a preliminary motion to vacate the panel’s decision must be based on a showing of fraud, corruption or partiality on the part of an arbitrator. *Id.* § 3-2A-06(c).

40. Admissibility of the award and the presumption of correctness are treated at Md. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1984). Although the Court of Appeals has noted that such a presumption does not change the burden of proof upon plaintiff, Attorney General v. Johnson, 282 Md. 274, 293-94, 385 A.2d 57, 68-69 (1978), it is doubtful that juries have such a refined understanding of the burden of proof issue that they would give no additional weight to this declared presumption which favors defendant.

41. 59 Md. App. at 162, 474 A.2d at 963.

42. *Id.* at 168-69, 474 A.2d at 967.

43. *Id.* at 158-59, 474 A.2d at 962.
vacate should have been granted, the court reasoned that "evident partiality" includes an "appearance of bias," such that an inference of partiality could be made by a reasonable person.\textsuperscript{44} The court noted that the provisions in the Health Claims Act detailing the selection of panel members presupposed the availability of accurate background information to allow the parties to raise timely objections.\textsuperscript{45} In the present case, the court found that plaintiff was deprived of information that might have induced him to seek disqualification of this particular doctor panel member.\textsuperscript{46} Hartman thus sends a clear message to those who administer the Health Claims arbitration system that accurate and up-to-date background information on prospective panel members is vital.

Several recent Court of Appeals decisions serve to clarify the jurisdiction of the arbitration system.\textsuperscript{47} In \textit{Cannon v. McKen},\textsuperscript{48} the court held that claims cognizable under the Act require that defendant have breached his duty to render health care in his/her professional capacity. Breaches of non-professional duties that may occur through premises liability, slander, or assault do not come under the Act and should be treated as normal tort claims.\textsuperscript{49}

Plaintiff in \textit{Cannon} was injured when a piece of dental machinery fell on her while she was under the care of defendant dentist.\textsuperscript{50} She sued under theories of negligence, strict liability in tort, and breach of warranty. Defendant raised a preliminary objection based on plaintiff's failure to file a claim with the Health Claims Arbitration Office.\textsuperscript{51}

\textsuperscript{44} The Court of Appeals rejected the standard used by the trial court, i.e., that actual bias must be demonstrated before an award can be vacated for evident partiality. The court cites federal and state case law for the proposition that the mere "appearance of bias" is sufficient to constitute evident partiality: "[T]he test for vacatur on the ground of evident partiality is whether the reasonable person, as a party to the arbitration proceeding, upon being advised of the undisclosed matters, would have . . . doubts regarding the prospective arbitrator's impartiality . . . ." See, e.g., \textit{Richco Structures v. Parkside Village, Inc.}, 82 Wis. 2d 547, 263 N.W.2d 204 (1978), cited in 59 Md. App. at 166, 474 A.2d at 966.

\textsuperscript{45} 59 Md. App. at 166, 474 A.2d at 966.

\textsuperscript{46} \textit{Id.} at 168, 474 A.2d at 967.

\textsuperscript{47} The Health Claims Act provides for arbitration of claims "by a person against a health care provider for medical injury." \textit{Md CTS. & JUD. PROC. CODE ANN.} § 3-2A-02(a) (1984). Medical injury is defined as "injury arising or resulting from the rendering or failure to render health care." \textit{Id.} § 3-2A-01(f).

\textsuperscript{48} 296 Md. 27, 459 A.2d 196 (1983).

\textsuperscript{49} \textit{Id.} at 36-37, 459 A.2d at 201.

\textsuperscript{50} \textit{Id.} at 28-29, 459 A.2d at 197-98.

\textsuperscript{51} The mandatory nature of the Act is analogous to the obligation to exhaust administrative remedies. The court explains it in terms of a "condition precedent," without which a medical malpractice claim cannot be brought into court. \textit{Id.} at 30-31 n.3,
In rejecting that argument, the court first concluded that the language of the statute was ambiguous, and then looked to the legislative intent described in Attorney General v. Johnson. The court noted that since the system had been established to address a medical malpractice insurance crisis, only those claims normally associated with the rendering of health care were intended to come within the Act. Therefore, injuries resulting from something incidental to health care treatment and not arising from the breach of medical professional standards of care are not cognizable under the Act.

The court reiterated this proposition in Nichols v. Wilson. Plaintiff brought suit in her own name and on behalf of her child against defendant doctor and others, alleging assault and battery, negligence, and intentional infliction of emotional distress. The child had been admitted to defendant hospital for suture removal. Plaintiff claimed that her child was forcibly restrained, struck by the doctor, and abandoned while in physical and emotional distress.

Plaintiff’s damage claim for the negligence count fell below the statutory minimum provided in the Health Claims Act. The court held that the other two counts arose from conduct other than that traditionally associated with medical malpractice. Although the court cited Cannon as dispositive, the facts indicate a somewhat closer case here than in Cannon. The alleged slapping of the child


52. 296 Md. at 32, 459 A.2d at 199.
54. 296 Md. at 33-34, 459 A.2d at 199-200.
55. Id. at 36-37, 459 A.2d at 201. The court noted that the pleadings were “too sparse” to indicate whether the injury arose from defendant’s breach of his professional duty or from some other non-professional duty, and remanded the case for more detailed pleadings. Id. at 37-38, 459 A.2d at 201-02. In a detailed dissent, Judge Davidson found that the pleadings clearly indicated negligence other than medical malpractice, and that the claim was consequently outside the purview of the Act. Id. at 45, 459 A.2d at 205 (Davidson, J., dissenting).

57. Id. at 155-57 n.2, 460 A.2d at 58-59 n.2.
58. Md. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (1984) provides that all claims in excess of $5,000 are covered by the Act. Plaintiff had first sought damages of $10,000 on the negligence claim and subsequently reduced them to $5000—ostensibly to remove the claim from the requirement of mandatory arbitration. Id. at 156-57, 460 A.2d at 59. Defendants nonetheless argued that the aggregate damages from all three counts should be considered as one, since the alleged injuries arose out of a continuous occurrence. The court rejected the argument. Id. at 158-60, 460 A.2d at 59-60.
59. 296 Md. at 160-61, 460 A.2d at 60-61.
60. Id. at 160, 460 A.2d at 61.
clearly suggests assault and battery, but it could also be construed as a breach of a professional duty since it was so closely associated with defendant's actual rendering of a health care service. Both *Cannon* and *Nichols* make clear, however, that tortious conduct in a medical setting does not necessarily trigger mandatory arbitration. The true test is whether the alleged misconduct violated a professional standard of care resulting in an injury traditionally associated with medical malpractice.

*Brown v. Rabbitt*\(^{61}\) presents the reverse of *Cannon* and *Nichols*. Here, the court concluded that the injury did in fact arise from a failure to render appropriate health care, even though the claim sounded in breach of warranty.\(^{62}\) Plaintiff claimed that defendant, prior to performing a sterilization on her, had expressly warranted that certain post-operative complications would not arise and that he also impliedly warranted that all of her medical care would be rendered in accordance with appropriate standards.\(^{63}\) Following the surgery, complications arose and plaintiff filed a breach of warranty claim against the doctor.\(^{64}\) The court made clear that the style of the claim was irrelevant and that the present case fell within the Act.\(^{65}\)

The effect of these decisions involving the functioning of the Health Claims Arbitration System is to clarify aspects of jurisdiction and procedure. We may, however, expect further challenges to the system as critics continue to question whether it is achieving its goals.

C. Health Care Providers

In *State v. Good Samaritan Hospital*,\(^{66}\) the Court of Appeals held that a Maryland statute\(^{67}\) requiring hospitals to allow staff

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62. *Id.* at 176, 476 A.2d at 1170.
63. *Id.* at 173-74, 476 A.2d at 1168-69.
64. *Id.*
65. *Id.* at 174-76, 476 A.2d at 1169-70.
67. Section 19-351(b) of the Health-General Article provides:

(b) **Podiatrists.** — (1) A hospital or related institution that provides medical or surgical care of the foot, other than incidental care, shall include, in its bylaws, rules, or regulations, provisions for use of facilities by and staff privileges for qualified podiatrists.

(2) The hospital or related institution may restrict use of facilities and staff privileges by podiatrists to those podiatrists who meet the qualifications that the hospital or related institution sets for granting those privileges.

privileges\textsuperscript{68} to qualified podiatrists does not violate the constitutional prohibition against impairment of contract.\textsuperscript{69}

Good Samaritan Hospital sought a declaratory judgment invalidating the statute, alleging that it violated the contract clause of article I of the United States Constitution,\textsuperscript{70} the due process and equal protection clauses of the fourteenth amendment,\textsuperscript{71} article 24 of the Maryland Declaration of Rights,\textsuperscript{72} and article III, section 33 of the Constitution of Maryland.\textsuperscript{73} The constitutional challenge raised by the hospital basically questioned the State’s right to use its police power to require that a state-chartered private hospital grant privileges to a group the hospital wished categorically to exclude.

The trial court held that the statute violated the contract clause, resulting in an impermissible taking of the use of the hospital’s property.\textsuperscript{74} The court reasoned that the hospital’s charter was, in fact, a contract with the State, and that the podiatry statute materially interfered with the hospital’s right to manage its internal affairs. It concluded that this interference was unconstitutional since its purpose was not the “abatement of a nuisance” or a response to “an immediate threat to public health and safety.”\textsuperscript{75}

The Court of Appeals rejected this reasoning, finding no constitutional infirmity in the statute.\textsuperscript{76} The court noted that there is always some accommodation between the State’s interest in protecting the general welfare and a party’s right to be secure in its contractual relationships.\textsuperscript{77} The question becomes not whether the State can impinge on a contractual relationship, but to what degree

\textsuperscript{68} Staff or admitting privileges policies, while generally under the authority of the institution’s trustees, have traditionally reflected the opinions of the hospital’s medical staff. Clark, \textit{Why Does Health Care Regulation Fail?}, 41 MD. L. REV. 1, 17-18 (1981). Hence, physicians have had considerable input in decisions to exclude non-physician health care providers as a class. For a discussion of the potential abuse of such authority, see Silver v. Castle Memorial Hosp., 53 Hawaii 475, 488, 497 P.2d 564, 573 (1972) (Abe, J., concurring) (danger that credentials committees will seek to exclude for other than reasons of competence).

\textsuperscript{69} 299 Md. at 323, 473 A.2d at 898-99.
\textsuperscript{70} U.S. CONST. art. I, § 10.
\textsuperscript{71} U.S. CONST. amend. XIV, § 1.
\textsuperscript{72} Md. CONST. DECL. OF RIGHTS art. 24.
\textsuperscript{73} Md. CONST. art. III, § 33.
\textsuperscript{74} 299 Md. at 318, 473 A.2d at 895-96.
\textsuperscript{75} \textit{Id.}, 473 A.2d at 896.
\textsuperscript{76} \textit{Id.} at 323, 473 A.2d at 898-99.
\textsuperscript{77} \textit{Id.} at 319-20, 473 A.2d at 896-97.
and for what purpose. If reasonable and geared to justifiable public purposes, legislative enactments are generally accorded deference by the courts.78 The court found that in this case, no specific provisions of the hospital’s charter insulated it from the reach of legislative enactments designed to promote the general welfare.79 And the court found no impairment of contract even reaching the threshold level needed to trigger the constitutional inquiry. The court noted that the statute does not require the hospital to offer any services which it does not already provide—only that it not exclude as a class those who are licensed podiatrists.80 The court upheld the statute, finding that it does not “defeat or fundamentally change Good Samaritan’s corporate purpose to erect and maintain a hospital.”81

The case raises the interesting possibility that, should the General Assembly pass statutes prohibiting hospitals from excluding other non-physician health care providers on a class-wide basis,82 such statutes would be upheld. As it stands, Good Samaritan unequivocally upholds Maryland’s statute granting right of access to qualified podiatrists. Not only was the court unconvinced by the contract clause argument, it addressed the merits of the other constitutional arguments and found them wanting as well.83

78. Id.
79. Id. at 321, 473 A.2d at 897-98. Both the Maryland Constitution and the Annotated Code directly contradict the claim that corporate charters are beyond the reach of the police power. Section 48 of Article III of the Maryland Constitution allows for the repeal, modification and alteration of corporate charters, as does Md. CORPS. & ASS’NS CODE ANN. § 1-102(e) (1985).
80. 299 Md. at 323, 473 A.2d at 898-99.
81. Id. at 323, 473 A.2d at 899.
83. Basically, the court applied a rational-basis analysis to the due process and equal protection arguments, finding that the statute was neither arbitrary nor capricious, but could reasonably be construed as promoting the public welfare. 299 Md. at 324-29, 473 A.2d at 899-901.

The court noted three possible public policy reasons underlying enactment of the podiatry statute: 1) there is a public health interest in affording a sterile hospital setting for certain foot care; 2) there is the possibility that without such a statute hospitals would continue to deny privileges to podiatrists contrary to the public interest; and 3) there is a state interest in promoting competition between podiatrists and physicians to reduce patient costs. Id. at 326, 473 A.2d at 900.

The court also rejected the argument that the podiatry statute was a “special law” in violation of article III, § 33, of the Maryland Constitution. The court has interpreted that language in the past to prohibit enactments benefiting particular persons or cases. In the present case, the court reasoned that since the statute burdened no single hospital more than another or benefited any particular podiatrist, it can not be constituted a “special law.” Id. at 331, 473 A.2d at 902.
Another provider dispute is found in *Board of Examiners in Optometry v. Spitz* in which the Court of Appeals resolved a long-standing feud between optometrists and opticians. In *Spitz*, the court ruled that an optician who fits contact lenses is not practicing optometry.

The Board of Examiners in Optometry brought an action for declaratory and injunctive relief against optician Richard Spitz for unlawfully practicing optometry by fitting contact lenses. At the trial substantial technical evidence was heard as to the actual fitting process, with the Board claiming that the procedures actually utilized by Spitz involved activities reserved by statute for licensed optometrists or physicians. The trial court concluded that Spitz could not engage in acts requiring the exercise of his independent judgment or discretion, but that he could perform purely mechanical operations pursuant to a physician's prescription.

On appeal the Board argued that Spitz, by making his own measurements and assessments, was in violation of the language and purposes of the optometry statute. Spitz argued that the statute does not preclude his fitting contact lenses because it nowhere mentions contact lens fitting. Furthermore, he noted that numerous attempts to place such procedures within the optometry statute have failed. Spitz cited a 1976 Attorney General Opinion which had concluded, albeit with some reservations, that the fitting of contact lenses by opticians did not constitute the practice of optometry.

84. 300 Md. 466, 479 A.2d 363 (1984).
86. 300 Md. at 467, 479 A.2d at 364.
87. The Court of Appeals decision includes an extensive summary of the trial court's factual findings as to the step-by-step fitting process. The procedures indicate that a significant amount of independent judgment and expertise is involved in fitting contact lenses. *Id.* at 468-72, 479 A.2d at 364-66.
88. *Id.* at 473, 479 A.2d at 366-67.
89. *Id.* at 473, 479 A.2d at 367. The trial court's decision was described by the Court of Appeals as a middle course between the opposing contentions. *Id.* Neither side was willing to accept this. The Board appealed, Spitz cross-appealed, and the parties jointly petitioned for a writ of certiorari. *Id.* at 468, 479 A.2d at 364.
90. *Id.* at 473, 479 A.2d at 366-67. The court has previously considered the statute's purpose in Dvorine v. Castelberg Corp., 170 Md. 661, 185 A. 562 (1936) (protection of the public against unskilled practitioners).
91. The optometry statute was enacted in 1914 at a time when contact lenses were relatively unknown. 300 Md. at 476, 479 A.2d at 368.
92. *Id.* at 473, 479 A.2d at 367.
93. 61 Op. Md. Att'y Gen. 630, 636-37 (1976). The Opinion noted that out-of-state cases are divided. Some have reached the conclusion that contact lens fitting involves complicated procedures demanding the expertise and judgment of an optometrist. See,
The Court of Appeals basically agreed with Spitz, holding that opticians do not practice optometry as long as they work from a physician's prescription and ultimately refer the wearer back to the prescribing physician for final approval. In reaching this decision, the court weighed very heavily the fact that opticians have been fitting contact lenses since the 1940's, ostensibly with the approval of the prescribing ophthalmologists, and the fact that there was no empirical evidence in the record to suggest that the public has been endangered by such a practice. The court also gave "careful consideration" to the Attorney General Opinion, and to the numerous unsuccessful attempts to specifically place contact lens fitting within the optometry statute. Finding that the legislature has tacitly acquiesced in the long-standing practice, the court stated that any change must come from them.

The court's decision appears to leave a gap in the regulation of health care practitioners. After Spitz, it is clear that opticians may legally fit contact lenses. Yet because opticians are unregulated, there is no statutory or other regulatory bar to prevent anyone from engaging in the fitting of contact lenses. The legislature should address the issue of contact lens fitting directly and delineate who may engage in this practice and under what circumstances.

e.g., Ketring v. Sturges, 372 S.W.2d 104 (Mo. 1963) (fitting of contact lenses is not purely mechanical and involves judgment within meaning of optometry statute); State ex rel. Reed v. Kuzirian, 228 Or. 619, 365 F.2d 1046 (1971) (optician may fit contact lenses only under direct personal supervision of optometrist or physician). Other cases have concluded that the procedures are relatively simple and within certain bounds do not constitute the practice of optometry. See e.g., State ex rel. Londerholm v. Doolin, 209 Kan. 244, 497 P.2d 138 (1972) (contact lens fitting not the practice of optometry since doesn't involve "adaptation" of lenses); High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963) ("fabricating, fitting and inserting" contact lenses allowable pursuant to a prescription with return to physician for final approval). The Maryland Attorney General Opinion basically followed the view of the latter cases, while at the same time admitting that there was substantial authority suggesting the correctness of the former position. It suggested that a full evidentiary hearing as to the technical aspects of the procedure might reach a different conclusion. The Opinion recommended clarifying legislation by the General Assembly. 61 Op. Att'y Gen. at 638.

94. 300 Md. at 482, 479 A.2d at 371.
95. Id. at 476, 479 A.2d at 368.
96. See, e.g., S.B. 845 (1975), S.B. 721 (1974); H.B. 959 (1965), cited in 300 Md. at 478, 479 A.2d at 369. The Board had argued that there were, as well, a number of proposed amendments which would have allowed opticians to fit contact lenses and that the legislature had rejected these too. 300 Md. at 478-79, 479 A.2d at 369.
97. 300 Md. at 479, 479 A.2d at 369-70.
98. Id. at 482, 479 A.2d at 371.
D. Wrongful Birth

Negligent sterilization or "wrongful birth" cases have proliferated in recent years. The issue gained prominence in Maryland following the Court of Appeals decision in Sard v. Hardy. Although the holding in Sard addressed the problem of informed consent, the underlying compensable injury was the birth of a child subsequent to a sterilization procedure.

Courts are now faced with the issue of what kinds of damages should be recognized in "wrongful birth" cases. Most allow for losses associated with the medical costs of the unplanned pregnancy, the expense of a second sterilization, and the pain and suffering surrounding the pregnancy and delivery. A harder question is whether to allow the inclusion of the costs of raising the child.

In Jones v. Malinowski, a case of first impression in Maryland, the Court of Appeals joined a substantial minority of states that allow child care costs to be included as damages in a suit for negligent sterilization. The plaintiff in Jones had three children, the birth of each having caused considerable trauma to her. She and her husband were of limited financial means and plaintiff had planned to resume working full-time when her third child started school. The couple sought sterilization. Following a tubal ligation by defendant physician, plaintiff became pregnant and subsequently delivered a live, healthy baby. She and her husband brought suit for negligent sterilization.

100. 281 Md. 432, 379 A.2d 1014 (1977).
101. The question was whether the doctor's failure to apprise plaintiff of material facts relating to her surgery constituted negligence. Id. at 434-35, 379 A.2d at 1017. For the only reported case to date in the Court of Appeals for the Fourth Circuit reviewing the informed consent principles of Sard, see Lipscomb v. Memorial Hosp., 733 F.2d 332 (4th Cir. 1984).
102. 281 Md. at 435-38, 379 A.2d at 1017-19.
105. One of the earliest cases to allow child care damages was Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (child care damages awarded to alleviate financial burden on mother who already had nine children). Other states allowing such damages include Arizona, Connecticut, Michigan, Minnesota, Ohio, and the District of Columbia. See cases cited in 299 Md. at 265, 473 A.2d at 433; Note, supra note 103, at 1177-79.
106. 299 Md. at 269-70, 473 A.2d at 435.
107. Id. at 260, 473 A.2d at 430.
108. Id. at 260-61, 473 A.2d at 431.
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Following a trial in the circuit court, the judge instructed the jury that it could consider "the costs of raising the unplanned child from birth to the age of majority," as well as the value of a healthy child's "aid, comfort and society during the parents' life expectancy." The jury was not instructed, however, to consider that plaintiff might have aborted the child or placed it up for adoption. The jury awarded plaintiff $70,000 and defendant appealed.

The Court of Appeals basically affirmed the propriety of the trial court instructions. In structuring its opinion, the court looked to traditional tort law, reasoning that the cost of raising an unplanned child is, in fact, a foreseeable consequence of a negligent sterilization. The court saw no reason why a physician should be exempted from basic rules of negligence damages merely because the primary evidence of the tortious conduct is a healthy child.

The court found it inappropriate to presume that the birth of a healthy child will automatically entail benefits outweighing damages and found that the trier of fact should look to the reasons why plaintiff sought sterilization in the first place. This formulation focuses on the actual injury sustained—circumventing the problem of categorically denying child care damages in all cases and yet allowing for a realistic appraisal of each fact situation.

A further element in this appraisal process involves weighing the pecuniary costs of raising the child against the nonpecuniary

109. Quoted in 299 Md. at 261, 473 A.2d at 431.
110. Id.
111. The Court of Appeals granted certiorari prior to the intermediate court's consideration of the case. Id. at 259 n.1, 473 A.2d at 430 n.1.
112. Id. at 268-70, 473 A.2d at 435.
113. In structuring the opinion in this way, the court avoided interpreting the child as the "injury"—a notion offensive to many courts which have disallowed childrearing damages. Id. at 263-64, 473 A.2d at 432. For a discussion of the "child-as-injury" approach, see Note, supra note 103, at 1169-70.
114. The court noted opinions of other courts rejecting the argument that the birth of a child is always a blessing that offsets the economic burden of child rearing. See, e.g., University of Ariz. v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983) (although norm is that family will adjust to birth of child, birth can cause serious emotional or economic problems); Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) ("no inconsistency in [the] view that parental pleasure softens but does not eradicate economic reality"), cited in 299 Md. at 265-68, 473 A.2d at 433-34.
115. Possible reasons may be roughly categorized as economic, genetic, or therapeutic. Plaintiff may have wished to prevent an additional economic or psychological burden on the existing family, or she may have feared the birth of a defective child. She might also have acted to avoid risking a health hazard to herself. 299 Md. at 267, 270-71, 473 A.2d at 434, 436. See also Note, supra note 103, at 1189-97.
benefits derived from the child's presence in the family. Thus, the trier of fact may consider the intangible elements of love, comfort, and solace that may benefit the parents, as well as the possibility that, once grown, the child may contribute tangible economic assets to the family. It is perfectly conceivable that a particular jury may find, given this evaluation, that no child-rearing damages are appropriate.

The court cautioned that juries may not consider that plaintiff may have aborted the fetus or placed the child up for adoption because it would be unreasonable to carry the doctrine of avoidable consequences this far. Lastly, the court noted that Maryland public policy recognizing the special nature of the family relationship does not compel the conclusion that birth can never be construed as a compensable injury. Rather, it stated the rule in Maryland to be that child-rearing costs may be considered in assessing damages in a suit for negligent sterilization since they are a direct and foreseeable consequence of defendant's tortious conduct.

E. Abortion

In Coleman v. Coleman, the Maryland Court of Special Appeals rejected a husband's argument that he had a right to prevent his wife from having a first trimester abortion. Although the fetus had already been aborted, thus rendering the controversy moot at

116. The reasoning used by the court is found in the "benefits rule" of the Restatement (Second) of Torts § 920 (1979), which allows for mitigation of damages if the tortfeasor's conduct also conferred a benefit on the plaintiff.

117. The majority viewpoint prohibits such damages from even being considered by the jury, whereas the minority allows the jury to exercise its traditional fact-finding role in appraising each situation. 299 Md. at 266-67, 273-74, 473 A.2d at 434, 437.

118. Id. at 274, 473 A.2d at 437-38.

119. For this doctrine, see Restatement (Second) of Torts § 918 (1979). The doctrine requires plaintiffs to minimize damages as much as is reasonably possible.

120. The court rejected the argument, stating that family planning is not against public policy and that there is no reason based on law or public policy to immunize a doctor from the consequences of his negligence. 299 Md. at 273, 473 A.2d at 437.


122. Id. at 763, 471 A.2d at 1119. Other states addressing the issue have held that a woman has a right to an abortion irrespective of the consent or objections of the child's father. See, e.g., Rothenberger v. Doe, 149 N.J. Super. 478, 374 A.2d 57 (1977). State statutes requiring the father's consent have been held unconstitutional. See, e.g., Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); Wynn v. Scott, 449 F. Supp. 1302 (D. Ill. 1978), appeal dismissed, 439 U.S. 8 (1978). But cf. Scheinberg v. Smith, 550 F. Supp. 1112 (S.D. Fla. 1982) (invalidating a state statute requiring notice of proposed abortion to the husband and opportunity to consult prior to abortion). In Scheinberg the court indicated that the state might justifiably seek to protect the husband's interest in the procreative potential of the marriage when the abortion creates a
Reasoning that such cases were likely to recur, the intermediate court directly contradicted the position taken by the Court of Appeals the previous term, when the high court had dismissed an almost identical case for mootness.125

In Coleman, the Court of Special Appeals held the portion of Maryland's abortion statute126 that defines the circumstances in which an abortion may be obtained to be unconstitutional because it conflicts with Roe v. Wade127 and its progeny.128 The statute has never been modified to conform to the Roe standard despite several attacks on its validity.129 Whatever the reasons for the legislative

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123. Appellant originally filed a petition seeking an injunction to prevent appellee from having an abortion. 57 Md. App. at 757, 471 A.2d at 1116-17. The trial judge issued a temporary restraining order which he subsequently dissolved following a hearing. Within three days appellee obtained an abortion. Id. at 758, 471 A.2d at 1117. Meanwhile appellant filed an appeal and petitioned unsuccessfully for a writ of certiorari to the Court of Appeals. 298 Md. 353, 469 A.2d 1274 (1984).

124. The Court of Special Appeals heard oral arguments, issued a per curiam order affirming the trial court, and published an explanatory memorandum one month later. 57 Md. App. 755, 471 A.2d 1115 (1984).


126. Appellant's first argument was that under the Maryland Code a woman is not permitted to elect an abortion. The statute permits abortions, to be performed in accredited and licensed hospitals, only if the pregnancy is likely to "gravely impair" the physical or mental health of the mother, likely to result in the birth of a severely deformed or retarded child, or occurred as a result of a rape. Md. Health-Gen. Code Ann. § 20-208(a) (Supp. 1984).

127. 410 U.S. 113 (1973). Roe, along with its companion case, Doe v. Bolton, 410 U.S. 179 (1973), established that a woman is permitted to terminate a pregnancy, in consultation with a physician and up to the end of the first trimester, without state interference. Roe, 410 U.S. at 163. Key to the Roe decision is the assumption that the fetus is not viable in the first trimester. Id. at 463-65.


129. As early as 1972, the United States District Court for the District of Maryland held unconstitutional that part of the Maryland statute requiring that abortions be performed in accredited and licensed hospitals. Vuitch v. Hardy, Civ. No. 71-1129-Y (D. Md., filed June 22, 1972). The Fourth Circuit affirmed in a per curiam opinion, noting the applicability of the recently decided Roe and Doe cases. 473 F.2d 1370 (4th Cir.) cert. denied, 414 U.S. 824 (1973). The Maryland Court of Special Appeals ruled similarly in State v. Ingel, 18 Md. App. 514, 308 A.2d 223 (1973) (the Code provision defining abortion as a crime if performed other than in an accredited and licensed hospital is unconstitutional on its face). A 1977 Attorney General Opinion agreed with the rationale of these cases and further noted that the sections of the Code limiting abortion to situations that threaten substantial harm to mother or child or that result from rape do
inactivity, subtext Coleman now expressly holds the statute unconstitutional. subtext

After addressing the constitutional issue, the court disposed of the husband's additional arguments: 1) that science has changed the definition of viability; subtext 2) that nontherapeutic abortions are impermissible; and 3) that there is a recognized right under the ninth amendment to defend the preborn child.

The court found the husband's viability argument unpersuasive despite testimony of a geneticist that viability is present just after fertilization. Concluding that such an opinion was basically theoretical and not within the mainstream of medical science, the court held that the evidence presented was insufficient to impeach the Roe standard. The court was similarly unimpressed with the husband's contention that there was no health reason justifying his wife's election to abort. Roe does not demand such justification during the first trimester, but rather permits a woman, in consultation with her physician, to terminate a pregnancy without interference from the state.

The court also rejected the husband's construction of a constitutional argument combining the ninth amendment of the United States Constitution with common law language prescribing a parental duty to maintain and care for the child, noting that the

not conform to the holdings of Roe and Doe and are therefore unconstitutional. 62 Op. Md. Att'y Gen. 3, 4-7 (1977).

130. The abortion restrictions subsections were transferred and renumbered without change by Act of June 1, 1982, ch. 770, 1982 Md. Laws 4182 (codified at Mo. HEALTH-GEN. CODE ANN. § 20-208).

131. "[T]he Maryland Statute fails to delineate between terminating the pregnancy during the first trimester and any subsequent time. Because of that failure, Health-General Art. § 20-208(a) is unconstitutional insofar as it conflicts with decisions of the Supreme Court of the United States." 57 Md. App. at 760, 471 A.2d at 1118.

132. Id. at 764, 471 A.2d at 1120.

133. Id. at 762, 471 A.2d at 1119.

134. Id. at 760, 471 A.2d at 1118.

135. Id. at 765, 471 A.2d at 1120. The court noted that as recently as 1983 the Supreme Court reiterated Roe's first trimester standard as marking the point at which maternal choice outweighs the state's interest in protecting potential life. Id. at 763, 471 A.2d at 1119-20, (citing City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 434 (1983)).

136. Id. at 762-63, 471 A.2d at 1119 (citing City of Akron, 436 U.S. at 434). Planned Parenthood v. Danforth, 428 U.S. 52 (1976) invalidated a state statute granting a husband the right to veto his wife's decision to have an abortion. Based on its reading of Roe and Danforth, the Maryland court stated that the husband had no standing to enjoin his wife from having an abortion. 57 Md. App. at 763, 471 A.2d at 1119.

137. U.S. CONST., amend IX.

138. The husband quoted 1 W. BLACKSTONE, COMMENTARIES *447, for the proposition that parents have a duty to provide, and children have a right to receive, care and
Supreme Court has already construed the ninth and fourteenth amendments to give a privacy right to the woman during the first trimester of pregnancy. 139 As the court stressed, the Supreme Court has not indicated that such rights as the husband asserted would outweigh this privacy right. 140

For the present, Maryland case law explicitly follows Roe v. Wade. 141 Whether the legislature will choose to conform the statutory law to the constitutional decisions by the Supreme Court is uncertain, but given the law's nonenforcement and the court's decision in Coleman v. Coleman, legislative inaction will clearly have no effect on abortion rights in Maryland.

F. Statutory Developments

During its 1984 session, the Maryland General Assembly enacted several bills aimed at providing more comprehensive and more appropriate community-based services for disabled individuals. House Bill 1333 142 authorizes private group homes for emotionally disturbed children and adolescents. 143 Although a number of state agencies currently provide services for delinquent, 144 neglected, 145 and educationally handicapped children, 146 there has maintenance. "By begetting . . . [the children, the parents] have entered into a voluntary obligation . . . [to preserve the life] they have bestowed, . . . ." Id., quoted in 57 Md. App. at 760, 471 A.2d at 1118.

139. Id. at 761, 471 A.2d at 1119; see Roe, 410 U.S. at 153-54.
140. 57 Md. App. at 761, 471 A.2d at 119.
141. The Court of Appeals has yet to address the issue on its merits. Its denial of appellant's petition for certiorari in Coleman came before the intermediate court issued its opinion. 298 Md. 353, 469 A.2d 1274 (1984). It is unclear whether the court's denial was in consideration of the mootness of the controversy or whether it signifies an unspoken approval of the trial court's decision to deny injunctive relief to the husband.
143. The preamble to the bill states in part that: "It is the policy of the State: . . . (4) To provide homelike and community-based, private therapeutic group homes for children and adolescents who would otherwise be inappropriately confined to State residential institutions and centers . . . ." Id. at 2583. The new program will be under the aegis of the Mental Hygiene Administration, whose Director is authorized to license, regulate and evaluate the group homes. Id. at 2587-88 (codified at Md. HEALTH GEN. CODE ANN. § 10-921 to -926 (Supp. 1984)).
144. The Juvenile Services Administration provides institutional and group homes for children who are classified as delinquent, truant, or who generally need supervision based on their social misconduct. Md. HEALTH-GEN. CODE ANN. § 6-109 (1982); Md. CTS. & JUD. PROC. CODE ANN. § 3-801(f) (1984).
146. Maryland's Department of Education is required to provide free special
been a long-recognized gap in meeting the needs of emotionally disturbed youngsters requiring noninstitutional residential care. The legislation does not mandate the establishment of group homes, but requires the Director of the Mental Hygiene Administration to submit a needs and implementation plan by early 1985.\textsuperscript{147}

The legislature’s enactment of a family support services bill (HB 441)\textsuperscript{148} reflects a related emphasis on maintaining disabled children in their own homes or in a family environment rather than in institutional placements. The new program is designed to keep “developmentally disabled”\textsuperscript{149} children in the home by providing money for such support services as counseling, personal care, equipment, and transportation.\textsuperscript{150} As administered by the Department of Health and Mental Hygiene, the program contemplates the coordinated use of existing private nonprofit community-based services to which the developmentally disabled are already entitled.\textsuperscript{151}

A third bill (HB 375)\textsuperscript{152} focusing on community-based care mandates the preparation of a five-year master plan identifying housing and support services needs of the mentally ill. The immediate goal of the legislation is to assess the number of individuals now in institutions, as well as in the community,\textsuperscript{153} who would be better education and other services to handicapped children with related learning disabilities. Md. Educ. Code Ann. §§ 8-401 to -417.6 (1985). While some emotionally disturbed children may fall into this category, many others do not. For a comprehensive survey of Maryland programs and an analysis of the special needs of the emotionally handicapped, see Leviton & Shuger, Maryland’s Exchangeable Children: A Critique of Maryland’s System of Providing Services to Mentally Handicapped Children, 42 Md. L. Rev. 823 (1983).


\textsuperscript{149} “Developmentally disabled” is defined in Md. Ann. Code art. 88A, § 128(c) (Supp. 1984) as a severe, chronic mental or physical disability that is manifested in childhood, likely to continue indefinitely, results in substantial functional limitations in living, and reflects a need for extensive special care.


\textsuperscript{153} The Mental Health Association of Maryland (MHA) estimates that there are 6500 people currently living in the community who are in need of residential placement. Tel-
served in a residential facility.\textsuperscript{154} Once identified, and the need for additional facilities determined, the ultimate goal of the legislation is to place those with mental disorders into a more appropriate rehabilitative setting.\textsuperscript{155}

The legislature also passed a number of bills clarifying and expanding rights of the mentally disabled.\textsuperscript{156} House Bill 1373\textsuperscript{157} requires that mentally ill persons be informed of their rights on admission to facilities, and that the latter post notices as to these rights, and implement complaint procedures.\textsuperscript{158} Patients are expressly granted the right to converse privately with a lawyer, clergyman, or other visitor.\textsuperscript{159}

House Bill 230\textsuperscript{160} adds to the enumeration of rights of the mentally retarded the right to worship as one chooses, and the right to receive an accounting of funds held by the facility.\textsuperscript{161}

An entirely new section was added to the patient “Bill of Rights,” granting mentally ill individuals the right to refuse medication.\textsuperscript{162} The legislation excepts emergency situations and, with respect to patients involuntarily hospitalized, it authorizes a clinical review panel to override a patient’s refusal.\textsuperscript{163} Right to refuse treatment issues are highly controversial,\textsuperscript{164} and this bill attempts to strike a balance between patient rights and his or her participation.

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ephone conversation with Herbert S. Cromwell, Executive Director, Baltimore Chapter of MHA (Sept. 12, 1984).
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\textsuperscript{155} Id.

\textsuperscript{156} The legislature had previously focused a great deal of attention on the rights of mentally ill individuals during its 1983 session. A significant patient “Bill of Rights” was passed that established new rights and consolidated provisions defining existing rights. Regulatory provisions and pertinent Mental Hygiene Administration policies were consolidated within the “Bill of Rights.” It is now codified at Md. Health-Gen. Code Ann. §§ 10-701 to -713 (Supp. 1984). The 1984 bills add additional rights to this comprehensive “Bill of Rights.”


\textsuperscript{160} Act of May 8, 1984, ch. 171, 1984 Md. Laws 590 (codified at id. § 7-601(b) (Supp. 1984)).


\textsuperscript{163} Md. Health-Gen. Code Ann. § 10-708 (Supp. 1984). The three-member review panel must follow a fairly strict procedural process in determining whether the patient’s refusal should be overridden. Panel decisions approving the use of medication must be re-evaluated every 60 days. The medication may not be given at all if there is an alternative treatment acceptable to both the individual and his doctors. Id. § 10-708(c).

\textsuperscript{164} See generally Apelbaum & Gutheil, Rotting With Their Rights On: Constitutional Theory
in treatment on the one hand, and timely and responsible medical care on the other. A majority of states have similar statutes and others provide for such a right pursuant to court action, administrative rules, departmental policies, or Attorney General rulings. Maryland began utilizing clinical review panels within state facilities in early 1983 and the practice is now extended to private facilities.

The legislature also enacted SB 433 providing a relatively simple substitute consent procedure authorizing medical or dental treatment for a disabled individual. The bill eliminates the need for judicially appointed guardians in instances where a close relative is available and willing to consent to the proposed treatment. Health care providers who reasonably rely on this substitute consent and persons giving such consent are exempted from civil and criminal liability.

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165. The bill reflected a consensus approach with input from, among others, the Maryland Attorney General’s Office, the Maryland Psychiatric Society, the Mental Hygiene Administration, Legal Aid, and the Mental Health Association of Maryland. Testimony on HB 1372, Mentally Ill Individuals—Refusal of Medication, given by the Mental Health Association of Maryland (March 13, 1984).


169. The legislation limits the substitute consent procedure to certain enumerated relatives who must be contacted in descending order, for example, “(1) [a] spouse, or, if not reasonably available; (2) an adult child, . . . .” MD. HEALTH-GEN. CODE ANN. § 20-107(d) (Supp. 1984). Thus, the physician or facility may not “shop” the list for a relative amenable to the treatment. Advice memo from Joseph P. McCurdy, Jr., Asst. Attorney General, to All State Psychiatric Facilities; State Mental Retardation Facilities and Facilities for the Chronically Ill and Aging, at 3 (Aug. 15, 1984).

IX. Property

A. Testamentary Disposition

1. Use of Extraneous Evidence to Determine Testamentary Nature of Documents.—In construing wills, the court's primary purpose is to ensure that the testator's intent is fulfilled. Such intent is normally to be determined from the "four corners of the will" rather than from any presumed intention which is not embodied in the express language of the will. However, when the issue is whether the professed document was actually intended by the testator to be his will, pertinent accompanying facts and circumstances may be considered which tend to prove or disprove that fact. In Lowenthal v. Rome, the Maryland Court of Special Appeals recognized this vital distinction and affirmed a lower court decision which relied heavily on extraneous written evidence of the testator's intent.

The testator in Lowenthal was a Maryland domiciliary. He had substantial assets located both in Maryland and in Spain. The court had before it three wills executed by the testator. Two wills were written in Spanish and executed in accordance with Spanish law and one will was written and executed in accordance with Maryland law. The first will, written in Spanish and executed in Spain, left the Spanish estate to the testator's stepchild and the remainder (roughly two-thirds of the total estate) to his brother. The second will was executed approximately six weeks later. It was written in English and executed in Maryland. It distributed the estate in the same manner as the first. The third will was executed approximately three months after the second. This will was written in Spanish and was executed in Spain. It left the Spanish estate to the testator's brother but was silent as to the disposition of the Maryland estate.

2. The "four corners" doctrine was coined by the Maryland Court of Appeals in Fersinger v. Martin, 183 Md. 135, 36 A.2d 716 (1949) (a will construction case determining whether the testator left his wife the entire estate or merely a life interest). The doctrine limits inquiry into the testator's intent to the face of the writing or the "four corners of the will." It necessarily excludes consideration of extrinsic evidence as to intent. It is important to note that courts are not in all cases limited exclusively to the language of the will. Where the language of the will contains some ambiguity either expressly, or as applied to the facts and circumstances at the time the will was executed, the court may look outside the will to determine the testator's intent. See T. Atkinson, supra note 1, at 810-15.
3. Rabe v. McAllister, 177 Md. 97, 8 A.2d 922 (1939).
Had the last Spanish will been taken as the only evidence of the testator's intent, the result would have been a finding of intestacy as to the Maryland estate. Because there is a presumption against intestacy, the lower court sought to avoid a finding of intestacy as to the Maryland estate. It accepted as evidence of the testator's intent a letter he had written to his brother. This letter indicated that the last will was intended merely to revise the previous documents, not to revoke them.\footnote{The letter which the testator wrote to his brother stated that the testator had revised his American will and had given all of the Spanish assets to his brother. \textit{Id.} at 753, 471 A.2d at 1115.} Thus, the court did not read the Maryland will and the final Spanish will as separate documents, but read them together as evidence that the testator intended the entire estate to go to the testator's brother.\footnote{This is not the first time a Maryland court has held that two testamentary documents should be read together to form a total disposition of a decedent's estate. In \textit{Rabe v. McAllister}, 177 Md. 97, 8 A.2d 922 (1939), the court considered the testamentary validity of three wills executed over an eight-year period, the last two of which were German. The court's determination of the validity of the wills was far less consequential since it determined the force of a perpetual care clause. However, the case established the basic framework for determining which of several writings is to be read as a testamentary instrument. In holding that the first and third instruments should be read together, the court noted that the first instrument disposed of all of the decedent's property and the third made only a slight modification, which made sense only when the latter will was read in conjunction with the first.}

The trial court's decision was unquestionably in accord with the testator's true intent. But because it was not possible to determine the trial court's actual use of the letter in this case, the Court of Special Appeals avoided any attempt to make the necessary distinctions between use of evidence to determine testamentary validity of documents and its use to show testamentary intent.\footnote{The \textit{Lowenthal} court's acknowledgement that extrinsic evidence may be admitted (even in the absence of facial ambiguity) to determine the testamentary validity of a document is an important distinction to make because it runs counter to the normal rules of testamentary construction. It is unfortunate that in \textit{Lowenthal} the court did not clarify the practical problems posed by the admission of such evidence. It is likely that in many cases such evidence may be necessary to determine the intent of the testator.} The court found that the admission and use of the letter was at most harmless error.\footnote{\textit{Id.}}

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lead to an incidental construction of the document beyond its bearing on the issue of testamentary validity. And such consideration may not always be harmless error. Therefore, the court could have enhanced the opinion's value to practitioners by further exploring the trial court's use of the testator's letter.

2. Waiver of Conditions Precedent to Testamentary Requests.—In *Martin v. Young* \(^9\) the Maryland Court of Special Appeals indicated in dicta\(^10\) that performance of a condition precedent to a testamentary bequest may be waived when performance of the condition is rendered impossible just five days before the testator's death. The court's analysis focused on what the testator's intent would have been had the testator anticipated the circumstances that rendered performance impossible.

In *Martin*, Mrs. Fravel, the testator, left her house to Mrs. Martin, her domestic employee of eleven years, subject to the condition that she be in the testator's employ at the time of her death. Five days prior to Mrs. Fravel's death Mrs. Fravel was moved to a nursing home. The legatee was dismissed by a bank officer under a general power of attorney because her services were no longer needed. After the testator's death, employees of the bank acting as personal representative refused to pay the bequest. They argued that Mrs. Martin's bequest had lapsed because she failed to comply with the condition.\(^11\)

The *Martin* court adopted the *Restatement of Property* doctrine\(^12\) which excuses performance of a condition if the excusal accords with the testator's intent.\(^13\) To determine that intent, the focus of the court's inquiry "is whether the testator's primary concern was the betterment of the individual or the performance of the condition."\(^14\) The court expressly refused to limit its inquiry to the "four corners of the will," as proposed by the defendant. It was concerned that a narrow construction of wills in condition precedent cases could "open the door to all types of manipulations of the

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10. The sole issue before the Court of Special Appeals was whether the trial court had erred in granting the motion for summary judgment in favor of the defendant personal representatives. The court found that sufficient factual issues had been left unresolved, so it reversed the trial court's judgment and remanded the case for trial. *Id.* at 408, 462 A.2d at 80-81. As a result, the court's discussion of the appropriate analysis in condition precedent cases cannot be considered a part of the court's holding.
11. *Id.* at 402-03, 462 A.2d at 77-78.
14. *Id.*
testator's true intent as well as a legatee's privilege to inherit. 15 If the court limited itself only to consideration of the strict terms of the will, it could not take into account such relevant factors as the testator's waiver of the condition after its breach 16 or a reason, such as impossibility, for the failure of performance.

The court easily distinguished Pacholder v. Rosenheim, 17 the only other Maryland case dealing with a devise or bequest subject to a condition precedent, which held that the condition could not be waived. 18 In Pacholder, the testator left a cash bequest to his niece, conditioned upon the niece's marrying within her faith and with her parent's consent. The niece married within her faith, but eloped. 19 Three differences in the factual situations of Pacholder and Martin enabled the court to distinguish Pacholder. First, in Pacholder, the testator had two and one-half years to change the condition if he so desired; in Martin, the testator, had she been competent and physically able, had only five days to change the condition. 20 Second, the Pacholder legatee made a voluntary choice to violate the condition, whereas the Martin legatee attempted to fulfill it but was prevented by her dismissal by the bank. 21 Third, in Pacholder the legatee's behavior was at issue, whereas in Martin the impossibility of performance was the key. 22 The court's refusal to follow the Pacholder precedent is significant because it reveals the court's willingness to adopt a case-by-case analysis in condition precedent cases and to consider the equitable aspects of individual situations. 23

In developing its argument for waiving a condition precedent on grounds of impossibility, the court did not refer to or acknowledge the Maryland cases which allow a waiver of conditions

15. Id.
16. Id. The court spoke in general terms when it discussed the possibility of waiver of the condition because it was not a factor in Martin. In Martin, the testator died five days after the breach of the condition and arguably never knew the condition was breached.
17. 129 Md. 455, 99 A. 672 (1916).
18. Id. at 463, 99 A. at 675.
19. Id. at 459, 99 A. at 673.
20. 55 Md. App. at 405, 462 A.2d at 79.
21. Id.
22. Id. The court draws an exceedingly fine line between the second and third differences, which is arguably without significance because both focus on whether the breach was a result of the legatee's voluntary actions, or the result of actions outside the legatee's control. The court also noted that the overwhelming weight of authority today, unlike the Pacholder holding, recognizes the doctrine of substantial performance. See id.
23. Id. at 405-06, 462 A.2d at 79. Consideration of the fairness of requiring the performance of an impossible condition or one made impossible by an individual who stands to gain from the breach provides a more satisfying result.
subsequent. In 1881, in *Hammond v. Hammond*, the Maryland Court of Appeals excused performance of a condition subsequent to a bequest and implicitly rejected the four corners doctrine when performance was rendered impossible by an act of God. In 1949, in *Keyser v. Calvary Brethren Church*, the court extended the doctrine to excuse performance due to physical impossibility or the illegality of performance.

The *Martin* court's failure to cite these condition subsequent cases does not weaken its opinion. However, the court could arguably have added depth to its opinion by citing to the parallel premises advanced in these condition cases. It is unfortunate that the court did not take advantage of this opportunity to fit the condition precedent analysis into a larger framework which would enhance the practitioner's understanding of both types of conditions.

3. **Mandatory Time Limit on Filing Caveats to Wills.**—In 1982, in *Sole v. Darby*, the Maryland Court of Special Appeals for the first time applied the equitable principles of waiver and estoppel to toll or otherwise interrupt the generally mandatory six-month time limit imposed on filing caveats to wills under the Maryland Estates and Trusts Article, section 5-207. In the *Sole* case, the out-of-state ca-

24. 55 Md. 575 (1881).
25. *Id.* at 583. The court enforced the payment of a cash bequest conditioned upon the beneficiary's provision of care and burial of the testator's brother. Performance was rendered impossible when the testator's brother predeceased the testator. This was considered an act of God. *Id.* at 577, 583.
26. *Id.* Had the court restricted its consideration to the terms of the will, any reason for not complying with the condition, including an act of God, would have been irrelevant.
27. 192 Md. 520, 64 A.2d 748 (1949).
28. *Id.* at 525, 64 A.2d at 750. The court enforced the payment of a cash bequest to the church conditioned upon the church's using the money to build a church within five years of payment of the bequest. Performance was rendered impossible by statutory restrictions on the use of building materials due to World War II. *Id.* at 522-23, 64 A.2d at 748-49.
29. A troublesome aspect of the condition subsequent cases cited is that, as a threshold matter, each distinguishes between conditions precedent and subsequent. *Hammond*, 55 Md. at 581-82; *Keyser*, 192 Md. at 523, 64 A.2d at 749. The importance of this distinction is never explained.
31. Since a will caveat is an attack on the validity of an alleged will, the effect of a will caveat in Maryland is to trigger judicial probate proceedings for the alleged will. Md. Est. & Trusts Code Ann. § 5-207 (1974); *id.* § 5-207, comment to former article 93.
(a) **Filing petition to caveat**—Regardless of whether a petition for probate has been filed, a verified petition to caveat a will may be filed at any time prior to the expiration of six months following the first appointment of a personal
veator missed the six-month filing deadline by four days because of a defective notice of appointment (a copy of which was sent to the caveator). The notice, as approved by the Register of Wills, correctly stated that the filing deadline was six months from the date of appointment, but erroneously dated the deadline six months and four days after appointment. Relying on the date given, the caveator missed the deadline by four days. The fact that the Register of Wills’ actions misled the caveator to act to her own detriment appears to be the single most influential factor in persuading the court to establish an equitable exception to the six-month rule.

Two years later, in Durham v. Walters, the Maryland Court of Special Appeals addressed a second case in which the caveators missed the six-month time limit for filing a caveat petition. In dicta, the court refused to apply the exception established in Sole. Therefore, what at first under Sole appeared to be a common law exception to the caveat filing deadline, became, after Durham, a limited exception available only in cases which closely follow the facts in the Sole case.

In Durham, thirty-nine distant relatives of the testator missed the filing deadline by nine months. None of them received personal notice of the probate of the will, but some did live in the county

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representative under a will, even if there be a subsequent judicial probate or appointment of a personal representative . . . .

33. In Sole, as in most jurisdictions, the actual notice was not prepared by the Register, but by the personal representatives. The court charged the Register of Wills with the error, noting that to require greater diligence from the personal representatives than from the Register would lead to an unduly harsh result. 52 Md. App. at 224 n.1, 447 A.2d at 508 n.1.

34. “It is clear in this case that somebody ‘goofed.’ It is equally clear that it was not the appellant.” Id. at 223, 447 A.2d at 508.


36. The appellants did not raise the waiver and estoppel issues before the lower courts. Thus, any discussion of these issues in the Durham opinion cannot technically be considered part of the court’s holding. One explanation for the appellant’s failure to raise these issues may have been that the Court of Special Appeals’ decision in Sole was not issued until after the judicial probate hearing in Durham.

37. 59 Md. App. at 13, 474 A.2d at 529.

38. Md. Est. & Trusts Code Ann. § 7-104 (1974) requires only that the personal representative provide the Register of Wills with a list of interested persons “to the extent known to him” so that the Register may issue the notice provided in Md. Est. & Trusts Code Ann. § 2-210 (1974). The caveators argued unsuccessfully that the failure to notify them constituted a fraud and, in the alternative, if the personal representative did comply with the statutes without evidence of fraud, that the terms of Md. Est. & Trusts Code Ann. §§ 2-210 and 7-104 violate the procedural due process requirements of the fourteenth amendment to the United States Constitution. In both cases, the court rejected the caveators’ argument based on the testimony and on established federal and state case law. The court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S.
where notice was published. In general, as in Durham, the failure to file a timely caveat bars the court from granting relief. In Sole, the court was persuaded to recognize an exception to that rule because the Register of Wills' actions directly misled the caveator, causing her to miss the filing deadline. In Durham, however, there was no analogous fault on the part of the Register of Wills or personal representative. The court clearly indicated that absent such circumstances and absent any fraudulent concealment of the testator's death, the doctrine of laches would bar the caveators' estoppel argument. The testimony in Durham indicated that the notice clearly stated the correct filing deadline, that it appeared as required in the newspaper, and that it was delivered to those people required to receive it by law. The personal representative acted in good faith and complied fully with the statute. The court therefore found no justification for waiving the time limitation. The court correctly faulted the caveators and not the Register of Wills or personal representative for the nine-month late filing.

The Durham case presented the court with its first opportunity to refine the Sole exception. The court addressed the issue in dicta, despite the fact that the lower court had not addressed this issue. The opinion is of value because it provides guidance for future caveat litigation and is reasonably clear in its use of case law and

306 (1950), for the proposition that the requirements of due process may be satisfied by publication where personal notice is either not reasonably possible or practical, as when all possible unknown heirs would be difficult to identify. The court also cited James v. Zantzinger, 202 Md. 109, 96 A.2d 10 (1953), for the general proposition that notice by publication in Maryland satisfies due process of law. 59 Md. App. at 14-15, 474 A.2d at 530. See also Md. Est. & Trusts Code Ann. § 2-210 (1974), which is designed to comply with the due process requirements of the fourteenth amendment.

39. 59 Md. App. at 4-5, 474 A.2d at 525.
40. In the instant case, because a court of law considered the caveat, Md. Est. & Trusts Code Ann. § 5-207 (1974) operated as a statute of limitation for filing the caveat petition. At the Orphans Court level, the statute limits jurisdiction. The Orphans Court may exercise jurisdiction only when expressly conferred by statute. See Md. Est. & Trusts Code Ann. § 2-102 (1974). Therefore, the Orphans Court is without jurisdiction to consider caveat petitions filed after six months. Only courts of law may consider such exceptions as those pleaded in the Durham case. 59 Md. App. at 9, 474 A.2d at 527.
41. The court suggests that the caveators are charged with knowledge of the testator's death inasmuch as several of them were residents of the county where notice was published. The court, citing P. Sykes, Contest of Wills in Maryland § 3, at 4-5 (1941), clearly states that the caveators are charged with knowledge of their right to caveat. When considered with the fact that the caveators missed the deadline by nine months, the fairness of the court's decision is clear. 59 Md. App. at 13-14, 474 A.2d at 529-30.
42. 59 Md. at 14, 474 A.2d at 530.
43. Id. at 10, 474 A.2d at 528.
waiver and estoppel principles. Unfortunately, the court was not presented with a particularly difficult set of facts which might have pushed the court to define its exception more clearly.

4. Limitation of Rights of Residuary Beneficiary of Testamentary Trust.—In Probasco v. Clark, the Maryland Court of Special Appeals held that the residuary beneficiary of a testamentary trust may not successfully request the early termination of the trust over the objections of the life income beneficiary. The court reached this decision even though the life income beneficiary's interest would not be effectively altered under the residuary beneficiary's proposal.

Under the terms of the will, the testator left his son a $300 monthly payment for life out of the income and principal of the residuary trust. On the son's death, the trust was to terminate and the proceeds were to be paid outright to the Bel Air United Methodist Church (Church) as remainderman. As a result of the Church's need to fund its building program, the Church petitioned the circuit court to terminate the trust, which had grown from $187,551.38 to $267,826.97. The Church asked the court to order the trustee to pay over the balance of the trust estate, less expenses and the cost of an annuity purchased from a reliable insurance company, which would pay the life income beneficiary $300 a month. The circuit court approved the plan, but required that, as an additional safeguard, $50,000 of the trust corpus be retained to guarantee the monthly payments to the life beneficiary. On appeal, the Court of Special Appeals reversed the circuit court's decision.

The Probasco court adopted a very traditional approach in its refusal to modify the terms of the trust. The court's primary concern was to carry out the intent of the settlor. The court acknowledged that courts generally possess the power to modify trust terms, but the exercise of such power is conditioned upon the existence of three conditions. The court must be satisfied that the facts and

45. Pursuant to Md. EST. & TRUSTS CODE ANN. § 14-101 (1974), the remainder beneficiary petitioned the Circuit Court for Harford County to order termination of the trust.
46. 58 Md. App. at 690, 474 A.2d at 224.
47. Id. at 685-86, 474 A.2d at 222.
48. Id. at 686, 474 A.2d at 222. The remainder beneficiary's novel proposal appears to present a case of first impression in Maryland.
49. Id. at 687, 474 A.2d at 223.
50. Id. at 690, 474 A.2d at 222.
51. Id. at 688, 474 A.2d at 223. The court was equally concerned that its power not be used "merely as a tool or device to enable beneficiaries to receive a greater income or use of trust property . . . ." Id. at 687, 474 A.2d at 223.
circumstances leading to the request for modification could not have been foreseen by the trustee,\textsuperscript{52} that if the terms are not modified, the beneficiary will suffer loss,\textsuperscript{53} and that some exigency, contingency or emergency must have arisen out of the trust itself\textsuperscript{54} that "makes the action of the court indispensable to the preservation of the trust."\textsuperscript{55}

The Probasco court correctly recognized that the testator might have foreseen the Church's desire to expand and could have easily provided for such need.\textsuperscript{56} The court found no threat of loss to the beneficiary. And it refused to classify the Church's desire for the funds for its building program as "an exigency, contingency or emergency."\textsuperscript{57}

The court also rejected application of an exception to the rules governing early termination of a trust, which would permit early termination if all of the beneficiaries are \textit{sui juris}, if all of the beneficiaries consent, and if the objective of the trust is not violated. Without unanimous consent, the court cannot accelerate the trust's termination.\textsuperscript{58} In Probasco, the life income beneficiary's refusal to consent proscribed early termination.

The court's holding is supported by citation to many authorities but the opinion is disappointing both because of its mechanical application of prior case law and because of its technical flaws. In

\begin{itemize}
\item[52.] \textit{Id.} at 687-88, 474 A.2d at 223 (citing Johns v. Montgomery, 265 Ill. 21, 106 N.E. 497 (1914) (agricultural land held in trust for production of crop income permitted to be sold when land was incorporated into city limits and agricultural value dramatically decreased); Dyer v. Paddock, 395 Ill. 288, 70 N.E.2d 49 (1946) (residential property held in trust for production of rental income permitted to be sold after area changed to almost exclusive commercial use)).
\item[53.] \textit{Id.} at 688, 474 A.2d at 223.
\item[54.] \textit{Id.} \textit{See} Stellings v. Autrey, 257 N.C. 303, 312, 126 S.E.2d 140, 155 (1962); Carter v. Kempton, 233 N.C. 1, 6, 62 S.E.2d 713, 716 (1950).
\item[55.] 58 Md. App. at 688, 474 A.2d at 223 (quoting \textit{Stellings}, 257 N.C. at 321, 126 S.E.2d at 155).
\item[56.] \textit{Id.} The court suggested that, had the testator wished to give the Church money for its immediate use, or for a use prior to the life beneficiary's death, the testator could have provided for the purchase of an annuity just as the Church proposed to do. \textit{Id.} at 690, 474 A.2d at 224.
\item[57.] \textit{Id.} Implicit in the court's refusal to characterize the Church's desire as an exigency, contingency or emergency justifying early termination of the trust is the equitable notion that the Church cannot create its own emergency, plead emergency and then benefit by it.
\end{itemize}
Probasco, the court was faced with a novel and inventive proposal by the residuary beneficiary. Because the proposal virtually insured that the life beneficiary's monthly income would remain unchanged, the court's historic reluctance to modify the terms of a trust without the beneficiary's approval was strongly challenged. The court could have taken this opportunity to develop the rationale behind the beneficiary consent requirement, and could have reevaluated the justification for the enduring force of judicial reluctance to modify the terms of a trust. Unfortunately, the court did neither. Rather, it recited various holdings of foreign cases to reach the desired conclusion without actually developing the Maryland case law into which those out-of-state premises fit.

B. Eminent Domain

1. Interest Payable in Quick-Take Condemnation Proceedings.—The Court of Appeals in King v. State Roads Commission held that the compensation payable in quick-take condemnation proceedings held that the compensation payable in quick-take condemnation proceedings

59. The court's approach appears particularly hollow in view of the technical errors in the opinion. The court cited Altemeier v. Harris, 403 Ill. 345, 86 N.E.2d 229 (1949) (family settlement agreement) for the premise that a trust may be prematurely terminated if all beneficiaries consent and are sui generis. The Altemeier court's use of the term sui generis is arguably erroneous. Common sense suggests that the Altemeier court intended to require that all consenting beneficiaries be sui juris, or "legally competent" rather than "peculiar." The Probasco court could and should have recognized the error and cited Altemeier accordingly. The court instead cited with approval the Altemeier error and then cited an equivalent proposition which requires that the beneficiaries be sui juris and not sui generis. 58 Md. App. at 688-89, 474 A.2d at 223-24 (citing Re Bowlers' Trust Estate, 346 Pa. 85, 87, 29 A.2d 519, 520 (1943)).

The court also miscites Potter v. McLane, 247 Mass. 387, 142 N.E. 49 (1924), as authority for the premise that, absent an agreement of all interested parties, the court is without power to modify a trust. Potter deals with ascertaining the intention of the testator as the cardinal rule of construction, but not with beneficiary consent.


62. Quick-take condemnations are those in which the condemnor has authority to take land immediately upon payment into court of such amount as the condemnor shall estimate to be the fair value of the property. Md. Const. art. III, § 40A (state or Mayor and City Council of Baltimore may condemn land in Baltimore City); id. § 40B (State Roads Commission may condemn land which in its judgment is needed for highway purposes); id. § 40C (Washington Suburban Sanitary Commission may condemn land in Prince George's County which in its judgment is necessary for water supply, drainage and sewer systems). Each section provides that the enabling legislation must also require the payment of all sums later awarded by a jury. Id.

In conventional condemnations, the condemnor cannot take the property until just compensation is paid as agreed upon by the parties or as awarded by a jury. Id. § 40.
may include interest calculated at the prevailing market rate. Before *King*, interest had been computed using the six percent statutory rate. The market rate was held to be applicable in quick-take condemnation cases in order to meet the constitutional requirement that the condemnee be justly compensated for the property that was taken. The statutory rate could be too low to achieve this purpose.

In quick-take condemnations, land is taken before its monetary value is determined. Thus, there is often a considerable time lapse between the taking and full payment. This delayed payment puts the property owner in a worse position than he would have occupied had the property not been taken because he forfeits the significant earning capacity that immediate payment would have provided. To be made whole, as the constitution requires, the property owner is entitled to be paid interest at a rate which accurately reflects the time value of the money.

To meliorate the hardship to the property owner, the Maryland General Assembly provided that he is entitled to interest at six percent. The interest is payable on the deficiency (the amount by which the fair value as determined by the jury exceeds the deposit

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63. 298 Md. at 93, 467 A.2d at 1039. King appealed the judgment of the Circuit Court for Montgomery County contending that he was entitled to a greater rate of interest in the determination of his just compensation. The court considered the issue raised by King but held that he was not entitled to another trial to prove additional elements of just compensation because he had not presented any evidence on this issue in the original trial. *Id.* at 93-94, 467 A.2d at 1039.

64. *MD. REAL PROP. CODE ANN.* § 12-106(c) (1981) provides that, in quick-take proceedings, "the plaintiff shall pay interest at the rate of 6 percent per annum . . . ." This is distinguished from the legal rate of interest, which is that rate determined by the General Assembly to be applied to judgments generally. *MD. CTS. & JUD. PROC. CODE ANN.* § 11-107 (1984).

Compensation in quick-take proceedings is required by the constitution. See infra note 65. Thus the interest rate here is not controlled by the code's "legal rate."


66. See supra note 62.

67. In *King*, the land was taken on April 26, 1977 and judgment was entered on October 20, 1980. This was a lapse of nearly three and one-half years. 298 Md. at 87, 467 A.2d at 1035.

68. If the property had not been taken, the owner could have sold it, immediately received the fair value, invested the funds, and earned interest.

69. "[T]he required payment is not an award of interest in the traditional sense but rather . . . interest is a good yardstick by which to determine the rate of return on the property owner's money had there been no delay in payment of the full amount of the deficiency." 298 Md. at 89, 467 A.2d at 1037.

70. See supra note 64.
into court) for the period between the taking and the court's judgment in the condemnation proceeding.

In *King* the court held that just compensation may require interest to be paid at a higher rate than that provided by the legislature.\(^7\) The interest rate under the constitutional analysis is that rate which compensates the property owner for the time value of his money. The time value of money is a product of the prevailing economic climate. The court held that the proper rate is the rate which would be received by "a reasonably prudent person investing funds so as to produce a reasonable rate of return while maintaining safety of principal. . . ."\(^7\)\(^2\)

King argued that the statute was unconstitutional because the statutory requirement that interest be paid at six percent was in conflict with the constitutional requirement that interest be paid at a rate which approximates the time value of the money owed to the condemnee.\(^7\)\(^3\) The court avoided this conflict by holding that the statutory rate is not required but rather is merely the minimum rate to which a property owner might be entitled.\(^7\)\(^4\) Although the statutory language is not easily so construed,\(^7\)\(^5\) the alternative holding of unconstitutionality was unacceptable. First, this alternative holding would have placed upon the legislature the burden of articulating in a statute an interest rate that comports with the court's discussion in *King*. This would be no easy task. Second, to have no statutory rate, as a minimum or otherwise, would create the need for additional fact-finding in every quick-take condemnation action.\(^7\)\(^6\) Third, the

\(^7\)\(^1\) 298 Md. at 93, 467 A.2d at 1039.
\(^7\)\(^2\) Id. at 91, 467 A.2d at 1038.
\(^7\)\(^3\) Id. at 89, 467 A.2d at 1036.
\(^7\)\(^4\) Id. at 91, 467 A.2d at 1038. The court noted that this holding is supported by decisions of the federal courts and of other jurisdictions that have construed statutes worded similarly to Maryland's statute. The federal cases all construe the federal Declaration of Taking Act as setting a floor of six percent, not a ceiling. The Act requires that "interest at the rate of 6 per centum per annum be included in the ascertainment of just compensation in a quick-take proceeding." 40 U.S.C. § 258a (1976). See, e.g., Washington Metropolitan Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312, 1322 (4th Cir. 1983); United States v. 329.73 Acres of Land, 704 F.2d 800, 812 (5th Cir. 1983); United States v. Blankinship, 543 F.2d 1272, 1275-76 (9th Cir. 1976); United States v. 97.19 Acres, 511 F. Supp. 565, 567 (D. Md. 1981). See also Department of Transp. v. Rasmussen, 108 Ill. App. 3d 615, 439 N.E.2d 48, 59 (1982) (statutory rate of 6% construed as minimum only, with proper rate to be determined by trier of fact); State v. Carney, 309 N.W.2d 775 (Minn. 1981) (the rate to which condemnee is entitled may be more than, less than, or equal to the statutory rate); City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971) (statutory rate presumptively reasonable, merely fixes a prima facie measure of the proper rate).
\(^7\)\(^5\) See supra note 64.
\(^7\)\(^6\) The minimum rate not only provides a starting point, but also provides a
minimum rate is very helpful to the condemnor because the burden is on the condemnee to prove that the minimum rate is insufficient to provide just compensation.  

This holding should provide condemnors in quick-take condemnations greater incentive to estimate more closely and deposit into court the true market value of the property. Previously, the condemnor could pay a minimally reasonable deposit whenever the interest rates in the market were greater than six percent. The condemnor could then earn interest at the higher rate (or forego borrowing at the higher rate) and only pay the property owner interest at six percent. The property owner, concomitantly, was without the use of his monies and was thus foreclosed from investing the money at a higher rate (or using it to avoid borrowing at a higher rate to purchase like-kind property). Such conduct by the condemnor after King, however, will expose the condemnor to the risk of a court determination that the market rate was higher than the condemnor had actually earned on that money (or would have paid had it borrowed the money elsewhere). That danger, coupled with court costs, might compel more agreements between condemnors and condemnees at the time of the taking and create fewer condemnation court cases.

2. Compensable Damages.—Two cases recently decided by the Court of Special Appeals involved the determination of compensable damages in eminent domain cases. Perkins v. State Roads Commission considered whether certain damages were the direct result of functional rate in those cases in which interest is not substantial (because of a minimal time period or deficiency award). It thus precludes the necessity of presenting evidence as to rates in cases when it is not worth the effort.

77. "If the property owner produces evidence that the six percent rate is constitutionally insufficient, he should be entitled to a higher rate of return as part of just compensation." 298 Md. at 91, 467 A.2d at 1038 (emphasis added).

78. The State Roads Commission must make a reasonably supportable estimate because it will have to support that estimate in court at a later date. Otherwise, the condemnee will most likely be awarded the amount he is seeking.

79. 298 Md. at 87, 467 A.2d at 1035-36. In King the State Roads Commission (SRC) deposited $16,875 for property that was later determined to have a value when taken of $64,693.50. The deficiency that was outstanding for over three years was $47,818.50. The SRC paid approximately $10,800 of interest for the period of April 26, 1977 (date taken) to October 20, 1980 (date of judgment). This was computed at 6%. Assuming that the SRC invested this money due King at the rate of 12%, it would have accrued $23,300. The SRC thus netted $12,500 by holding King's money. In addition, the SRC enhanced its operating flexibility by maintaining a higher level of funds.

80. Md. Const. art. III, §§ 40, 40A, 40B, and 40C provide for "just compensation, as agreed upon between the parties, or awarded by a jury . . . ."

the taking and thus compensable, or were consequential and un-
compensable. *Griffith v. Montgomery County*\(^8\) considered that issue
and also considered whether, and under what circumstances, conse-
quential damages may be compensable.

In *Perkins*, the appellant had portions of her land taken by the
State Roads Commission of the State Highway Administration
(SRC) for the purpose of building an access ramp to the Capital
Beltway (I-495).\(^8\) In addition to the taking, an alley on which the
appellant’s land bordered was closed.\(^4\) The appellant argued that
the loss of her access to the alley was compensable as part of the
taking.\(^5\) The trial court ruled that the denial of access to a closed
alley was not admissible on the issue of damages.\(^6\) The trial judge
relied on *Johnson v. Consolidated Gas, Electric Light & Power Co.*,\(^7\) which
held that diminution of value of remaining (not taken) land caused
by the acquisition and use of adjoining land is consequential dam-
age and not compensable.\(^8\)

The Court of Special Appeals held that the trial judge erred in
denying the appellant the opportunity to show that the loss of access
was a direct result of the taking of the land.\(^9\) It agreed with the trial
judge that the damages would not be compensable as consequential
damages.\(^10\) However, the court held that, if the loss of access was a
direct result of the taking, then it was compensable. Because the
trial judge did not permit the distinction between consequential and
direct damages to be made, the Court of Special Appeals reversed
the judgment of the trial court.\(^11\)

The court remanded the case to the trial court to determine
whether the loss of access resulted from the taking. If not, it was to

\(\text{\(82.\) 57 Md. App. 472, 470 A.2d 840 (1984).}\)
\(83.\) 55 Md. App. at 640, 465 A.2d at 1176. The appellant’s land was situated be-
tween the Capital Beltway and St. Barnabas Road (Md. Rte. 414). An access ramp was to
be built between the two roads. This necessitated the taking of a strip of appellant’s
land, which abutted the Beltway, and another portion of her land, which abutted St.
Barnabas Road. *Id.*
\(84.\) *Id.* The alley was perpendicular to and joined St. Barnabas Road forming one
corner of appellant’s property. It was from this corner that the SRC took the land which
abutted St. Barnabas Road. *Id.* Thus, the piece of taken property fronted both St. Bar-
nabas Road and the alley.
\(85.\) *Id.* at 642, 465 A.2d at 1177.
\(86.\) *Id.* at 645, 465 A.2d at 1179.
\(87.\) 187 Md. 454, 50 A.2d 918 (1947).
\(88.\) *Id.* at 473, 450 A.2d at 927, cited in 55 Md. App. at 645, 465 A.2d at 1179.
\(89.\) 55 Md. App. at 646, 465 A.2d at 1179.
\(90.\) *Id.* at 645, 465 A.2d at 1179.
\(91.\) *Id.* at 646, 465 A.2d at 1179. The trial court had ruled that testimony regarding
any denial of access to the alley was not relevant.
determine whether the closing was done in contemplation of the taking. The second determination is significant because it demonstrates the court's interpretation of the concept of "flowing from the taking." If the alley was closed in contemplation of the taking, then the damages suffered from the loss of access flowed from the taking and were compensable. Any other holding would permit the SRC to close any public way along which it contemplated the taking of property and thus eliminate any compensation for damages resulting from loss of frontage.

In summary, the court foresaw three possible determinations on remand. First, the appellant's damages were the result of the taking of her alley frontage property. Her damages in such case would be compensable. Second, the damages resulted from the closing of the alley but the alley was closed in contemplation of taking her land. Her damages in this case would have flowed from the taking and therefore would be compensable. Third, the alley would have been closed without regard to whether other property was to be taken. In this case, the damages resulting from the alley closing would not be compensable as part of the taking.

The court also considered briefly whether damages that result from loss of access but do not "flow from the taking" are compensable. The court agreed with the trial judge's statement that damages caused by the use of adjoining land are not compensable. But Griffith suggests that this is not a bright line rule.

In Griffith the appellant's land and agricultural easement were taken for the purpose of building an access road to a landfill constructed on adjoining land. Appellant argued that he was entitled to damages he suffered from the project as a whole. His total damages included diminution in the value of his land resulting from the adjoining landfill. The court held that the damages resulting from the taking of his property to construct the road were separable from

92. The court reviewed 2A NICHOLS ON EMINENT DOMAIN § 6.45 (J. Sackman rev. 3d ed. 1981), [hereinafter cited as NICHOLS] which indicates that the key to allowing compensatory damages is whether they "flow[ ] from the taking." 55 Md. App. at 643, 465 A.2d at 1178. The court did not accept the appellant's interpretation that a taking allows a concomitant closing to be compensated even though the closing would not be compensable without a taking. The court rejected the interpretation as too broad. It held that the proper view of the Nichols' distinction is that "the damages for which an owner is entitled to be compensated are restricted to those which 'result' or 'flow from the taking,' not merely from the public purpose or project giving rise thereto." Id. at 644, 465 A.2d at 1178.


94. Id.

95. 57 Md. App. at 479, 470 A.2d at 843.
damages resulting from the use of adjoining property for a landfill. Therefore, he could not recover for the diminution to his remaining land due to the adjoining landfill.\textsuperscript{96}

Griffith suggests that the diminution to the condemnee's remaining land caused by the use of adjoining taken land \textit{may} be compensable in certain situations where both takings are part of the same project. The property owner can recover if the damages to the land not taken are not separable from the damages caused by the taking.\textsuperscript{97}

Griffith also involved claims for damages resulting from the impairment of a right to cross the property taken.\textsuperscript{98} The court held that such damages were not recoverable. The court stated that the rule in Maryland is that "an adjoining owner is not entitled to compensation where his right of access to a street or highway is not taken away but is only made more inconvenient."\textsuperscript{99} The court continued: "When the inconvenient access is to a new highway which does not replace an existing road there is no entitlement of compensation."\textsuperscript{100} These holdings follow the general rule that interference with or obstruction of the use of an easement must be of such a material character as to interfere with the reasonable enjoyment of the easement.\textsuperscript{101} The court held that such interference did not exist

\textsuperscript{96} Id. at 481, 470 A.2d at 845.
\textsuperscript{97} Id. at 480-81, 470 A.2d at 844-45. The court found that the holding in Johnson (see supra text accompanying note 88) supported this rule. The court also discussed the triparte analysis announced in United States v. 15.65 Acres of Land, 689 F.2d 1329 (9th Cir. 1982). Under that analysis, the property owner first needs to show that his taken property was indispensable to the overall project. Second, he must show that the use to which his taken property was put was a substantial part of the project. The third element is that which Griffith embraces as the rule in Maryland. The property owner must establish that the damages flowing from the use to which his taken property was put cannot be separated from the damages flowing from the use to which adjoining taken property was put. 57 Md. App. at 480, 470 A.2d at 844.
\textsuperscript{98} The appellant owned land on both sides of the strip of land taken for construction of the road. His predecessors in title, who once owned all the property involved, had sold the strip of land to a utility company. The predecessors had reserved both a right to cross the strip and an agricultural easement on the strip. These property rights were included in the sale to appellant of the property on both sides of the strip. The appellant claimed the access road to be constructed on the strip (and on pieces of appellant's taken property) would destroy the agricultural easement and impair the appellant's right to cross. The court held that the appellant could recover for the taking of his agricultural easement. 57 Md. App. at 485, 470 A.2d at 847.
\textsuperscript{99} Id. at 483-84, 470 A.2d at 846 (citing Turner v. State Roads Comm'n, 213 Md. 428, 132 A.2d 455 (1957)).
\textsuperscript{100} Id. at 484, 470 A.2d at 846 (citing D'Arago v. State Roads Comm'n, 228 Md. 490, 180 A.2d 488 (1962)).
\textsuperscript{101} Id. at 483, 470 A.2d at 846.
here.102

The court was aided in its decision by two factors. First, language in the appellant’s deed reserved the right to cross the property taken “at [the appellant's] own risk.”103 The court held that such risk included monetary risk as well as risk of personal injury.104 Second, the claim was speculative in nature because the appellants did not proffer that a road was to be constructed on the strip of property in the foreseeable future.105

C. Procedural Issues106

1. Proper Party to Open and Close at Condemnation Trials.—In Harford Building Corp. v. Mayor & City Council of Baltimore107 the Court of Special Appeals reaffirmed the procedural rule that in condemnation actions the condemnor, as plaintiff, has the right to open and close at trial.108 The court looked to common law and the Maryland Rules of Procedure to support its decision.

The court refused to accept the rule, followed in federal courts

102. Id.
103. Id. at 482, 470 A.2d at 845.
104. Id. at 483, 470 A.2d at 845-46.
105. Id. at 484, 470 A.2d at 846.
106. Other Developments:

1. In Boyd v. Supervisor of Assessments, 57 Md. App. 603, 471 A.2d 749 (1984), the Maryland Court of Special Appeals dismissed appellant's case for failure to exhaust administrative remedies. The appellant filed suit over the tax assessment of his home. Maryland law allows an appeal of the assessment to the Property Assessment Board of Baltimore City and an appeal of the Board's decision to the Tax Court. Md. ANN. CODE, art. 81, §§ 228-229 (1980 & Supp. 1983). Boyd did not appear before the Board, but he appealed the Board's approval of the assessment to the Tax Court. The Court of Special Appeals held that Boyd's failure to appear before the Board, a failure to take a necessary step in the administrative process, was fatal to his case.

2. Chapter 130 of the 1984 Session Laws makes a minor change in the procedures of foreclosure proceedings. Act of May 8, 1984, ch. 130, 1984 Md. Laws 529 (codified at Md. Ann. Code art. 81, § 108 (1984 Supp.). The Act sets a limit of 10 on the number of tax sales certificates that may be included in the bill of complaint of a single holder if more than one property owner is involved. Under the new law, if a single holder is holding more than 10 certificates of sale which involve more than one property owner, he must file more than one bill of complaint and pursue foreclosure through more than one proceeding.

108. Id. at 90, 472 A.2d at 482. The court also considered whether the property owner should have been allowed to use a capitalized lease agreement as evidence of the property's value. The court held that such evidence is clearly admissible under Maryland law for purposes of valuation, but in this instance the trial court's failure to allow its admission was harmless error. The court here reasoned that there was other comparable evidence admitted, and that the difference between the value claimed by the property owner and that claimed by the condemnor turned on different methods of valuation rather than on specific value estimates. Id. at 87-88, 472 A.2d at 481.
and in the majority of state jurisdictions, which recognizes the property owner as the "constructive plaintiff," and gives him the procedural advantage of opening and closing the trial. In its opinion the court did recognize the rationale for the majority view on this point. In practice, the condemnor's right to take is rarely contested, and when it is, it must be decided by the court prior to a jury trial on the question of damages. Thus, at trial, the only question for the jury to decide is the value of the property. At this point the property owner must convince the jury that the condemnor's valuation is too low.

Despite this rationale, the court refused to change the procedure. The court apparently was influenced by the fact that a bill that would have made this change was considered by the General Assembly in 1970, and failed to win approval. The court held that the right to open and close at trial in condemnation proceedings remains with the condemnor "until the law is amended by statute or rule change . . . ."

In its opinion the court carefully laid out the arguments for

109. See 5 Nichols, supra note 92, § 18.5[2].
110. 58 Md. App. at 90, 472 A.2d at 482.
111. Id. at 88, 472 A.2d at 481.
112. Thus in practice the property owner in condemnation proceedings comes into court bearing the burden of presenting sufficient evidence to contravene the condemnor's valuation of the property. If the owner fails to produce such convincing evidence, the condemnor's valuation will stand. Nichols, supra note 92, § 18.5[2], at 18-371, states the rationale for the majority view:

The general rule is that the right to open and close goes to the one on whom the burden of proof lies in the first instance—upon the party who would suffer defeat if no evidence should be given on either side. It consequently follows . . . that the owner should have the right to open and close, and this is generally the law.

The Illinois Supreme Court has pointed out that "[w]henever the plaintiff has anything to prove in order to secure a verdict, the right to open and close belongs to him . . . . [This] is a substantial right in the person who must introduce proof to prevent judgment against him." Liptak v. Security Benefit Ass'n, 350 Ill. 614, 618, 183 N.E. 564, 566 (1932).

In some jurisdictions the trial court has the discretion to decide which party opens and closes. Nichols, supra note 92, § 18.5[2], at 18-375 & n.20. In other jurisdictions the nature of the issue to be decided, for example, the right to take or the amount of damages, will determine which party opens and closes. Id. at 18-377 to -378 & nn. 22-26.1.

See also Ghingher & Ghingher, A Contemporary Appraisal of Condemnation in Maryland, 30 Md. L. Rev. 301, 324-25 (1970) (inequity arises from condemnor's right to open and close); Annot., 73 A.L.R.2d 618 (1960) (cases discussing the right to open and close argument in condemnation proceedings).

114. 58 Md. App. at 90, 472 A.2d at 482.
each side, so carefully, in fact, that it seemed to deliberately avoid taking a position itself. The present Maryland practice is based on common law, so the court appears to have had the power to change the practice if it chose to do so. However, the court's references to the "unbroken practice" in Maryland, the clear statement of the Maryland Rules, and the failure of the legislature to act suggest that the court believed the practice to be so well-established apart from the common law that the decision to bring Maryland in line with the majority position must rest with the legislature. Since there are cogent arguments to justify either position, this may have been the appropriate way to handle the decision. In denying certiorari the Court of Appeals appears to agree.

2. Foreclosure of Equity of Redemption at Tax Sale.—In Simms v. Scheve the Court of Appeals held that a purchaser of property at a tax sale may obtain foreclosure of equity of redemption without the entry of a decree pro confesso against a defendant who fails to file a responsive pleading. Underlying the court's holding was a finding that the Maryland statute regulating the tax sale procedure supersedes general equity procedures found elsewhere in the Code and in the Maryland Rules. Therefore, although the Maryland Rules required that, in equity, a decree pro confesso was necessary before proceeding against a party who failed to respond, such a

115. Id.
117. Id. at 8, 467 A.2d at 502. A decree pro confesso is "[o]ne entered in a court of equity in favor of the complainant where the defendant has made no answer to the bill and its allegations are consequently taken 'as confessed.' It is merely an admission of the allegations of the bill well pleaded." Id. at 5, 467 A.2d at 500-01 (quoting BLACK'S LAW DICTIONARY 370 (5th ed. 1979)). The decree pro confesso was developed to provide "relief [to the plaintiffs] against the delay and neglect of defendants." Id. at 6 (quoting E. MILLER, EQuITr PROCEDURE § 272, at 338-39 (1897)).
118. MD. ANN. CODE art. 81, §§ 70-123C (1957 & Supp. 1982).
119. 298 Md. at 8, 467 A.2d at 502. The court was persuaded by two factors. First, the language of the statute (particularly §§ 102, 106, 107, 112) suggests that a decree pro confesso was not to be entered before final judgment. Second, the foreclosure proceedings provide explicit notice to the defendant of the consequences of inaction. Since providing this notice is an important purpose of the decree pro confesso, requiring the decree would only be duplicating safeguards. Id. at 10, 467 A.2d at 503-04.
120. Md. R.P. 310(b), 611, 675 (1977). The function served by these rules is now addressed in Mo. R.P. 2-613 (Default Judgment). This new rule provides that, if a defendant fails to file a responsive pleading, the court will enter an order of default with notice to the defendant. The defendant may move to vacate this order within 30 days after its entry; if he does not do so or the motion is denied, judgment by default is entered. The order of default, in effect, replaces the decree pro confesso in the former rules.
decree is not necessary in tax sale proceedings. The court noted that the subpoena form required by statute in foreclosure proceedings clearly warns the defendant of the consequences of his inaction. This warning is a substitute for the decree pro confesso. The effect of the holding in Simms is to speed up the entry of judgment in proceedings to foreclose equity of redemption, while protecting the defendant's ability to respond.

3. Time for Appeal in Summary Ejectment Actions.—In Parkington Apartments v. Cordish, the Court of Appeals held that an appeal from a Baltimore City District Court order in a summary ejectment action must be filed within two days of the trial judge's declaration of his decision in open court. This holding is an exception to the common law principle that appeals may only be taken from final judgments.

The court's decision was prompted by two factors. First, it found that landlord-tenant actions must be governed by general statutes, public local laws and municipal and county ordinances. When general and public local laws conflict, public local law should prevail. The Baltimore City Code of Public Local Laws governing summary ejectment actions requires an appeal to be filed within two days of "rendition of judgment." The court defined "rendition of judgment" as the trial judge's declaration of his decision in open court. Second, the court was influenced by the public policy of the local law to expedite the hearing of summary ejectment appeals.

121. 298 Md. at 8, 467 A.2d at 502.
122. Id.
123. 296 Md. 143, 460 A.2d 52 (1983).
124. Code of Public Local Laws art. 4, § 9-3 to -8 (1980 ed. as to Baltimore City) provides the procedure for summary ejectment actions in Baltimore City.
125. 296 Md. at 153, 460 A.2d at 57. Because this case was decided pursuant to local law, the decision technically applies only to appeals from summary ejectment orders in Baltimore City. However, essentially the same appeals procedure is required by state law governing summary ejectment in all Maryland jurisdictions. Md. Real Prop. Code Ann. § 8-401(f) (Supp. 1984). Given the reasoning of this opinion, it seems highly likely that the court will interpret the statewide law in the same manner.
126. 296 Md. at 147, 460 A.2d at 54 (citing Md. Dist. Rule 1b (1981), now codified in Md. R.P. 3-711)).
127. Id. at 149, 460 A.2d at 55 (citing Md. Ann. Code art. 1, § 13 (1957)).
129. 296 Md. at 149, 460 A.2d at 55. The court found the definition in BLACK'S LAW DICTIONARY 1165 (5th ed. 1979) "instructive as to what the General Assembly may have contemplated when it used the term . . . ." Id.
130. 296 Md. at 150, 460 A.2d at 55. The court noted that [the two-day provision undoubtedly was placed in the act to prevent tenants
The court rejected the contention that, because the district court had established a rent escrow fund, the appeals procedure should be governed by the local rent escrow law, thus requiring a final judgment before the filing of an appeal. It reasoned that, because the original action was to recover possession of the landlord's premises for nonpayment of rent, use of the rent escrow procedure could not convert the proceeding into an ordinary civil action.

D. Tenancy by the Entireties

1. Termination of Lease by Lessors Who Hold as Tenants by the Entireties.—In Arbesman v. Winer the Court of Appeals reaffirmed the "continued validity and vitality of the tenancy by the entireties estate in Maryland," and expanded the law relating to tenancy by the entireties by ruling on a previously undecided question. The court held that when a husband and wife own property as tenants by the entireties, both must give their consent to terminate a letting of the property.

As long ago as 1878, Maryland law recognized that when husband and wife hold property as tenants by the entireties neither can dispose of the property in any way without the consent of the other. They are considered to be one person. The law has continued to develop along those lines. In a recent case the court enunciated a "team theory" approach to a tenants by the entireties estate: ""Viewing the offer [to sell] of tenants by the entireties as from prolonging possession by the device of an appeal. Moreover, the right of appeal accorded the tenant would be meaningless if he could be set on the street two days after trial as the statute clearly provides but he has no right of appeal until the expiration of three days after trial when a judgment absolute is entered.

_id._

132. 296 Md. at 153, 460 A.2d at 57.
134. Id. at 287, 468 A.2d at 636.
135. Id. at 296-97, 468 A.2d at 640. In Pollok v. Kelly, 6 Ir. R-C.L. 373, 8 Ir. Jur. 360 (Ireland 1856), cited by the court, it had been held that a husband had the right to convey an interest, without his wife's consent, in property held by both as tenants by the entireties. However, in Arbesman the court said that Pollok "arose so many years ago and under such a different concept of the role of women from that existing today that we regard it as lacking in precedential value." 298 Md. at 295, 468 A.2d at 639-40.
136. 298 Md. at 286, 468 A.2d at 635 (citing Marburg v. Cole, 49 Md. 402, 411 (1878)).
137. Id. at 288, 468 A.2d at 636 (citing Tizer v. Tizer, 162 Md. 489, 160 A. 163 (1932)).
being made by a team rather than the two individuals’" means that "'[t]he continuation of an offer made in this fashion depends upon the continuous assent of both tenants [by the entireties].'" 138

While this "team theory" approach follows from previous Maryland cases, conceptually it can lead in two different directions. In Arbesman, the Circuit Court for Baltimore County emphasized the importance of the requirement of continuous assent. Reasoning that this requires a "joint act" of husband and wife for the tenant to remain on the premises, the circuit court ruled that when the husband withdrew his consent to the tenancy, the necessary joint act was destroyed. 139 The effect of this approach would be to allow one spouse to make a change in the use of the property, a result which appears to contradict the concept of tenancy by the entireties that has developed in Maryland law.

The Court of Appeals saw the consequences of the husband's withdrawal of consent differently. Looking at the language of previous cases that emphasized that neither party to a tenancy by the entireties owns a separate interest, that there is only one owner (the "team"), and that husband and wife must act together to sell or lease the property, the court concluded that both spouses must consent to terminate a lease of the property. 140

The effect of this holding, in contrast to the lower court's decision, is to make it impossible for one spouse to take action regarding the property without the consent of the other. This is consistent with previous Maryland case law, and in addition gives greater emphasis to the active participation of both spouses in the disposition and control of the property. This posture is more in accord with the concept of tenancy by the entireties as it has developed in Maryland law, which has consistently stressed the equality of each spouse in the tenancy by the entireties relationship. 141

2. Characterization of Ownership of Check Drawn to Multiple Parties.—In Diamond v. Diamond, 142 the Maryland Court of Appeals re-

138. Id. at 289-90, 468 A.2d at 637 (quoting Beall v. Beall, 291 Md. 224, 235, 434 A.2d 1015, 1021 (1981)).
139. Id. at 285, 468 A.2d at 634.
140. Id. at 296, 468 A.2d at 640.
141. In its opinion the court recognized that one spouse can lease or dispose of property owned as tenants by the entireties if that spouse is acting as the agent of the other. However, the court emphasized that agency will not be inferred from the marital relationship alone; there must be specific evidence to support the claim of agency. Id. at 290-92, 468 A.2d at 637-38.
jected the plaintiff's argument that a tenancy by the entirety interest had been created in an uncashed insurance settlement check\textsuperscript{143} made payable to the plaintiff, his wife and his attorney.\textsuperscript{144} The plaintiff hoped to establish a tenancy by the entirety interest in the check in order to insulate his share of the proceeds against a writ of attachment filed against him individually.\textsuperscript{145} The court based its decision on the fact that there was no discernible intent to establish the tenancy by the entirety interest.\textsuperscript{146} Absent such intent the check was held in joint tenancy.

3. Subrogation for Mortgage Payments Made by Children on Parental Request.—In Springham v. Kordel,\textsuperscript{147} the Maryland Court of Special Appeals considered the effect of mortgage payments made for property held in tenancy by the entirety when one spouse and the children made payments and the other spouse did not. The court held that the children may be entitled to subrogation for mortgage payments made at their parent's request when that parent has a lawful claim for the payments against a third party,\textsuperscript{148} in this case, her husband. In addition, the court found that a spouse may be entitled to reimbursements for mortgage payments he or she made after being

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  \item \textsuperscript{143} The insurance settlement was made in response to two actions brought by the plaintiff and his wife against a freight company. In the first action the plaintiff claimed damages for personal injuries. In the second action the plaintiff and his wife claimed damages for loss of consortium. As is often the case, the insurance company made the settlement check payable to the plaintiff, his wife, and his attorney without apportioning the proceeds among the individual claims. \emph{Id.} at 26-27, 467 A.2d at 511-12.
  \item \textsuperscript{144} \emph{Id.} at 26, 467 A.2d at 511. As part of the case at bar, the attorney requested that a lien for his fees be given priority over satisfaction of the writ. The Court of Appeals, like the lower courts, rejected the request and cited numerous Maryland cases which hold that charging liens are not recognized in the absence of a statute. \emph{Id.} at 35, 467 A.2d at 516. Retaining liens are recognized but require that the attorney reduce the property recovered to her possession. The attorney's lien failed because the insurance company successfully stopped payment on the check. \emph{Id.} at 36, 467 A.2d at 516.
  \item \textsuperscript{145} \emph{Id.} at 29, 467 A.2d at 513. A valid tenancy by the entirety interest cannot be violated to satisfy the individual debts of either the husband or wife. Lake v. Callis, 202 Md. 581, 97 A.2d 316 (1953); Hertz v. Mills, 166 Md. 492, 171 A. 709 (1934); McCubbin v. Stanford, 85 Md. 378, 37 A. 214 (1897).
  \item \textsuperscript{146} 298 Md. at 29, 467 A.2d at 513 (citing Jones v. Jones, 259 Md. 336, 270 A.2d 126 (1970) (the act of obtaining an attorney to represent both husband and wife in a damage action falls short of showing evidence of an intent to create a tenancy by the entirety interest in the proceeds of any recovery)).
  \item The court never makes clear whether an intent to establish such an interest in the proceeds is to be established before the issuance of the check or simply before the issuance of the writ. Because a party may transfer his interest at any time, an intent to create a tenancy by the entirety interest should only have to occur sometime before the issuance of the writ.
  \item \textsuperscript{147} 55 Md. App. 449, 462 A.2d 567 (1983).
  \item \textsuperscript{148} \emph{Id.} at 454, 462 A.2d at 570.
\end{itemize}
Mr. Kordek deserted his wife and children in 1971 and neither made payments for his family's support nor made any part of the mortgage payments. Ms. Kordek continued making payments on the property which she and her husband owned as tenants by the entireties. After seven years she could no longer afford to make the payments and her children did so at her request. When Ms. Kordek died, her husband tried to sell the house. The children filed a bill of complaint in the Circuit Court for Baltimore City to enjoin the sale, pending a determination of their share and Ms. Kordek's estate's share of the sale price. Mr. Kordek demurred, arguing that neither the estate nor the children had a legal basis for recovery, and the circuit court sustained his demurrer.

On appeal the Court of Special Appeals determined that a spouse may be entitled to restitution for mortgage payments made after desertion. The court noted that mortgage payments made while spouses are living together are presumed to be gifts to each other. However, mortgage payments made by a spouse who has been deserted are not presumed to be gifts. Therefore, the spouse who has been deserted may be entitled to his or her expenses as carrying charges for maintaining the deserting party's interest. To determine whether the children acquired rights as subrogees for the mortgage payments they made, the court looked to established principles of subrogation in Maryland law. The court held that the contribution might not have been voluntary because the children may have made contributions on behalf of a destitute parent at the parent's request, they may have had an interest of their own to protect, or they may have had a moral obligation to make the payments. If the contributions were not voluntary, the children

149. Id. at 457, 462 A.2d at 571.
150. Id. at 450-51, 462 A.2d at 568-69.
151. Id. at 457-58, 462 A.2d at 572 (quoting Crawford v. Crawford, 293 Md. 307, 309-14, 443 A.2d 599, 600-03 (1982)).
152. The elements of legal subrogation were set forth in George L. Schnader, Jr., Inc. v. Cole Bldg. Co., 236 Md. 17, 23, 202 A.2d 326, 330 (1964) in which the court held the following to be essential to legal subrogation:
   (1) the existence of a debt or obligation for which a party other than the subrogee is primarily liable, which (2) the subrogee who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interests.
   Id. See also Government Employees Ins. Co. v. Taylor, 270 Md. 11, 21, 310 A.2d 49, 55 (1973) (quoting Schnader, Inc.).
153. 55 Md. App. at 454-56, 462 A.2d at 570-71. The court looked at three criteria to determine whether payments were voluntary: if one is protecting an interest of his own,
would be entitled to subrogation.

The Court of Special Appeals remanded the case to the circuit court for trial to determine whether the children were entitled to subrogation, and whether Ms. Kordek's estate was entitled to contribution from the time of the desertion.

E. Zoning

The Maryland courts considered a number of procedural issues presented in zoning cases in the past year. In *Howard Research & Development Corp. v. Concerned Citizens for Columbia Concept*, the Maryland Court of Appeals held that the Howard County Board of Appeals had the authority to hear an appeal from a County Planning Board decision approving a site plan. Howard Research and Development had argued that the Board was only permitted to hear appeals from an administrative officer's decision under the Howard County Code and that the Planning Board, being a group of

he is not a volunteer; if payment is made under a moral obligation, it is not voluntary; if one pays a debt at another's request, and thus discharges the latter's liability, the payment is not voluntary. *Id.* at 453-54, 462 A.2d at 569-70; see also *Schnader, Inc.*, 236 Md. 17, 24-25, 202 A.2d at 326, 331.

154. 55 Md. App. at 452-55, 462 A.2d at 569-71 (citing 73 AM. JUR. 2D Subrogation §§ 14, 24, 25 (1974)).
156. *Other Developments:*

In Williams v. William T. Burnett & Co., 296 Md. 214, 462 A.2d 66 (1983), the Maryland Court of Appeals reversed an Anne Arundel County Board of Appeals decision, which had reclassified 20.7 acres from a residential to a heavy industrial zone. The respondent had sought the industrial classification, even though it was in conflict with the County's 1978 General Development Plan. He argued that his land had been mistakenly zoned residential in a 1973 comprehensive rezoning and on the 1976 comprehensive zoning map. The respondent had conceded that ANNE ARUNDEL COUNTY, MD., CODE § 2-100(a) (1976), passed in 1979, forbade a reclassification unless there was a mistake in the comprehensive zoning map, and the reclassification would comply with the General Plan. Nevertheless, he had maintained that the Code was not intended to apply to a reclassification based on a mistake in a comprehensive rezoning plan enacted before § 2-100(a)'s passage because to do so would be to apply it retroactively. The Court of Appeals disagreed, saying the section was intended to be applicable, since the only comprehensive zoning map in existence in the County was enacted in 1976—prior to the effective date of § 2-100(a). The court pointed out that, if the respondent's analysis was followed, the Code would only apply to mistakes made on maps adopted after 1979. Since there were no such maps, the Code would be meaningless. The court reasoned that the legislative intent was to disallow reclassifications based on mistakes in the 1973-1976 comprehensive rezoning unless the reclassifications were consistent with the General Development Plan, and the respondent's reclassification request was denied. 296 Md. at 220-21, 462 A.2d at 69.

158. *Id.* at 367, 466 A.2d at 36. Concerned Citizens had appealed the decision of the County Planning Board approving the construction of a gas station. *Id.* at 358, 466 A.2d at 31.
159. The Howard County Code provides that the Board of Appeals shall have the
persons, could not be construed to be an officer. The Court of Appeals disagreed, finding that the County Council specifically authorized the Board to hear appeals from the decisions of administrative agencies, as well as those of individuals, when it had enacted a local rule of statutory construction that “words used in the singular number shall include the plural.” Because the Maryland Code provides that chartered counties may provide for a board of appeals to “hear matters . . . on review of the action of an administrative officer or agency,” the holding in this case may be applied to any chartered county whose statutory board of appeals authorization includes similar language and rules of construction.

The Howard Research decision is reminiscent of dicta in the earlier case of Board of County Commissioners v. Gaster in which the Court of Appeals expressed doubt as to whether the Cecil County Planning Commission was an administrative official since, it said, the term “official” suggests an individual, not a group. While Howard Research holds that, at least in Howard County, an “official” includes the Planning Board, Howard Research may be distinguishable from Gaster. Howard Research involved an interpretation of article 25A, section 5(U) of the Maryland Code and provisions of the Howard County Code, while Gaster involved an interpretation of article 66B, section 4.07(d)(1) of the Maryland Code and provisions of the Cecil County Code. Nevertheless, in light of a recent opinion of the Maryland Attorney General which followed Gaster and stated that the “official” in section 4.07(d)(1) of the Maryland Code includes a local planning commission, and in light of Cecil County’s having a “singular includes plural” provision in its code, it can be expected that a local board of zoning appeals may hear an appeal from the decision of a planning commission, whether in a chartered

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power to hear and decide appeals from determinations “made by any administrative official.” Howard County, Md., Code § 16.301(b) (1979).

160. 297 Md. at 363, 466 A.2d at 34.


164. Id. at 242 n.1, 401 A.2d at 671 n.1.


or non-chartered county and whether or not a local rule of construction explicitly includes the commission in its definition of "official."

In two cases, the Court of Special Appeals considered whether the actions of local administrative bodies in allowing a rezoning and variance were proper. In *Floyd v. County Council*, the Court of Special Appeals held that the Prince George's County Council, meeting as an administrative body, had not acted arbitrarily when it reclassified property from a residential zone to a floating employment institutional area zone even though the floating zone did not comply with the Master Plan's map. The court reasoned that the local code created a flexible standard for review of rezoning proposals, permitting their approval even if they are inconsistent with the Plan's map as long as they are consistent with the Plan's principles. The court also noted that the trial court had erred in its review of the Council's decision when it considered evidence regarding a Plan amendment that supported the rezoning but which had been enacted subsequent to the Council's decision on the rezoning proposal, but this was not reversible error because it did not cause the trial court to overturn the Council's decision. With or without the additional evidence, the Council's action was justifiable.

In *Klein v. Colonial Pipeline Co.*, the Court of Special Appeals overturned the denial of a variance by the Harford County Board of Appeals because it had acted arbitrarily, first, in imposing a more stringent requirement on the applicant than that mandated by the County's zoning ordinance and, second, in using the denial of the request to punish the applicant for an earlier zoning violation.

170. *Id.* at 257, 461 A.2d at 82.
171. *Id.* at 256-57, 461 A.2d at 82 (citing *Prince George's County, Md., Code* § 27-591(b)(1) (1979 & Supp. 1981)).
173. Under *Meltzer*, if the additional evidence had caused the trial court to overrule the Council, there would have been reversible error because the trial court would have gone beyond its role as a reviewer of an administrative decision and done the rezoning itself, a function reserved to the Council. *Id.* at 156, 210 A.2d at 512.
175. *Id.* at 337, 462 A.2d at 554. The Board of Appeals denied the variance, stating that Colonial had not complied with Harford County Zoning Ordinance § 15.051 because Colonial had not met its burden of proof that it had the best possible means for fire protection. Section 15.051 only requires that the best practicable means be provided. *See Harford County, Md., Zoning Ordinance* art. 15, § 15.051 (1979) (repealed 1982).
176. 55 Md. App. at 337, 462 A.2d at 554. Colonial had failed to fully comply with conditions imposed on an original 1965 conditional use permit. The Board of Appeals
The court declared that "[i]t is an improper exercise of the Board's and Hearing Examiner's function to transform zoning application proceedings into a violation and enforcement process."\textsuperscript{177} It based its finding on several out-of-state cases,\textsuperscript{178} apparently making new law in Maryland. In so holding, the court has removed an effective, albeit illegal, enforcement tool from county zoning officials, forcing them to fall back on the more conventional, sometimes cumbersome and ineffective remedies permitted by their ordinances.

In \textit{Maryland-National Capital Park \\& Planning Commission v. Friendship Heights},\textsuperscript{179} the Maryland Court of Special Appeals applied existing Maryland law in deciding a number of zoning matters concerning right to appeal, standing, and judicial review of zoning decisions. After extensive hearings, the Maryland-National Capital Park and Planning Commission approved a building and road extension site plan pursuant to its zoning ordinance authority.\textsuperscript{180} Friendship Heights, a special taxing district, appealed to the Montgomery County Circuit Court\textsuperscript{181} contending that the approval was arbitrarily made, that the Commission should have considered evidence submitted substantially after the Commission's deadline,\textsuperscript{182} and that, as a special taxing district, Friendship Heights had veto power over any road constructed partially within its boundaries.\textsuperscript{183} The circuit court dismissed the case, holding that, since the Montgomery County Code did not require hearings prior to site plan approvals, there was not a contested case and, therefore, no right of cited this lack of compliance as a reason for denying Colonial's 1979 variance request. \textit{Id.}

177. \textit{Id.} at 338, 462 A.2d at 554.

178. \textit{Id.} The court also held that the res judicata doctrine does not apply to administrative proceedings as an inflexible rule of law. Colonial applied for a conditional use permit in 1976 which was denied by a hearing examiner based on an error of law. The decision was reversed by the circuit court, but reinstated by the Court of Appeals because proper appellate procedure was not followed. The Court of Special Appeals held that it would be impermissible to allow res judicata to perpetuate the illegality, especially because there was a substantial change in conditions, and an error of law in the first decision. \textit{Id.} at 340-41, 462 A.2d at 556.


180. \textit{Id.} at 75, 468 A.2d at 1356.

181. The appeal was taken pursuant to the Maryland Code which states in pertinent part that "any party aggrieved by a final decision in a contested case . . . is entitled to judicial review thereof under this subtitle." \textit{Md. Ann. Code} art. 41, § 255 (1982).

182. Friendship Heights submitted expert studies 24 days after the final date set by the Planning Board for final evidence submittal.

183. Friendship Heights was relying on the Montgomery County Code, which provides that "the governing body of such . . . special taxing area shall consent thereto to the other . . . part[y] desiring to construct such road or public way." \textit{Montgomery County, Md., Code} § 49-57 (1977).
appeal to the circuit court.\textsuperscript{184} However, for purposes of judicial economy, the circuit court addressed the substantive issues raised by Friendship Heights.

The Court of Special Appeals reversed the circuit court’s dismissal. It held that Friendship Heights, as a special taxing district, did have legal standing to appeal to the circuit court because of the potentially adverse economic impact of the Commission’s decision.\textsuperscript{185} Furthermore, since a Montgomery County site plan review hearing is statutorily mandated,\textsuperscript{186} it is a “contested case” and subject to judicial review.\textsuperscript{187} The court also noted that the Commission, even though nominally successful below, could appeal since it was prejudiced by the circuit court’s “no contested case” decision, which would have permitted an attack on a site planning decision of the Commission through a mandamus, declaratory, or injunctive action for three years.\textsuperscript{188} A decision on the merits would have required that any appeal be taken within thirty days.\textsuperscript{189} Therefore, the circuit court’s dismissal was prejudicial to the Commission by exposing it to attack for three years rather than thirty days.

Reaching the merits, the court held, first, that because the deadlines for the submission of evidence to the Commission were deemed fair, it was not arbitrary for the Commission to refuse to review evidence submitted twenty-four days after the deadline,\textsuperscript{190} as Friendship Heights contended. Second, Friendship Heights had no legal right to veto the road construction since veto authority is given

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    \item \textsuperscript{184} 57 Md. App. at 76 & n.2, 468 A.2d at 1356 & n.2.
    \item \textsuperscript{185} Id. at 78, 468 A.2d at 1357. The court also noted that, under the Maryland Code, Friendship Heights could be an aggrieved party and, therefore, could meet the second condition precedent to appeal to a circuit court from an administrative decision, as held in Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967). See Md. Ann. Code art. 41, § 256A (1982).
    \item \textsuperscript{186} The site plan hearings were required under the Montgomery County Planning Board’s procedural rules. An agency must adhere to its rules and regulations or its decision will be struck down under the Accardi doctrine. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The court therefore reasoned that the hearing was required by law.
    \item \textsuperscript{187} Since the hearing was required by law it fell within the contested case definition of Md. Ann. Code art. 41, § 244(d) (1982). An aggrieved party in a contested case is entitled to judicial review. Id. § 255(a).
    \item \textsuperscript{188} 57 Md. App. at 78, 468 A.2d at 1357.
    \item \textsuperscript{189} “An order for appeal shall be filed within thirty days from the date of the action appealed from...” Md. R.P. B4a.
    \item \textsuperscript{190} 57 Md. App. at 90, 468 A.2d at 1363. The court held that “[a]s a matter of fundamental fairness to all participants... there must be a definite date after which written material may not be submitted...” Id. See supra note 182 and accompanying text.
\end{itemize}
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here to ensure that construction standards are met,\textsuperscript{191} rather than to ensure that a community does not get a road it does not want. Finally, the court held that the Commission's decision was supported by substantial evidence and was reasonable, and, therefore, should stand because "[t]he standard of review on appeal of administrative actions is whether a reasoning mind could have reached the factual conclusion decided by the agency."\textsuperscript{192}

In \textit{Maryland-National Capital Park \& Planning Commission}, the Court of Special Appeals applied existing Maryland law in deciding a number of zoning-related matters concerning right to appeal, standing, and judicial review. Since the case involves a strict application of existing law to facts, it is of limited significance.

\textbf{F. Other}\textsuperscript{193}

\textit{1. Rights of Receivers of Real Property.}—In \textit{Ivy Hill Association v. Kluckhuhn},\textsuperscript{194} the Court of Appeals extended to real property claims a rule that it has consistently applied to claims against personal

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193. \textit{Other Developments}:
Babcock Memorial Presbyterian Church was affiliated with the United Presbyterian Church in the United States of America. It was incorporated in Maryland as required by United's Book of Order, and was bound by its bylaws to United's rules and constitution. As a consequence of a dispute with United, Babcock sought in 1980 to sever its ties with United and transferred its property without United's consent to another local church, which was not affiliated with United. Contending that the transfer violated its constitution, United took possession of the property, and Babcock brought an ejectment action.

In Babcock Memorial Presbyterian Church v. Presbytery of Baltimore, 296 Md. 573, 464 A.2d 1008 (1983), the Maryland Court of Appeals, wisely avoiding entanglement in a discussion of church doctrine, applied straightforward concepts of corporate law to reach the conclusion that a local affiliate of the United Presbyterian Church could not transfer its church property without the presbytery's consent. The court considered the secular aspects of the local church's bylaws and constitution before determining that, under Maryland corporation law, the local congregation could neither sell nor give the property away because "[i]t is elementary that a corporation has only such powers as are expressly granted by its charter or by statute and such as may impliedly be derived from its corporate purposes." \textit{Id.} at 591, 464 A.2d at 1017. The court found that, by its bylaws, Babcock was organized as part of the hierarchical structure of United and, as such, was under the control of that larger body. By those same bylaws, Babcock was not permitted to transfer its property without United's written permission. \textit{Id.} at 588-90, 464 A.2d at 1016-17.
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property that is subject to receivership. In short, the court held that "[t]he appointment of a receiver neither affects title nor determines any rights to the property, but rather the receiver takes possession of the property subject to those liens and encumbrances which already may exist."195

The plaintiff, Ivy Hill Association, was successor to a receiver of all the property of Ivy Hill Cemetery Company of Prince George's County. The original receiver was appointed in 1953. The defendant, Kluckhuhn, owned property adjacent to that of the Cemetery Company. The disputed property was a tract of the Cemetery Company's land, which bordered Kluckhuhn's property. Kluckhuhn claimed to have been in adverse possession of the disputed property since 1946, or for more than twenty-five years.196

The receiver claimed that the appointment caused the property to be in custodia legis (in the custody of the court). The receiver contended that, because the property was thus in the custody of the court, it was beyond any claim to title. The court dismissed this complaint, holding that the mere appointment of the receiver does not place the property in the custody of the court.197 The appointment vests the receiver with the right to demand and to accept possession. However, the receiver must actually take possession for the property to be under the protection of the court. Thus, there must be both appointment and possession by the receiver in order to place the property in the custody of the court.198

The receiver also claimed that the appointment tolled the running of the statute of limitations with respect to third party claims against the property. The court held that the receiver's appointment serves only to put him in possession of such property that is, at the time of the appointment, in possession of the entity for which he is acting as receiver.199 The appointment does not interrupt the running of the statute of limitations in favor of an adverse possessor.200 Only the institution of a possessory action by the receiver would cause the property to be in custodia legis and toll the statute of limitations.201

The effect of the holdings in Ivy Hill is to place an affirmative

195. Id. at 704-05, 472 A.2d at 82.
196. Id. at 697-98, 472 A.2d at 78-79.
197. Id. at 699-700, 472 A.2d at 80.
198. Id. at 699, 472 A.2d at 80.
199. Id. at 701, 472 A.2d at 80-81.
200. Id.
201. Id. at 704, 472 A.2d at 82.
duty on the appointed receiver to institute claims of possession against any adverse possessor of property over which he has receivership. In this way the adverse possessor is not divested of his rights by means of a judicial proceeding to which he is not a party.

2. Redemption of Leased Premises.—The Maryland Real Property Code permits a landlord to obtain summary eviction of a tenant for nonpayment of rent within seven days from the date the rent becomes overdue. A tenant may redeem his right to possession of the premises, however, by tendering “to the landlord . . . all past due rent and late fees, plus all court awarded costs and fees, at anytime before actual execution of the eviction order.”

In Berlin v. Aluisi, the Court of Special Appeals held that, under this provision a tenant may redeem the premises by tendering the amount of rent which was judicially determined to be due at the trial. The court held that such a tender is sufficient, even if additional rent has in fact accrued and is overdue on the date the warrant is executed.

The landlord argued that because the statutory language conditions the right of redemption on the tender of “all past due rent” he should be entitled to repossess the premises unless the tenant has in fact tendered all rent which had accrued and was unpaid when the warrant was executed. The court admitted that the statute could

202. Md. Real Prop. Code Ann. § 8-401(a)-(d), (f) (1981 & Supp. 1984). These subsections prescribe the procedures to be followed to evict a tenant who has failed to pay the rent. Briefly, the landlord is to file a written complaint with the district court where the property is located setting forth, inter alia, the amount of rent due and unpaid. The district court will then issue a summons notifying the tenants that the trial will be held on the fifth day following the filing of the complaint. At the trial the court determines the amount of rent due, enters a judgment in favor of the landlord, and orders the tenant to render the premises to the landlord within two days. (The tenant can pay, at the end of the trial, the amount determined to be due and the complaint would be entered as satisfied.) If the tenant does not pay or surrender the premises within two days the court will issue a warrant ordering the sheriff to cause the landlord to repossess the property.

203. Id. § 8-401(e)(1981). However, if the tenant has received more than three such summonses in the 12 months preceding the initiation of the present action, he does not have this right to redemption prior to conviction. Id.


205. Id. at 403, 470 A.2d at 395.

206. Id. at 397, 470 A.2d at 392. The complaint was filed on November 12, 1981. The trial was held on December 3, 1981 and the court determined that the November rent was due and unpaid. The warrant was presented to the tenant on December 29, 1981. The tenant, when presented with the warrant, paid the sheriff only the amount stated as due on the warrant (November rent). The landlord demanded that the tenant also pay December rent which was, on December 19, also due and unpaid. The sheriff refused to evict the tenant because the tenant had paid the amount stated on the warrant. Id. at
be construed to bear the meaning the landlord attributed to it. But the court found that the legislative purpose underlying the right of redemption compelled a less restrictive construction of the statutory language.²⁰⁷

The court reasoned that the redemption provision was enacted to avoid forfeiture of the premises. It was “clearly intended to me-liorate the plight of the tenant who might be unable to pay the rent on the day it falls due but can manage to pay it before he is actually evicted.”²⁰⁸

The court admitted that the overall purpose of the summary proceedings is to provide the landlord with a fast and efficient mechanism by which to evict tenants who have not paid their rent.²⁰⁹ The court recognized, however, that the statutory right of redemption was intended to benefit the tenant by providing him with an opportunity to tender the past due rent and maintain possession. The court then concluded that because the right of redemption statute was intended to benefit the tenant, it should be construed so as to best effectuate this purpose.²¹⁰ If the tenant was required to tender all the amounts claimed by the landlord to be due, then the purpose of the redemption statute would be circumvented. What the court failed to stress was that this construction would also conflict with the purpose behind the proceedings. Although intended to benefit the landlord by their expediency and ease, the proceedings also guarantee the tenant a judicial determination of amounts due before eviction can be had. This guarantee would be eluded if the tenant were required to tender the landlord’s claim of rents due without a judicial determination that they in fact were due.

The court suggested that an eviction of a tenant for failure to pay amounts that were not judicially determined could be a deprivation of the tenant’s property rights without due process of law.²¹¹ But the court refrained from relying on the constitutional issue in deciding the case. By raising the issue, however, the court intimated the importance of this underlying constitutional guarantee.

The court also addressed the landlord’s suggestion that the sheriff should have determined how much rent was actually due

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²⁰⁷ 470 A.2d at 389. This cause of action by the landlord included a writ of mandamus against the sheriff. Id. at 394, 470 A.2d at 390.
²⁰⁸ Id.
²⁰⁹ Id. at 401, 470 A.2d at 394.
²¹⁰ Id. at 402, 470 A.2d at 394.
²¹¹ Id. at 397-98, 470 A.2d at 392.
when he presented the warrant to the tenant, and then required the tenant to tender such amount to avoid eviction. The court suggested that the constitutional mandate of separation of powers might be violated if the sheriff, an executive officer, determined a matter reserved to the judiciary. The court held that the sheriff's statutory duty is merely to execute the instructions of the warrant. This construction is supported by the district court's practice of requiring the sheriff to evict the tenant only if the tenant did not pay the judicially determined amount as shown on the warrant.

Landlords need to take advantage of the time efficiencies of the summary proceeding in order to avoid the accrual of substantial amounts of rent from the time the complaint is filed until the time the warrant is served. The statutory scheme permits this period to be as short as seven days. Furthermore, landlords should repeatedly file complaints against delinquent tenants in order to take advantage of the provision which prevents the tenant from abusing the redemption procedure. This provision estops the tenant from redemption if three summonses have been issued to him in the prior twelve months. Although the decision appears to disadvantage landlords, it should merely prompt them to capitalize on the efficiencies and remedies provided by the summary proceeding statutes.

3. Interest Payable in Mortgage Foreclosures.—In Weismiller v. Bush the Court of Special Appeals held that, when the holder of a deed of trust or mortgage purchases the mortgaged property at a foreclosure sale at a price below the outstanding balance owed (including costs), the mortgagee is not required to pay any interest on the purchase price, which otherwise may be required prior to

212. Md. Const. Decl. of RTS. art. VIII ("That the Legislature, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.").

213. 57 Md. App. at 398-99, 470 A.2d at 392.

214. Id. at 395, 470 A.2d at 391.

215. Id. at 400, 470 A.2d at 393.

216. See supra note 202 (i.e., five days from filing of complaint to trial and two days from trial to issuance of summons). In Berlin, a total of 47 days elapsed between the filing of the complaint and the presentment of the warrant. The court did not explain the reasons for the delay.


The court reasoned that the mortgage debt should be treated as a credit against the purchase price. Hence it would be inappropriate to charge interest on a debt that has been paid. According to the court, this principle is well established in Maryland law. The resolution of this question presented a corresponding issue under a Maryland statute which provides that a mortgagee may continue to collect interest on a note for sixty days after the property is sold at a foreclosure sale. This provision is inconsistent with the right of the mortgagee as purchaser to forego paying interest on the purchase price of the property, because that right assumes that the mortgage has been paid off by the purchase. The court held that "[t]he mortgagee/buyer cannot have it both ways—collecting interest on the mortgage but not paying interest on the purchase price." The implication is that the mortgagee must select the position it will take, thus choosing one or the other benefits of the law.

4. Scope of Judicial Review.—In Prince George's County v. Silverman, the Maryland Court of Special Appeals indicated that it is the substance and not the form of a legislative body's act which determines the degree to which the act is subject to judicial review. At issue in Silverman was the Prince George's County Council’s indefinite tabling of a resolution that would have designated a tract of land upon which the plaintiff held a purchase option as

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219. Id. at 598-99, 468 A.2d at 648-49. This extends as well to any deposit on the purchase price which may be required.
220. Id. at 599, 468 A.2d at 649.
221. Id. at 598-99, 468 A.2d at 648-49. The court cited cases from over 130 years of Maryland law to support its opinion, from Murdock’s Case, 2 Bland 461, 468 (1828), to Woelfel v. Tyng, 221 Md. 539, 158 A.2d 311 (1960).
222. MD. REAL PROP. CODE ANN. § 7-105(d)(2) (1974 & Supp. 1983). This statute applies in Calvert, Cecil, Frederick, Kent, Queen Anne’s, Talbot, Caroline, Charles, St. Mary's and Worcester Counties only, absent a contrary provision in the mortgage.
223. In Worcester County the period is 180 days. Id. § 7-105(d)(2)(ii).
224. 56 Md. App. at 599, 468 A.2d at 649.
225. Id. at 599-600, 468 A.2d at 649.
227. Id. at 50, 472 A.2d at 108. The standard of review depends upon the character of the legislature’s act. The general test to determine whether a legislative action is truly legislative in nature (as opposed to administrative or quasi-judicial) is whether the action is one making new law. See Eggert v. Montgomery County Council, 263 Md. 243, 259, 282 A.2d 474, 482 (1971); City of Bowie v. County Comm’rs, 258 Md. 454, 463, 267 A.2d 172, 177 (1970); Scull v. Montgomery Citizen’s League, 249 Md. 271, 282, 239 A.2d. 92, 98 (1968).
surplus county property.\textsuperscript{228} Rejecting the County's argument that the propriety of the Council's action was not subject to judicial review because it was legislative in nature,\textsuperscript{229} the court affirmed the existing standard\textsuperscript{230} and determined that the Council was operating in a quasi-judicial or administrative capacity when it considered the resolution, since the measure was not a new enactment of general application but merely an act administering a law already in force.\textsuperscript{231} Accordingly, the court noted that the appropriate standard of review was whether the Council’s action was arbitrary, capricious, or discriminatory.\textsuperscript{232} The court concluded that, measured by this standard, the Council acted arbitrarily in failing to approve the resolution,\textsuperscript{233} and it affirmed the lower court’s issuance of a writ of mandamus compelling conveyance of the property to the plaintiff.\textsuperscript{234}

5. Liability Associated with Removal of Abandoned Vehicles.—In \textit{T.R. Ltd. v. Lee},\textsuperscript{235} the Maryland Court of Special Appeals considered two questions concerning the rights of towing companies that remove

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  \item \textsuperscript{228} 58 Md. App. at 47, 472 A.2d at 106-07. Pursuant to § 2-111.1 of the Prince George’s County Code, the County Executive had determined that the property in question was no longer needed for public use and it was submitted to the County Council for approval as surplus property. However, contrary to the express requirements of § 2-111.1, the County had put the property up for sale, before submitting the matter to the Council for approval, at an auction in which the plaintiff was the highest bidder. \textit{Id.}, 472 A.2d at 107.
  \item \textsuperscript{229} \textit{Id.} at 50-51, 472 A.2d at 108-09. The County relied upon the general rule that treats a legislative body’s enactment as presumptively valid and provides that the motives, wisdom, or propriety of the enactment are not subject to judicial review. \textit{See}, e.g., County Council v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975).
  \item \textsuperscript{230} \textit{See supra} note 227.
  \item \textsuperscript{231} 58 Md. App. at 50-51, 472 A.2d at 108-09. The Council’s action concerned the disposition of one parcel of land, and its effect was limited to the plaintiff’s rights in the property. Moreover, far from being a new legislative enactment, the Council’s action was merely taken pursuant to previously enacted legislation, namely § 2-111.1 of the Prince George’s County Code. \textit{Id.} at 49, 472 A.2d at 108. \textit{See City of Bowie v. County Comm’rs}, 258 Md. 454, 463, 267 A.2d 172, 177 (1970).
  \item \textsuperscript{232} 58 Md. App. at 50, 472 A.2d at 108. \textit{See}, e.g., County Council v. Carl M. Freeman Ass’n, 281 Md. 70, 376 A.2d 860 (1977).
  \item \textsuperscript{233} Apparently, the Council was concerned that the prior owners of the property had been unfairly forced to sell the land to the County and it tabled the resolution so that an amendment to the County Code giving prior owners of surplus county land a right of first refusal could become effective. Since the Council’s sole function was to decide whether the property was no longer needed for public use, and it was undisputed that the land was surplus, the court held that the Council’s action was clearly arbitrary. 58 Md. App. at 54, 472 A.2d at 110.
  \item \textsuperscript{234} \textit{Id.} at 46, 472 A.2d at 106.
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vehicles from public highways at the direction of law enforcement officers. It held that, under the Prince George's County Code, (1) state police are authorized to order the removal of abandoned vehicles from any road in Prince George's County, and (2) towing companies are entitled to reimbursement for towing and storage to the time the vehicles are reclaimed by their owners. However, in the absence of the owner's consent to the towing of his vehicle, or a statute creating a lien, towing companies are not entitled as a matter of law to payment beyond the date the owner demands return of his vehicle because they have no lien on the property. 236

Appellee Lee's stolen tractor trailer was overturned on an interstate highway in Prince George's County on October 29, 1980. The vehicle was abandoned by the driver, and Maryland State Police ordered it removed from the roadway by appellant T.R. Ltd.'s towing company, under the authority of Prince George's County Code section 26-160. When Lee sought to recover his vehicle from the appellant's storage lot, T.R. Ltd. refused to release it until Lee paid the towing and storage bill. Lee brought a cause of action in Prince George's County Circuit Court to replevy the vehicle, claiming that the appellant had no legal right to retain possession of his property. T.R. Ltd. argued that it had acquired a lien on the equipment 237 and that it was entitled to payment for the cost of righting, towing, and storing the tractor-trailer. The trial court held that T.R. Ltd. had no legal basis for recovery. 238

The Court of Special Appeals reversed the trial court, declaring that Maryland law 239 gives the state police the same jurisdictional authority to order removal of vehicles from county roads as local police under local statute. Because the Prince George's County Code authorizes county police to order the removal of vehicles from all roads in the County and to charge the owner the costs of towing and storage, 240 the court concluded that T.R. Ltd. was entitled to compensation from Lee for righting, towing, and storing the vehicle

236. Id. at 634, 465 A.2d at 1190.
237. Id. at 631, 465 A.2d at 1188. The towing company believed it had a statutory lien on the equipment under Md. Com. Law Code Ann. § 7-307 (1975), which provides that "[a] carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation," and under Prince George's County, Md., Code § 26-160 (1979), which provides that "the County Police Department shall have the authority to impound and remove such motor vehicle and charge the owner thereof the costs of towing, storage, and any other charges incurred in connection therewith."
until Lee requested the vehicle's return. The court, however, declared that the Prince George's County Code provision alone provided a basis for the reimbursement, not a lien. The court found that T.R. Ltd. had not acquired a lien on the tractor-trailer and was not entitled to storage fees beyond the point in time when Lee first demanded his vehicle's return. Lee had not given his consent to the initial towing, which might have created a common law possessory lien, and the police officer, only having custody of the vehicle at the time, could not speak for the owner. Moreover, there was no statute to support the creation of a statutory lien. Therefore, not having a lien, T.R. Ltd. was not entitled to retain possession of the vehicle after Lee requested its return. It also was not entitled to storage fees beyond the time of Lee's request, and therefore, only had a limited right of recovery.

G. Legislative Developments

1. Maryland Real Estate Time-Sharing Act.—"Time-share" schemes provide for the ownership of, or the right to use,
property\textsuperscript{245} for certain specified periods over a course of years.

the claims of the statutory lien creditor or other creditors, including holders of purchase money security interests. To remedy this, the General Assembly limited the recovery under the second priority to a maximum of $300 (auctioneers are expressly excluded). Any resulting unsatisfied claim for storage fees must await satisfaction as a fifth priority.

4. In response to the move from Baltimore of the Baltimore Colts football team, the General Assembly sought to extend the eminent domain powers of Baltimore City to include the power to acquire by purchase or condemnation any professional sports franchise that had territorial rights in Baltimore City on or after January 1, 1983. Act of Mar. 29, 1984, ch. 624, 1984 Md. Laws 18. Subject to condemnation under the new provisions are all property rights of the business entity including real, personal, intangible, and tangible property. CHARTER OF BALTIMORE CITY, Md. art. II, § 2(B). This broad provision was thought necessary to make concrete the elusive concept of a sports franchise.

The Act permits the City to condemn or purchase any property of the franchise that is located in the State of Maryland. \textit{Id}. That is, the franchise must have (or have had) territorial rights to represent Baltimore City, but the condemnable property need not be in the City. The Baltimore Colts do own property in Baltimore County, including land and buildings at the Owings Mills training complex. This property would be subject to condemnation under the Act.

The Act is retrospective in that the City may now condemn any franchise that had territorial rights to represent Baltimore City on January 1, 1983. \textit{Id}. This provision permits the City to attempt to condemn the Colts even though the team has departed, relocated in Indianapolis, and no longer represents Baltimore.

The Act also empowers the City to sell any franchise the City should purchase or condemn under the Act. \textit{Id}. This provision, in effect, enables the City to finance the purchase of the franchise through private funds.

The innovative and unprecedented provisions of the Act raise many constitutional issues. Among them are arguments that the Act violates the commerce clause and sanctions the taking of property without due process. These issues will be decided in pending litigation between the City of Baltimore and the owner of the Colts. Mayor of Baltimore v. Indianapolis Colts, Inc., No. 885-0020 (D. Md. filed Jan. 3, 1985).

5. The language of MD. REAL PROP. CODE ANN. § 7-102 (1981) was refined in 1984 to expressly insure that readvanced mortgage and deed of trust funds enjoy the same lien priority as those funds originally advanced under the mortgage or deed of trust. Act of May 29, 1984, ch. 624, 1984 Md. Laws 3134. Although title 7 does not define the term "readvanced," it is meant to refer to and include revolving credit lines and other similar arrangements in which the borrower may secure loans on a continuing basis so long as the outstanding principal balance on the loan never exceeds the stated principal amount. Arguably, the former provision provided this protection to such mortgages and deeds of trust. However, the new language removes any uncertainty as to the security of such readvances.

6. Prior to the 1984 session of the Maryland legislature, MD. REAL PROP. CODE ANN. § 7-101(b) (1981) required that the assignment of mortgages for security purposes be perfected by filing a financing statement and entering the transfer in the grantor-grantee index and block index maintained in the appropriate county land record office. The new provision dispenses with the requirement of these filings. MD. REAL PROP. CODE ANN. § 7-101(b) (Supp. 1984). It now requires only that an assignment of the mortgage be recorded in the land records of the county in which the assigned mortgage is recorded. A concomitant change was made in MD. COM. LAW CODE ANN. § 9-302(1)(h) (Supp. 1984).

245. The property subject to time-share developments is generally real property used for vacation purposes, although personal property (such as recreational vehicles) may
Time-share ownership is similar to condominium ownership in that the buyer receives an individual interest in a particular unit plus an undivided interest in a common area which is shared by all unit owners. However, as the name implies, the time-share owner’s interest in his individual unit extends only for a limited period of time. Because time-share ownership is relatively new and is an unfamiliar concept to many people, and because it involves creating many different interests in a single piece of property, there exists real potential for abuse.

Prior to 1983, no Maryland statutory or case law existed in regard to time-sharing. In 1982 complaints about a time-share project in Ocean City, Maryland led to an investigation by the Attorney General’s Office. This investigation uncovered a pattern of fraud and mismanagement in a scheme which had sold time-share interests to over 1100 purchasers.

In response to the abuses discovered, the 1983 General Assembly quickly passed some minimal regulations requiring registration and bonding of time-share developers, and forbidding misrepresentation in sales. In 1984 these were replaced by the Maryland Real Estate Time-Sharing Act, a comprehensive regulatory plan.

This Act applies to all time-share developers, defined broadly as anyone in the business of creating or disposing of his own time-share in a time-share project. The Act distinguishes between sale of ownership for a limited period (a time-share estate), and sale of the right to use property (a time-share license). The only major differences in treatment of the two within the Act appear to conceivably be “time-shared” as well. This Act was not designed to cover personal property.


247. Interview with Francis X. Pugh, Assistant Attorney General and Counsel to the Department of Licensing and Regulation, State of Maryland, in Baltimore (October 15, 1984). Mr. Pugh was a member of the Governor’s Task Force on Time-Sharing, which authored the Maryland Real Estate Time-Sharing Act. The investigation by the Attorney General’s office led to criminal conviction of the developers.


251. Id. § 11A-101(s) defines time-share estate as “the ownership during separated time periods, over a period of at least 5 years, including renewal options, of a time-share unit or any of several time-share units, whether the ownership is a freehold estate or an estate for years.”

252. Id. § 11A-101(w) defines time-share license as the right to use or occupy units over the separated time periods defined in id. § 11A-101(s), supra note 251.
be in the required content of the time-share project instrument, and the requirement that time-share estates be transferred by recorded deed.

The Maryland Real Estate Time-Sharing Act applies to all time-share projects located within the state. Its provisions are enforced by the Maryland Real Estate Commission. Provisions of the Act can be divided roughly into two areas: (a) documentation, registration, and bonding requirements for time-share developers; and (b) consumer protections.

(a) Documentation, Registration, and Bonding Requirements.—These requirements were designed to accomplish three major goals: to provide information to the purchaser; to require developers to think through and carefully plan projects in advance; and to provide the state with documentary evidence in case enforcement of the Act is necessary.

(i) The Time-Share Instrument.—The Act requires time-share developers to record a time-share instrument in the land records of the jurisdiction in which the project is located. This instrument must contain a description of the physical, financial and administrative structure of the project. Instruments for time-share estates must include a description of arrangements by the owners to manage and operate the project, as well as arrangements to maintain, repair and furnish the units. The instrument must also provide for an owners' association, must establish rules and regulations governing the administration of the project once the purchasers take possession, and must provide for the assessment and collection of expenses. Time-share license instruments must describe arrangements that the developer has established to perform these

253. Id. §§ 11A-103, -105, -107.
254. Id. § 11A-102(b).
255. Id. § 11A-127. Pre-existing project instruments, documents or contracts containing rights or obligations inconsistent with the Act are excepted, and project instruments of a time-share project in existence before January 1, 1985 may be amended to achieve compliance.
256. Id. § 11A-122.
257. Interview with Francis X. Pugh, supra note 247.
258. MD. REAL PROP. CODE ANN. § 11A-103 (Supp. 1984). The instrument must include the project's location, description of units and common elements, amenities, structure of time-share arrangements, method for allocating votes and expenses, and provisions for amending and terminating the arrangement. Id.
259. Id. § 11A-105. Additionally, id. § 11A-106 provides for the timing of transfer of control from the developer to time-share owners.
functions for the licensees.260

(ii) The Public Offering Statement.—In addition to filing a time-share instrument, the developer must draft a public offering statement, which must be given to potential purchasers before a contract is signed.261 This document must describe the project in detail, must identify the managing entity, and must contain detailed financial data on the project, as well as any fees the purchaser may have to pay after purchase.262

Exchange agreements that allow time-share owners to trade units are common features of time-share arrangements. The details of all exchange programs affiliated with a project must also be spelled out in the public offering statement.263

(iii) Certificate of Registration.—All time-share developers must apply for and receive a certificate of registration from the Maryland Real Estate Commission.264 To receive the certificate developers must post a purchase money bond or letter of credit in the amount of $100,000.265 In addition, each developer must designate a project broker for the time-share project, who must be a licensed real estate broker.266 Only licensed brokers or sales people can sell, advertise or offer time-shares.267

260. Id. § 11A-107.
261. Id. § 11A-112(a). The public offering statement must also be filed with the Maryland Secretary of State. Id. § 11A-112(b).
262. Id. § 11A-112(f). In the case of older buildings a detailed description of physical condition and cost of necessary repairs must be included. Id. § 11A-113.
263. Id. § 11A-120. Such exchange programs are typically run by one of several independent national exchange brokers rather than by the time-share developer. The statement must include a description of the mechanism for the program, protections available to unit owners, costs, number of participants and confirmed exchanges. Id.
264. Id. § 11A-121(a). This certificate may be denied or revoked after a hearing for misconduct or misrepresentation. To apply for the certificate the developer must file copies of the time-share instrument, the public offering statement, forms used for deeds and sales contracts, and evidence that the building to be converted permits time-share arrangements. Generally a developer who owns 25% or more of a project must file annual updates with the Commission. Id. § 11A-121(g).
265. Id. § 11A-121(a).
266. Id. § 11A-124(a). This applies to the sale of both time-share estates and time-share licenses.
267. Id. § 11A-124(c).
(iv) Other Limitations.—The Act places additional limits on developers attempting to convert existing buildings to time-share projects in order to protect current residents. If an entire building is to be converted, current residential tenants in that building must be given 120 days notice to vacate. In a condominium building, a developer may partially convert the building to time-shares by selling time-share interests in individual units. In such a building, if thirty-four percent of current owners vote to limit time-shares, thereafter no one can become a developer with respect to more than one unit, with the exception of units owned by a developer before a document specifying this limitation is filed in the land records.

(b) Consumer Protections.—The Act forbids developers to make any kind of misrepresentation in promoting a time-share project. This prohibition includes misrepresentation of the project itself in words or pictures, and misrepresentation of the price of units, the resale potential, the availability of exchange programs, or auxiliary facilities. The Act also regulates the use of prizes, sweepstakes, and gifts and discounts which are frequently used to attract potential purchasers to project sites.

To further protect consumers the Act provides that a purchaser may cancel his contract within at least ten days after signing a sales contract. During this “cooling-off period” the purchase money must be kept in escrow by the developer.

Implied and express warranties generally required in the sale of real property are applicable to time-share estates. The Act also provides additional implied warranties applicable only to time-shares. These include a one-year warranty on defects in construction of individual units, and a three-year warranty on the project’s

268. Id. § 11A-113.
269. Id. § 11A-104(a). A vote of 80% of unit owners can remove this limitation. Id. § 11A-104(b).
270. Id. § 11A-119.
271. Id. § 11A-119(a).
272. Id. § 11A-119(b).
273. Id. § 11A-119(c). It apparently is not unusual for such promotional expenses, along with commissions and other sales costs, to consume 40% of income from sales in large time-share projects. Interview with Francis X. Pugh, supra note 247.
274. Id. § 11A-114. The cancellation period extends until a copy of the public offering statement is received, the construction of the building in which the time-share units are located is completed, or a performance bond for its completion is posted, even if this extends the cancellation period past 10 days. Id. Section 11A-115 provides for a seven-day cancellation period in the case of a resale.
275. Id. § 11A-116(a).
The Act requires the developer to provide a managing entity before transferring the first time-share if the number of time-share units in a project exceeds twelve.\textsuperscript{277} This requirement ensures that purchasers know clearly who will be responsible for managing the maintenance and repair of a project, and who will be responsible for handling financial assessments. The Act also provides a procedure for assigning and collecting assessments and limits such assessments to those time-share owners whose units will receive some benefit from them.\textsuperscript{278}

This Act seems to reflect an attempt to deal with possible abuses in time-share developments by preventing them before they occur. To comply with the Act's requirements developers must plan the entire physical, financial and administrative structure of the project before offering any units for sale. Potential purchasers will have the details of this plan available to them before they make a purchase.

The success of the Act in actually protecting consumers appears to depend to a great degree on two factors beyond the control of any law: the diligence of consumers in actually reading and evaluating the information available to them, and the ability of developers to actually carry through the plans they commit to paper (although the bonding requirements do provide protection in case they fail to do so).

To the extent, however, that any law can prevent the kind of fraud and mismanagement that shows the need for regulation, this Act seems capable of accomplishing that purpose because it is comprehensive and detailed. Additionally, it insures that, should its preventive purpose fail, the information necessary to deal after-the-fact with abuses will be readily available.

\section*{2. Modifications to the Maryland Condominium Act.}—The Maryland Condominium Act\textsuperscript{280} comprises a comprehensive regulatory scheme for condominium development and management. The 1984 General Assembly modified the Act in a number of ways.\textsuperscript{281}
Some of these modifications simply clarified ambiguous language or procedures. Others made substantive changes in the law. These substantive changes fall into two broad categories: (1) changes that affect the development of or conversion to condominium projects; and (2) changes that affect the management of such projects after the unit owners have assumed control from the developer.

(a) Development and Conversion.—Unless the property is being used for residential purposes, lessees under a lease exceeding sixty years are now permitted to convert the property to a condominium regime. Prior to the amendment the right to convert was limited to fee simple owners.

Special notice to current tenants of a property being converted to condominiums is required only in the case of conversions of residential rental facilities. Prior law required notice to all tenants who used the property as a residence, without reference to the character of the building as a whole.

Prior law required that certain classes of tenants receive mandatory lease extensions. The 1984 amendment continues this requirement and in addition specifies that the lease extensions, as well as leases continued during the required notice period, must contain the same terms and conditions as leases prior to notice of conversion.

In addition to reimbursement of moving expenses for current tenants the Act requires a minimum cash payment to qualifying low-income residents.

The law now provides that a condominium developer's public offering statement must be filed with the Maryland Secretary of State, and that, if a building to be converted is more than five

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284. Id. § 11-102.1(a)(1).

285. Id. § 11-102.1(f). Mandatory lease extensions are required for the handicapped, elderly and low-income residents who qualify under the terms of § 11-102.1(f).

286. Id. The minimum cash payment required is $375, plus the previously required reimbursement for moving expenses actually expended up to a maximum of $750.

287. Id. § 11-126(a)(1). The mandatory notice to current tenants must be included in the public offering statement. Id. § 11-126(b)(14).
years old, the public offering statement must contain a statement of repairs the developer intends to make.288

(b) Management.—The 1984 law made several changes in the way condominiums can be governed by the council of unit owners. Prior law required the consent of 100% of unit owners and mortgagees to effect changes in the condominium declaration289 or plat.290 Current law requires consent of 80% of unit owners.291 In certain cases which could affect the property interests of individual unit owners, approval of all unit owners is still required to make a change.292 Changes which could affect property interests of parties outside the council of unit owners are not permitted at all.293 Another provision of the current law permits the council of unit owners the power to grant leases in excess of one year.294 Specific and detailed requirements for adequate notice, hearings, and an appeals process were added to the sections of the Act dealing with procedures for the council of unit owners to establish a lien on individual units295 or to make changes in the project’s rules and regulations.296

A new provision was added to the law regulating the power of the council of unit owners to allow access to “utility services or communication systems for the exclusive benefit of units.”297 The amendment provides that such access may be granted by a majority vote of the board of directors.298 This action by the board must comply with detailed notice and hearing requirements, and may be invalidated by the unit owners through a reconsideration process.299

288. Id. § 11-126(b)(12). A statement of physical condition plus an estimate of the cost of needed repairs was already required by law.
292. For example, changes in unit boundaries, percentage interest in common elements, liabilities for common expenses and rights to common profits, percentage vote allocated to each unit, a change from residential to non-residential, or vice versa. Md. Real Prop. Code Ann. § 11-103 (c)(i), (iii) (Supp. 1984).
293. For example, changes to rights or benefits reserved to the developer or a utility, or required by governmental authority are not permitted. Id. § 11-103(c)(ii).
294. Id. § 11-109(d)(14).
295. Id. § 11-110(d), (g). This amendment also made provisions for judicial review.
296. Id. §§ 11-111A, -111D. Section 11-124(e) specifies that in case of conflicting provisions in the condominium’s title, declaration, plat, bylaws, or rules and regulations, the order of precedence is the order just stated.
297. Id. § 11-125(f)(2). Access includes easements, rights of way, licenses, and leases in excess of one year.
298. Most other changes require approval by at least two-thirds of unit owners.
299. Id. There are some limitations on this power to grant access: The cost of instal-
An additional amendment established the time and procedure for electing the board of directors after the council of unit owners takes control of the project.  

3. Housing Discrimination.—The 1984 Maryland General Assembly expanded the statute prohibiting discriminatory housing practices to prohibit landlords, real estate brokers and real estate agents from refusing to rent or sell housing to persons sixty-two years of age or older solely on the basis of age. The General Assembly enacted the amendment despite a general lack of documentation regarding widespread discriminatory practices against the elderly in housing matters.  

4. Homeowners' Emergency Mortgage Assistance Program.—In 1984, the Maryland General Assembly responded to the plight of unemployed homeowners faced with losing their homes due to mortgage foreclosures by establishing the Homeowners' Emergency Mortgage Assistance Program. Under the terms of the program the
Department of Economic and Community Development will make loans to recently, involuntarily unemployed persons,\(^{305}\) unable to make current mortgage payments on their homes. The loan proceeds, available for up to twenty-four months, will be paid directly to the mortgagor on behalf of the mortgagor\(^ {306}\) on a monthly basis and are to include an initial amount equal to any delinquent amount and penalties owing on the mortgage.\(^ {307}\) To qualify, the applicants must meet seven criteria.\(^ {308}\) The applicant must:

1. be unemployed and currently receiving, have received within six months, or have exhausted available state and federal unemployment insurance benefits;
2. be the owner and occupant of property with one or two units on which there is a qualified mortgage;\(^ {309}\)
3. have a reasonably good credit history prior to the unemployment;
4. be delinquent in paying a qualified mortgage;
5. not be eligible for mortgage assistance under any federal program;
6. be reasonably expected to resume employment within twenty-four months after the benefits are first provided; and

Program of Mortgages to HUD, 24 C.F.R. §§ 203.640-.662 (1984). Under that program, HUD accepts an assignment of the mortgage and either suspends or reduces the mortgagor’s mortgage payments for up to 36 months. The program requires that the mortgagor repay the entire mortgage amount by the original maturity date, extended up to 10 years. Pennsylvania has the recently created Homeowners' Emergency Assistance Program which is similar to Maryland’s program in both purpose and procedure. Homeowners' Emergency Assistance, Pa. STAT. ANN. tit. 35, § 1680.401c-.410c (Supp. 1984-85). The noteworthy differences between the Pennsylvania program and the Maryland program are that Pennsylvania requires that (1) the mortgagor must have received notice of the mortgagee’s intention to foreclose or have mortgage payments 60 or more days in arrears, id. § 1680.404c, and (2) up to 36 months of benefits be provided the mortgagor, id. § 1680.405c.

305. Md. Fin. Inst. Code Ann. § 13-402 (Supp. 1984) states the program’s purpose to be “to assist homeowners who, because of recent involuntary unemployment, are unable to make current mortgage payments on their homes.” Section 13-408 lists applicant qualifications but does not define the term “recent.” By implication, “involuntary” may be defined as loss of employment due to any reason which would qualify the applicant for state or federal unemployment insurance benefits because applicants must be qualified to receive or have received such benefits for involuntary unemployment.

306. Id. § 13-406(a).
307. Id. § 13-406(c).
308. See id. § 13-408.

309. A “qualified mortgage” is defined as a mortgage which is (1) a lien on residential property owned and occupied by the mortgagor; (2) the mortgage payments are delinquent; and (3) the mortgage is not insured by the Federal Housing Administration. Id. § 13-409(1)-(3).
7. participate in a financial counseling program.\textsuperscript{310}

The mortgage program will be funded by the sale of state general obligation bonds.\textsuperscript{311} The mortgagor will be required to repay the loan plus interest,\textsuperscript{312} and the loans made will be secured by liens on the mortgaged property.\textsuperscript{313} The loan payments paid out to the mortgagee on behalf of the mortgagor will be set at an amount equal to the difference between the mortgage payments due and the amount the mortgagor can reasonably be expected to pay.\textsuperscript{314}

5. \textit{Home and Housing Rehabilitation Financing, Interest on Loans.}—In an attempt to perfect earlier legislation aimed at providing low interest home mortgages and rehabilitation financing\textsuperscript{315} to low income persons, the Maryland General Assembly repealed and reenacted article 41, subsections 257L(c)(1) and (c)(6).\textsuperscript{316} Formerly, the subsections required that the interest rates charged to participants in the program be set high enough to cover all of the programs' \textsuperscript{310} The counseling program will either be sponsored by the Department or be a program approved by the Department. \textit{Id.} § 13-408(7).

\textsuperscript{311} \textit{Id.} § 13-405.

\textsuperscript{312} \textit{Id.} § 13-407(b). It is not clear when the repayment of the loan by the mortgagor is to begin, and over what term the repayment may be. Currently, the terms of repayment are being determined on a case-by-case basis.

\textsuperscript{313} \textit{Id.} § 13-406(f).

\textsuperscript{314} \textit{Id.} § 13-406(b). Under the terms of the program, the interest rate charged to the homeowner will be set by the Department of Economic and Community Development, presumably on a case-by-case basis, taking into consideration the costs of the moneys to the Department and possible losses. \textit{Id.} § 13-407(1)-(3). This should allow the Department to make these loans affordable to those who need it in much the same manner as is provided in article 41, § 257L, Home and Housing Rehabilitation Financing. \textit{See infra at text accompanying notes 315-20.}

\textsuperscript{315} \textit{Md. Ann. Code} art. 41, § 257L(b)(5) (1982) defines “rehabilitation” as the repair, reconstruction, renovation, redevelopment, or improvement of an existing building to restore it to a decent, safe, and sanitary condition in accordance with applicable construction, health, safety, fire, occupancy, and other codes and standards, to ensure that the building can be maintained in that condition, and to improve the general utility and attractiveness of the building. Except as provided in § 257L(d), applicable codes and standards shall be those in force in the political subdivision where the building is located. If the political subdivision lacks codes and standards deemed sufficient by the Secretary to promote the objects of this section, the Department may by regulation prescribe codes and standards which shall apply in that subdivision solely for purposes of this section. The Secretary may allow exceptions to any code or standard, with the approval of the local enforcement authority when necessary to preserve the historic or architectural value of any building undergoing rehabilitation pursuant to this section. “Rehabilitation” includes the provision of utility submetering for units in a residential rental building.

\textsuperscript{316} Act of May 29, 1984, ch. 597, 1984 \textit{Md. Laws} 3062 (codified at \textit{Md. Ann. Code} art. 41, § 257L(c)(1), (c)(6) (Supp. 1984)).
costs.\textsuperscript{317} This is no longer a requirement for low income participants.\textsuperscript{318} The change is in response to what is considered the programs' recent failure to serve the lower part of the income scale for which they were designated\textsuperscript{319} and should enable the various programs\textsuperscript{320} to lower their interest rates to levels within the financial reach of lower income persons.

6. \textit{Title to Street or Highway}.—Before the 1984 amendments to the Real Property Code, a grantor who owned tracts of land on opposite sides of a road and who transferred only one tract of that land was irrebuttably presumed to grant to his transferee an interest to the center of the road.\textsuperscript{321} The revised statute makes the presumption rebuttable by providing that the grantor may expressly grant or reserve his entire interest in the road.\textsuperscript{322} Similarly, under the revised code, a grantor who owns only one tract of land which borders on a road may defeat the same presumption by expressly reserving his entire interest in the road.\textsuperscript{323}

7. \textit{Release of Mortgage and Release of Lien}.—Before amendment by the 1984 General Assembly, to release a mortgage under Real Property Code, section 7-106(d), the mortgagee or the mortgagee's agent was required to execute a separate release.\textsuperscript{324} Under the revised provision, the mortgagee or the mortgagee's agent may

\textsuperscript{317} The specific costs outlined by the statute are administrative and other expenses, losses expected due to defaults, and the interest cost of monies used to fund the program. Md. Ann. Code art. 41, § 257L(c)(6)(i)(1)-(3) (1982).

\textsuperscript{318} Eligible low income participants will be identified by the Secretary of the Department of Economic and Community Development. Md. Ann. Code art. 41, § 257L(c)(6)(iii)(1) (Supp. 1984).

\textsuperscript{319} Department of Legislative Reference, Summary of Committee Report, Senate Economic Affairs Committee, H.B. 213 (1984).

\textsuperscript{320} Two state programs were directly affected by the statutory change and as a result were able to lower interest rates charged low income participants. These programs are the Maryland Home Financing Program and the Maryland Housing Rehabilitation Program. Telephone interview with Nancy Rase, Deputy Director for Maryland Home Improvement Programs, State of Maryland, Community Development Administration (Feb. 15, 1985).

\textsuperscript{321} Md. Real Prop. Code Ann. § 2-114 (1981). This presumption was not express, but was implied and resulted from the construction of the former statute. The proviso that a contrary intent could be shown in the deed to rebut the presumption appeared only in conjunction with tracts bordering on one side of the road. The former statute failed to include the proviso when describing a tract which borders on opposite sides of a road.

\textsuperscript{322} Act of May 8, 1984, ch. 236, 1984 Md. Laws 707 (codified at Md. Real Prop. Code Ann. § 2-114(c) (Supp. 1984)).

\textsuperscript{323} Id.

indicate that the mortgage has been released by marking the original mortgage "paid" or "cancelled." This change is an attempt to alleviate the problems formerly presented when out-of-state mortgagees, unfamiliar with the separate release requirement, responded to a request for a release by marking and forwarding the original mortgage document.

The clerk of court may now accept the original mortgage marked "paid" or "cancelled" by either the mortgagee or his agent, in lieu of an executed release, as long as the original marked mortgage is accompanied by an affidavit of either the mortgagee, mortgagor, agent of either, or party making satisfaction. The affidavit must state that the mortgage has been paid or satisfied and must include the land record reference where the mortgage is recorded.

In addition to this amendment, the General Assembly enacted a measure designed to protect the mortgagor who has satisfied his debt but who is unable to obtain a recordable release from the mortgagee or holder of the deed of trust. The Code now provides that the person responsible for the disbursement of funds in connection with the grant of title to the property may, after having made a demand, bring a civil action against satisfied lienholders who fail to provide releases within thirty days. The lienholder, his agent or both may be held liable for the delivery of the release as well as all costs, expenses and reasonable attorney's fees incurred in connection with the action. The legislation should discourage satisfied lienholders and their agents from acting indifferently to debtors who often need prompt evidence that their debt has been satisfied.

325. Id. § 7-106 (Supp. 1984). Md. Real Prop. Code Ann. § 3-105(b) (1981) also requires that the separate release, or the marked mortgage document, be recorded in the clerk of court office in which the original mortgage or deed of trust is recorded.

326. The revision also brings the law regarding releases of mortgages into conformity with the law regarding the release of deeds of trust. Compare id. § 3-105(d)(2)(Supp. 1984) with id. § 3-105(d) (1981).

327. Id. § 3-105(d)(2) (Supp. 1984).

328. Id. § 7-106(e). The civil action may be brought in the circuit court for the county in which the property is located.

329. The provision makes no mention of damages resulting from the failure to provide the release, i.e., loss of potential financing.

330. Testimony in support of the bill suggested that debtors, unable to obtain prompt evidence of the recorded release, occasionally have been forced to incur the additional cost of retaining a title attorney to prepare periodic reports regarding the status of the debt. Letter from Louis Cohen, President, State of Maryland Institute of Home Builders to Hon. Joseph E. Owens, Chairman, Committee on the Judiciary (Mar. 21, 1984).
8. Mechanics' Liens, Streets.—Until the recent revision to the Real Property Code, section 9-102(b), mechanics' liens under the statute were available only for the installation of water lines, sanitary sewers or storm drains.\(^{331}\) In 1984, the Maryland General Assembly extended the statute to give mechanics' liens to persons who build streets in new developments.\(^{332}\) The extension of the statute is considered to be equitable because roadbuilders are thought to deserve the same convenient mechanism for collection of contractual payments as are provided other materialmen providing basic land improvements.\(^{333}\)

9. Validity of Certain Deeds of Maryland Corporations.—Title 3, subtitle 1 of the Maryland Corporations and Associations Article\(^{334}\) sets forth requirements to validate certain corporate consolidations, mergers, or transfers of assets.\(^{335}\) The requirements are intended to protect stockholders.\(^{336}\)

Section 14-113 of the Real Property Article\(^{337}\) extends protection to the innocent transferees of certain assets which are part of transactions not satisfying the requirements of title 3, subtitle 1 of the Corporations Article. An innocent party who accepts a deed that could be found invalid under the Corporations Article, from a Maryland corporation, is protected if the deed is accompanied by a certificate which is executed by the person who executed the deed on behalf of the corporation. The certificate must state that the grant is not part of a transaction in which there is a sale, lease,

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333. Id. § 9-102(b) (Supp. 1984).
334. Prior to the reenactment of the statute, roadbuilders had to rely on filing claims against developer's bonds or letters of credit to collect their money. The availability of a mechanics' lien should prove to be a faster and more effective method of obtaining payment. Letter from Harvey A. Epstein, Esq., Director of Governmental Affairs, State of Maryland Associated Builders and Contractors to Hon. Joseph E. Owens, Chairman, Committee on the Judiciary (Feb. 1, 1984) (submitted as evidence of the Association’s support of the bill).
336. For example, § 3-105 requires that for any consolidation, merger, share exchange, or transfer of assets to be effective (with stated exceptions), a resolution proposing the transaction must be adopted by the board of directors, the transaction must be considered at a meeting of the stockholders for which adequate notice was given, and the stockholders must approve the proposed transaction by two-thirds of all votes entitled to be cast. Id. § 3-105.
exchange or other transfer of all or substantially all of the property and assets of the corporation. The statement need not be true to protect the purchaser. Although there is no affirmative statutory requirement that such a certificate be filed, by inference, failure to do so could result in the invalidation of the deed if there is noncompliance with the Corporations Article.

The 1984 Maryland General Assembly strengthened the protection extended innocent purchasers by requiring that the person executing the deed execute the certificate. Under the old provision, the corporate president and vice president were the only individuals with such authority. The purpose of the change was to protect a party granted a deed by a Maryland corporation who had no reason to suspect that the person authorized to execute the deed might not also be authorized to execute the certificate.

COURTNEY G. CAPUTE
MARK S. DEMILIO
DANA REED

339. The language required in the certificate tracks the language formerly found in Md. Ann. Code art. 23, § 66(a) (repealed 1975) (current version at Md. Corps & Ass'ns Code Ann. § 3-105 (1975)). Inasmuch as the certificate protects an innocent purchaser against any violation under title 3, subtitle 1 that might render the deed void, the required language appears to have little meaning.


X. Taxation

A. Sales Tax: Computer Software

In *Comptroller of the Treasury v. Equitable Trust Co.*,¹ the Maryland Court of Appeals considered the applicability of the state sales tax to transfers of "canned" computer programs² through license agreements. Under the sales tax statute³ the sale of any tangible personal property is taxable.⁴ The issue in this case was whether the computer programs acquired by Equitable were tangible or intangible property.

Equitable's position was that the computer programs transferred intangible knowledge by the temporary tangible medium of

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2. "Canned" computer programs are "existing, prepackaged programs of general application." *Id.* at 464, 464 A.2d at 250. The programs involved in this dispute were not designed specially or developed exclusively for Equitable, but were developed to be sold to many different purchasers. *Id.*
3. Md. Ann. Code art. 81, § 325 (1980). Almost all states impose a tax on at least some computer programs. Only in the few states in which courts have held that all computer programs are intangible property, or in states in which tangible property in general is not taxed, are all computer programs exempt from taxation. Currently Alaska, Delaware, Hawaii, Montana, New Hampshire, New Mexico, and Oregon have either a gross receipts tax or no sales tax and do not tax tangible property in general; Arizona, Illinois, Louisiana, Minnesota and Texas have determined that software is intangible and not subject to sales tax; Alabama, California, Colorado, District of Columbia, Florida, Indiana, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Utah, Virginia, and Washington tax canned but not customized programs; and Arkansas, Connecticut, Georgia, Idaho, Kansas, Kentucky, Massachusetts, Nebraska, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming tax all computer software. Roskam, *The State Sales Tax Treatment of Computer Software: A State-By-State Review*, 36 Tax Exec. 239, 241, 244-47 (1984).
4. The statute states in part: "For the privilege of selling certain tangible personal property at retail . . . and for the privilege of dispensing certain selected services defined as sales at retail . . . a vendor shall collect from the purchaser a tax . . . ." Md. Ann. Code art. 81, § 325(a) (1980) (emphasis added).

"'Purchaser' means any person who purchases tangible personal property or to whom services are rendered . . . ." *Id.* § 324(c) (emphasis added).

"'Sale' and 'selling' mean any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred by any means whatsoever for a consideration including rental, lease, or license to use, or royalty, by a vendor to a purchaser . . . ." *Id.* § 324(d) (emphasis added).

"'Tangible personal property' means corporeal personal property of any nature." *Id.* § 324(e).

"'Retail sale' and 'sale at retail' mean the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this subtitle." *Id.* § 324(f) (emphasis added).
The Commissioner, on the other hand, claimed that Equitable had received tangible magnetic tape enhanced in value by the programs encoded on it. The court held that Equitable had acquired tapes containing program copies, and since magnetic tapes are tangible personal property, the tapes were subject to state sales tax.

Equitable's losing argument was that the court should conceptually sever the program copy from the tape and view the transaction as: (1) a transfer of knowledge; and (2) the delivery of a tape. The value of a blank tape is insignificant when compared with the value of the program, and the entire transaction should be considered as a transfer of intangible knowledge not subject to sales tax. The court rejected this argument because it would have necessitated the adoption "as part of Maryland sales tax law [of] a principle that the buyer's predominant purpose for a transaction controls the classification of the acquisition as either tangible or intangible."

The court stated two reasons for rejection of the predominant purpose test. First, the legislative policy inherent in the definition of price—that a price should include the cost of the property,

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5. 296 Md. at 461, 464 A.2d at 249.
6. Id.
7. Id. at 481-84, 464 A.2d at 259-61.
8. Id. at 468, 464 A.2d at 253.
9. Id.
10. Id. at 470-71, 464 A.2d at 254. The predominant purpose test was recognized as one of several factors to be used in determining the applicability of use tax to a transaction in Quotron Sys., Inc. v. Comptroller of the Treasury, 287 Md. 178, 411 A.2d 439 (1980). The taxpayer in Quotron was involved in two interrelated activities. One was maintaining a computerized data bank of economic information which its customers could access, and the other was installing Quotron-owned hardware on customers' premises for their use in accessing the data bank. The Comptroller argued that these activities were subject to the state's use tax, which taxes the exercise of any right or power over tangible personal property. MD. ANN. CODE art. 81, § 372(d) (1980). In determining the applicability of the use tax to these activities, the court considered who has control of the equipment and whether the equipment furnished had any value exclusive of services rendered. Quotron, 287 Md. at 188, 411 A.2d at 444. The main factor considered by the court was the predominant purpose of the activity, which the court found to be the provision of services. Id.

Quotron is not controlling in the Equitable Trust case because it discussed the differences between the provision of services and the equipment furnished with those services. Equitable is not arguing that the transfer of the computer program is a provision of services, but rather that it is the transfer of intangible property, namely information. Quotron applies only when the predominant purpose is the provision of services. In Equitable Trust, Equitable sought to have the Quotron predominant purpose test extended to cases dealing with tangible vs. intangible property.

Price is defined as:

[T]he aggregate value in money . . . promised to be paid or delivered by a purchaser to a vendor in the consummation and complete performance of a
materials, labor and services used in making the product—is inconsistent with the conceptual severing of the blank tape from the program copy recorded as magnetic impulses.\textsuperscript{12} Second, the predominant purpose test may be inconsistent with the existing treatment of comparable transactions. For example, the predominant purpose in a purchase of books, motion pictures, video display discs, phonograph records, and music tapes is ordinarily to obtain knowledge, information or data.\textsuperscript{13} Yet all these transactions are considered purchases of tangible personal property and are currently subject to Maryland state sales tax unless there is an applicable statutory exemption.\textsuperscript{14}

Other courts which have held that tape copies of programs are intangible property have not found these concerns persuasive.\textsuperscript{15} These courts applied the predominant purpose test to tape copies of programs, yet limited the test's potential use by distinguishing computer programs from books, pictures, video display discs, phonograph records, and music tapes.\textsuperscript{16} The Maryland court, however, did not accept the reasoning of these opinions, holding that canned computer programs are tangible property and their transfer is sub-

\textsuperscript{12}\textsuperscript{13}\textsuperscript{14}\textsuperscript{15}\textsuperscript{16}
ject to the state's sales tax provisions.\textsuperscript{17} The Maryland legislature recently codified the court's decision in \textit{Comptroller of the Treasury v. Equitable Trust Co.}\textsuperscript{18} In addition, the computer's memory. Thus, there are alternative methods of acquiring programs other than by purchase on magnetic tape. \textit{Commerce Union Bank}, 538 S.W.2d at 408.

In \textit{First Nat'l Bank v. Bullock}, the Texas court distinguished phonograph record and filmstrip purchases from computer tape purchases on the basis that when information is transferred to the computer the tape is no longer of any value or importance to the user. \textit{Bullock}, 584 S.W.2d at 550.

The Illinois court also distinguished computer programs recorded on tapes from phonograph records, movies, and books in \textit{First Nat'l Bank v. Department of Revenue}. Although tapes are not the only medium through which computer programs could be transferred, the media used for books, phonograph records, and movies are the only practicable ways of preserving those articles. Thus, those articles are inseparable from their media, whereas computer programs are separable from tapes. 85 Ill. at 91, 421 N.E.2d at 178-79.

The Maryland Court of Appeals pointed to the inconsistencies within these opinions. For example, the argument that books, phonograph records and movies cannot be transferred by other media is simply incorrect. Technology exists for producing a copy of a movie film on disc, of a phonograph record on tape, and of a book on microfiche. 296 Md. at 476, 464 A.2d at 257.

The court acknowledged that the computer program could have been acquired in an alternative fashion. "But, because a taxable transaction might have been structured in a non-taxable form, it does not thereby become nontaxable." \textit{Id.} at 484, 464 A.2d at 261. Moreover, the fact that each tape is used only once does not change its tangible character. A dress pattern purchased at retail and used to make only one dress is still taxable. \textit{Id.} at 484, 467 A.2d at 261.

Finally, the program copy and tape are not truly separable. Even when used in the computer, the program copy is not separated from the tape. To remove the program copy from the magnetic tape requires that it be overwritten, or obliterated in a magnetic field. \textit{Id.} at 476, 464 A.2d at 257.

A tape containing a copy of a canned program does not lose its tangible character, because its content is a reproduction of the product of intellectual effort just as the phonorecord does not become intangible, because it is a reproduction of the product of artistic effort. The price paid for a canned program reflects the cost of developing the program . . . . Simply because the canned program on tape is much more expensive than the typical phonorecord, the program tape is not any less tangible. 296 Md. at 484, 464 A.2d at 261.

The court did not discuss transfers of custom software programs, which are distinguishable from "canned" computer programs. \textit{See supra} note 2. Custom programs are unique and are designed for a specific individual or organization. 296 Md. at 464, 464 A.2d at 250-51. Acquisition of such a program is a purchase of the services required to design it. Here the rationale of \textit{Quotron} applies. \textit{See supra} note 10. The predominant purpose in the acquisition of a custom software program is the acquisition of the personal services of the program's designer. Services are not subject to the sales tax provisions. Md. ANN. CODE art. 81, § 326(j) (1980). \textit{But see id.,} § 325(a) (subjecting to sales tax "certain selected services defined as sales at retail").

18. Act of July 1, 1984, ch. 249, 1984 Md. Laws 731 added the following subsection to the retail sales tax exemption statute:

\begin{quote}
§ 326. Exemptions - In general.
\end{quote}
statute provides an express exemption from sales tax for custom computer programs. The legislature did not, however, eliminate all potential disputes in this area. The statute establishes a subjective test to determine when a custom program results from alterations made to a "canned" program. Application of this test is likely to be the subject of future litigation.

B. Unitary Business

In *Comptroller of the Treasury v. Ramsay, Scarlett & Co.*, the Maryland Court of Special Appeals considered whether a Maryland corporation's enterprises, including an out-of-state division, constituted a unitary business, and, thus, required the corporation to include income from the out-of-state division in its taxable state income.

The tax hereby levied does not apply to the following sales:

(zz) . . . (1) Sales of custom computer software services.
(2) As used in this subsection "custom computer software" means procedures and programs created for and to be used exclusively by a specific person.
(3) "Custom computer software" does not include a program, procedure, or associated documentation which is mass produced and sold to the general public or to persons associated in a trade profession or industry.
(4) If the software includes standard or proprietary routines which would ordinarily be taxable under this article, the resultant product must incorporate significant creative input in order to qualify for the exemption provided in this subsection.

The statute is in accordance with the due process and commerce clauses of the United States Constitution. See Xerox Corp. v. Comptroller of the Treasury, 290 Md. 126, 142, 428 A.2d 1208, 1217 (1981). A state may tax income from out-of-state activities when there is: a minimal contact or nexus between the interstate activities and the taxing state; and a rational relationship between the income attributed to the taxing state and the interstate values of the enterprise. See Container Corp. of America v.
Ramsay, Scarlett is a Maryland corporation engaged in steamship agency and stevedoring operations in Baltimore. Around 1958 it entered the Louisiana market with a bulk terminal business. The activities of the unincorporated Louisiana division consisted of warehousing and, to a lesser extent, barge loading and unloading, stevedoring and steamship agency work. The day-to-day management of the Louisiana division was handled locally by a manager who reported to the corporation's president in Baltimore; major policy decisions affecting Louisiana had to be approved by the Baltimore board of directors. In addition, the Baltimore office handled several business functions on a corporate-wide basis and required surplus Louisiana earnings to be sent to Baltimore.

The court applied two tests, unities and dependency, to determine whether Ramsay, Scarlett is a unitary business. The unities test focuses on the presence of unity of ownership; unity of operation is present when the out-of-state activities are part of a unitary business. As for a "rational relationship" between the intrastate and interstate values of the enterprise, the "linchpin of apportionability in the field of state taxation is the unitary business principal." The exception for a unitary business is a reasonable one. In the case of a unitary business, some of the income of the "foreign" division is the result of activities performed by the "home" division and should be allocated to it. The application of an apportionment formula is an attempt to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing state."

23. 58 Md. App. at 334, 473 A.2d at 472.
24. Id.
25. Id. at 334-35, 473 A.2d at 472.
26. Purchasing of supplies, banking, borrowing, solicitation and choice of customers, fees charged, credit terms, billing, election of accounting and legal assistance, and hiring and firing of local personnel were all handled by the Louisiana management. Id. at 335, 473 A.2d at 472.
27. Payroll for administrative personnel, a profit-sharing plan, a health insurance plan, workmen's compensation, and liability insurance were handled in Baltimore for all employees including those in Louisiana. Id., 473 A.2d at 473. Additionally, the manager's salary was set by the board of directors in Baltimore and the board had the power to fire him. Id., 473 A.2d at 472.
28. 58 Md. App. at 335-36, 473 A.2d at 473.
29. This test was formulated by the Supreme Court of California in Butler Bros. v. McColgan, 17 Cal. 2d 664, 678, 111 P.2d 334, 341 (1941), aff'd, 315 U.S. 501 (1942). The Maryland version of this test can be found in Xerox Corp. v. Comptroller, 290 Md. 126, 139, 428 A.2d 1208, 1215-16 (1981)(citing with approval Butler Bros.).
30. Xerox, 290 Md. at 139, 428 A.2d at 1215-16. Unity of ownership, while not deci-
ation as evidenced by central purchasing, advertising, accounting, and management divisions;\textsuperscript{31} and unity of use in a centralized executive force and general system of operation.\textsuperscript{32} The dependency test is concerned with whether one business enterprise is dependent upon, or contributory to, another.\textsuperscript{33} It does not require a showing that the "operations within and without the state are 'necessary and essential' to each other and to the functioning of the business as a whole."\textsuperscript{34} It is enough that funds from the out-of-state division be required to be sent to the home division and used as part of working capital.\textsuperscript{35}

The court held that Ramsay, Scarlett was a unitary business based upon the application of either the unities test or the dependency test.\textsuperscript{36} It is not clear, however, whether these two tests may produce different results and, if they do, which test is to take precedence in future cases. The court stated that "the unities test has sometimes been described as merely a more particular statement of the dependency test."\textsuperscript{37} It seems that the court believed the unities sive alone, is a factor that must be considered in a unitary business determination. 58 Md. App. at 342-43, 473 Md. at 476.

31. \textit{Xerox}, 290 Md. at 139, 428 A.2d at 1215-16. Unity of operation does not require total integration of operations. 58 Md. App. at 343, 473 A.2d at 477. It is enough that some staff functions are centrally performed and economies of scale are produced by the cost saving administrative activities. F.W. Woolworth Co. v. Taxation & Revenue Dep't, 458 U.S. 354, 364-65 (1982). The Maryland Court of Special Appeals found that integration of the insurance and payroll functions as well as the existence of a corporate-wide profit-sharing plan was enough to satisfy the unity of operation requirement. 58 Md. App. at 344, 473 A.2d at 477. \textit{See supra} note 27.

32. \textit{Xerox}, 290 Md. at 139, 428 A.2d at 1216. The unity of use requirement relates principally to control. 58 Md. App. at 344, 473 A.2d at 477. Control exists where normal corporate authority may be exercised by the home division over the foreign division. An example of such authority is a home division’s approval of the acquisition of a warehouse site for its foreign division. \textit{Id.} Occasional oversight with respect to capital structure, major debt and dividends which any parent gives to an investment in a subsidiary is not by itself enough to satisfy the unity of use requirement. \textit{F.W. Woolworth Co.}, 458 U.S. at 369. Actual exercise of operational control is not essential if the potential for such control exists. W.R. Grace & Co. v. Commissioner of Revenue, 378 Mass. 577, 587, 393 N.E.2d 330, 336 (1979), \textit{cited with approval} in 58 Md. App. at 345, 473 A.2d at 477-78.

33. This test was formulated in Great Lakes Pipe Line Co. v. Commissioner of Taxation, 272 Minn. 403, 408, 138 N.W.2d 612, 616 (1965), \textit{appeal dismissed}, 384 U.S. 718 (1966). Maryland adopted the test in Xerox Corp. v. Comptroller, 290 Md. 126, 139, 428 A.2d 1208, 1216 (1981) (\textit{citing with approval} \textit{Great Lakes Pipe Line}).

34. 58 Md. App. at 346, 473 A.2d at 478 (\textit{quoting} Superior Oil Co. v. Franchise Tax Bd., 60 Cal. 2d 406, 413, 386 P.2d 33, 37 (1963)).

35. \textit{Id.} at 346, 473 A.2d at 478. \textit{See also Xerox}, 290 Md. at 140-41, 428 A.2d at 1216-17, in which a similar flow of funds was found to be present.


37. \textit{Id.} at 342, 473 A.2d at 476.
and dependency tests to be equivalent and, therefore, yielding the same result.

More guidance from the court in this area would be helpful. There may be cases in which application of the more general dependency test indicates the existence of a unitary business but the more particular unities test cannot be applied due to a dearth of information. No Maryland court has held that a business was unitary, basing its decision solely on the dependency test. A statement from the court indicating whether application of the dependency test alone is sufficient to show the existence of a unitary business is in order.

C. Domicile

An individual is subject to Maryland income tax as a resident of the state if he is domiciled in Maryland on the last day of the taxable year. The meaning of the term "domicile" is therefore crucial to a determination of tax liability. In Comptroller of the Treasury v. Haskin, the Court of Appeals of Maryland considered the meaning of this term in three cases heard jointly. The common issue in each

40. Id. at 683, 472 A.2d at 71.

The court decided three cases together because they involved a common issue. The cases were: Comptroller of the Treasury v. Haskin; Comptroller of the Treasury v. Valette; Comptroller of the Treasury v. Heacock. In each case the Court of Appeals decided in favor of the taxpayer.

The Haskins moved to Iran in 1977 to work for American Bell International (ABI). On ABI’s advice, they rented their Maryland home, placed their furniture in storage, and maintained a United States bank account. Once in Iran Mr. Haskin obtained an unrestricted visa, residence permit, and an Iranian driver’s license. Both he and his wife allowed their Maryland driver’s licenses to expire. Mr. and Mrs. Haskins both took language lessons. In January, 1979, the Haskins were forced to leave Iran because of the revolution. ABI policy was to return employees to their prior location and thus the Haskins returned to Maryland despite their desire to live elsewhere. Id. at 685-86, 472 A.2d at 72-73.

Mr. Valette accepted a permanent position with Westinghouse in Iran in 1974. On the company’s advice the Valettes maintained a United States bank account. They also rented their house, stored their furniture, sold their boat and one car, and stored another car with Mr. Valette’s parents. Since Westinghouse paid only for moving essential items, the Valettes spent some of their own money in order to move. In Iran they rented a home, because foreigners could not purchase real property, enrolled their children in school, and purchased a car. The Valettes participated in church activities and studied the Iranian language. They returned to Maryland when the Iranian government took over the English-speaking school the children attended. Id. at 687, 472 A.2d at 73.

In 1969 Mr. Heacock accepted a job with the European Space Research Organization (ESRO) in the Netherlands. He resigned from his job with the federal government and rejected the government’s offer of a three-year leave of absence. The Heacocks closed all Maryland bank accounts and opened one in Illinois. They rented their two houses as investments and arranged for a real estate agent to manage the
was "whether a Maryland domiciliary who accepts employment in a foreign country and moves there for an indefinite time, but later returns to Maryland, continues to maintain a Maryland domicile, and is therefore subject to state income taxes for the period of his absence." The court refused to apply a special test that the Comptroller of the Treasury argued was applicable, and applied the long standing test for domicile.

The Court of Appeals has defined a person's domicile as:

that place where a man has his true, fixed, permanent home, habitation and principal establishment, without any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning.

* * *

Even though a person may be absent from his domicile for many years, and may return only at long intervals, nevertheless he retains his domicile if he does not acquire a domicile elsewhere.

In *Shenton v. Abbot* the court developed a two-part test to determine whether there has been a change of domicile. The taxpayer must show by a preponderance of the evidence that: (1) a new residence was acquired with the intention of remaining there; and (2) there was an abandonment of the old domicile so permanent as to exclude the existence of an intention to return to the former place.

Accepting the *Shenton* test, the court in *Haskin* properly rejected the Comptroller's argument that a Maryland domiciliary who accepts employment in a foreign country and moves there for an indefinite time, but later returns to Maryland, has continued to
maintain a Maryland domicile as a matter of law.\textsuperscript{46} The court previously has emphasized that the key factor in determining a person's domicile is intent,\textsuperscript{47} which may be shown objectively by a multitude of factors.\textsuperscript{48} An individual's intent, therefore, must necessarily be factually determined in each case.\textsuperscript{49} Moreover, the meaning of domicile and the basic principles for determining domicile have been the same in this state regardless of the context in which the issue arose.\textsuperscript{50} Thus the same test should be applied for all cases in

\textsuperscript{46} 298 Md. at 692, 472 A.2d at 76. The Comptroller improperly relied on Comptroller v. Mollard, 53 Md. App. 631, 455 A.2d 72 (1983). In that case Mollard accepted a job in Belgium for an indefinite period but intended to return to the United States. Thus he failed to meet the requirement of intent to establish a new domicile.

It is absurd to assume that in every case in which an individual finds employment in a foreign country he does not intend to establish a domicile there. It would be just as absurd to assume that employment is sought because of an individual's desire to change his domicile. Clearly the question of domicile must be decided on the facts of each particular case. 298 Md. at 692, 472 A.2d at 76.


\textsuperscript{48} Toll v. Moreno, 284 Md. 425, 442, 397 A.2d 1009, 1017 (1979), aff'd, 458 U.S. 1 (1982). The two most important factors are where a person actually lives and where he votes:

Where a person lives and votes at the same place such place will be determined to constitute his domicile. Where these factors are not so clear, however, or where there are special circumstances . . . the Court will look to and weigh a number of other factors in deciding a person's domicile.


Other factors which the court may consider include:

[T]he paying of taxes and statements on tax returns; the ownership of property; where the person's children attend school; the address at which one receives mail; statements as to residency contained in contracts or other documents; statements on licenses or governmental documents; where furniture and other personal belongings are kept; which jurisdiction's banks are utilized; membership in professional, fraternal, religious, or social organizations; where one's regular physicians and dentists are located; where one maintains charge accounts; and any other factors revealing contact with one or the other jurisdictions.


\textsuperscript{49} 298 Md. at 692, 472 A.2d at 76.

\textsuperscript{50} Toll v. Moreno, 284 Md. 425, 438, 397 A.2d 1009, 1015 (1979), aff'd, 458 U.S. 1 (1982). Cases defining domicile for one purpose have regularly relied upon cases defining domicile for a totally different purpose. \textit{Id.} at 441, 397 A.2d at 1017. See, e.g., Bainum v. Kalen, 272 Md. 490, 497-98, 325 A.2d 392, 396 (1974) (defining domicile required to be a candidate for nomination for the Maryland Senate); Comptroller of the Treasury v. Lenderking, 268 Md. 613, 617-20, 303 A.2d 402, 404-406 (1973) (defining domicile for purpose of state income tax statute); Maddy v. Jones, 230 Md. 172, 180-82, 186 A.2d 482, 485-86 (1962) (defining domiciliary status required to recover under unsatisfied claim and judgment fund); Shenton v. Abbot, 178 Md. 526, 530-33, 15 A.2d 906, 908-09 (1940) (defining domicile required for probate of a will); Wagner v. Scurlock, 166 Md. 284, 291-93, 170 A. 539, 542-43 (1933) (defining domicile to determine if defendant was subject to service of process).
which domicile is at issue. The court, therefore, correctly concluded that “[i]ntentions cannot be assumed merely because [a] move is connected with employment” and, in finding for the taxpayers, necessarily concluded in each case that the taxpayer’s intent was not to remain domiciled in Maryland.

D. Real Estate Taxation

1. Auxiliary Farm Structures.—In Supervisor of Assessments v. Carroll, the Maryland Court of Appeals addressed the issue left open in Warlick v. Supervisor of Assessments: “whether accessory or auxiliary structures on a farm, occupied by farm employees, need necessarily be assessed” on the basis of the exemption for farmland. The taxpayer in this case owned two tracts of land that contained several residences at various locations. Some of these residences were occupied by farm employees, who lived there for the purpose of the continued maintenance and operation of the adjacent farmland, and the remainder of the residences were rented. The taxpayer claimed that the homesites occupied by farm employees qualified for lower assessment on an agricultural basis.

The court rejected this claim, stating that “[t]he exemption in Art. 81 § 19(b)(1) is for ‘[l]ands which are actively devoted to farm or agricultural use . . . ’ Everyone must have a place of abode . . . . The use here is residential, not farm or agricultural use.”

The court implied that a different result might be reached when

51. 298 Md. at 692, 472 A.2d at 76.
52. Id.
53. Id. at 694-95, 472 A.2d at 77.
55. 272 Md. 540, 325 A.2d 587 (1974). In Warlick the court ruled that the area where a farmer’s dwelling is located should be assessed as if it had been subdivided out of the farm. It does not qualify for the exemption from tax of land devoted to farm or agricultural use. Id. at 544-45, 325 A.2d at 589-90.
56. Id. at 544, 325 A.2d at 589. The exemption for farmland is statutorily provided as follows:

Lands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use, and shall not be assessed as if subdivided, it being the intent of the General Assembly that the assessment of farmland shall be maintained at levels compatible with the continued use of such land for farming.

57. 298 Md. at 313, 469 A.2d at 859.
58. Id.
59. Id. at 318-19, 469 A.2d at 861-62 (quoting MD. ANN. CODE art. 81, § 19(b)(1) (1980)).
the farm employees are required to live on the land. For example, on a dairy farm, where the continuous presence of employees is necessary for its operation, the employees' residences would appear to qualify for assessment on an agricultural basis. This is consistent with the legislative intent in providing the special assessment for farmland, which is to encourage farming "in order to maintain a readily available source of food and dairy products close to the metropolitan area of the state." The assessment of employees' homesites on a non-agricultural basis, when the employees are required to live on the farm, may increase costs enough to make the farm unprofitable. If, as a result, the land is no longer used for agricultural purposes the legislature's intent will have been defeated. Therefore, it is possible that homesites of employees required to live on a farm will be assessed on an agricultural basis, if the continuous presence of employees is necessary.

2. Recordation Taxes.—In Hampton Plaza Joint Venture, Inc. v. Clerk, Circuit Court for Baltimore County, the Maryland Court of Special Appeals considered the application of the Maryland Code provision that exempts the recording of a supplemental instrument securing debt from recordation taxes. Generally, an instrument is supplemental if it "merely confirms, corrects, modifies or supplements an instrument previously recorded . . . [and] does not increase the amount of the debt secured by the instrument previously recorded." In Hampton Plaza the taxpayer claimed that, when the proceeds of a new instrument were used to pay off older instruments, the new instrument was supplemental. The State argued that the new loan was a new transaction involving a new contractual relationship. It could not be considered as supplemental because it had the effect of extinguishing the old instruments. The court agreed with the State and held that when a new instrument effectively extinguishes old instruments, the new one cannot be considered supplemental and recordation taxes must be paid.

60. While deciding that the exemption did not apply to the case at bar, the court said: "There is no requirement that these farm employees live on the land rather than at some other location." Id. at 319, 469 A.2d at 862 (emphasis added).
64. Id.
65. 55 Md. App. at 53-54, 460 A.2d at 634-35.
66. Id. at 54, 460 A.2d at 635.
67. Id. The court noted that the State's argument was supported by the Court of Appeals' decision in Hammond v. Philadelphia Elec. Power Co., 192 Md. 179, 63 A.2d 759 (1949), in which the court said:
E. Statutory Changes

1. Tax Amnesty Program.—The Maryland Legislature has provided for the establishment of a tax amnesty program by the Comptroller of the Treasury. The statute allows for the Comptroller to authorize a thirty-day period during which, if a taxpayer voluntarily files a delinquent return and pays taxes owed, the penalties and interest imposed by article 81, sections 318 and 320 will be waived. This waiver applies only to penalties attributable to taxable years beginning prior to January, 1983. The Comptroller has the authority to determine any other conditions of the program.

2. Estate Tax-Qualified Terminable Interest Property Election.—The Maryland Legislature has enacted a statute responding to the general it may be said that where there is a new creditor, a new loan and a new contract relationship, and where the old note holders and their debts are paid and these debts extinguished, where one mortgage is paid by a new agreement, even though the latter is made with the same mortgagee, the new agreement is taxable.

Id. at 188, 63 A.2d at 763, quoted in 55 Md. App. at 54, 460 A.2d at 635.

68. Act of July 1, 1984, ch. 128, 1984 Md. Laws 566 states:
Section 1. Be it enacted by the General Assembly of Maryland, that the Comptroller of the Treasury may authorize for the fiscal year beginning July 1, 1984 a 30-day period during which all interest and penalties imposed by Article 81, §§ 318 and 320 of the Code will be waived if any taxpayer voluntarily files delinquent returns and pays taxes owed. The waiver shall apply to nonreporting, underreporting of tax liabilities, or to the nonpayment of tax previously assessed, but shall extend only to penalties attributable to the taxes paid during the 30-day period for taxable years beginning prior to January 1, 1983. The terms and other conditions of such a program shall be determined by the Comptroller.

69. Section 318 provides for the amounts of penalties and interest which may be charged to a delinquent taxpayer. See MD. ANN. CODE art. 81, § 318 (Supp. 1984). Section 320 explains the consequences of failing to file a return or report as required by the Code. See id. § 320.

(d)(1) In this subsection the following words have the meanings indicated.
(i) "Marital deduction formula clause" means any provision of a will or other controlling instrument that makes a bequest or transfer, the size or amount of which is determined in whole or in part with reference to the amount allowable to a decedent's estate as a marital deduction under the tax law of the United States.
(ii) "Qualified terminable interest property" means property described in § 2056(b)(7) of the Internal Revenue Code of 1954 of the United States.
(2) If a will or other controlling instrument executed on or before September 12, 1981 contains a marital deduction formula clause, an election by the personal representative or other authorized person to treat property not transferred pursuant to the clause as qualified terminable interest property for purposes of the estate tax marital deduction under the tax law of the United States shall neither increase nor decrease the amount or fraction of the estate,
effect of a Qualified Terminable Interest Property (QTIP) election for a non-marital trust on the distribution of some estates pursuant to wills executed before September 13, 1981. Under prior law, a QTIP election reduced the amount passing to a spouse pursuant to a marital deduction formula provision, which contained reduction language for other property qualifying for the marital deduction. The election would thus be worthless because the amount of property qualifying for the marital deduction would remain unchanged. The new statute makes a QTIP election worthwhile under the above circumstances. It provides that when a will or trust contains a marital deduction formula clause and the personal representative elects to treat other property includible in the decedent's estate as QTIP under Internal Revenue Code section 2056(b)(7), the amount passing under the clause shall not be decreased by reason of the election. The impact of the statute is shown by the following example.  

Ex: Husband (H) executes a will on January 1, 1977, which provides that his wife (W) is to receive one-half of the adjusted gross estate or $250,000, whichever is greater, reduced by the value of any other bequest, gift, or devise to her under another paragraph of the will. A subsequent paragraph provides for all tangible property to pass to W, and the last provision was for a residuary trust to benefit W for life and then pass to H and W's surviving children. At H's death in 1985 the value of the adjusted gross estate was $2,000,000, the tangible property was worth $100,000 and the amount passing under the trust was $500,000.

Under prior law a QTIP election for the $500,000 passing

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71. Qualified Terminable Interest Property means property:
   (I) which passes from the decedent,
   (II) in which the surviving spouse has a qualifying income interest for life, and
73. The Tax Reform Act of 1976 amended § 2056 to increase the marital deduction allowed in the case of small estates. For decedents dying after 1976, the marital deduction became the greater of $250,000 or 50% of the adjusted gross estate. 26 U.S.C. § 2056(c)(1)(A) (1976). In 1981 the marital deduction became unlimited. Id. § 2056(a) (1982).
under the trust would have resulted in W's receiving only $400,000 outright ($1,000,000, less the $100,000 of tangible property, less the $500,000 of QTIP) because of the reduction language in the will. If no QTIP election were made, W would receive $900,000 outright and the $100,000 of tangible property. Whether or not the QTIP election is made, only one-half of the estate would qualify for the marital deduction. Thus, the purpose in including a marital deduction formula clause, to minimize estate taxes, would be thwarted because the marital deduction is now unlimited.

The new law eliminates this problem. The statute provides that a QTIP election will not decrease the amount or fraction of the estate transferred pursuant to the marital deduction formula clause. Thus, under the new law, if a QTIP election is made, W will receive a marital deduction of $1,500,000 ($900,000 outright, plus $100,000 tangible property, plus $500,000 QTIP). The new law will allow a QTIP election to result in a larger marital deduction. This result is consistent with the marital deduction formula clause's goal of minimizing estate taxes.

It seems that the use of the word "increase" in section 11-106(d)(2) is unnecessary. Under prior law it was not possible for a QTIP election to result in an increase in the amount of an estate transferred pursuant to a marital deduction formula clause.

The statute applies only to wills executed before September 12, 1981 (when the maximum allowable marital deduction was less than 100% of a spouse's adjusted gross estate) and decedents dying after July 1, 1984. The statute will not apply if a codicil to the will executed after September 12, 1981 expressly provides otherwise.

F. Other Developments

1. Retaliatory Tax.—In Metropolitan Life v. Insurance Commis-
sioner, the Maryland Court of Special Appeals upheld the constitutionality of the statute concerning the assessment of a retaliatory tax as applied to New York insurance companies. A retaliatory tax on companies from states with a uniform insurance premium tax throughout the state has been upheld in the past. At issue in this case was a special retaliatory tax allocation formula developed by the Insurance Commissioner in response to New York City's assessment of a premium tax which was separate from and in addition to the New York state tax.

ANN. CODE art. 81, § 230 (1980), the Tax Court was without jurisdiction to hear the appeal. 57 Md. App. at 608, 471 A.2d at 751.

2. In Maryland Nat'l Bank v. State Dep't of Assessments, 57 Md. App. 269, 469 A.2d 907, cert. denied, 299 Md. 656, 474 A.2d 1344 (1984), the Maryland Court of Special Appeals considered the impact of a change in wording of the statute which defines net income for purposes of calculating the franchise tax imposed upon Maryland financial institutions. See MD. ANN. CODE art. 81, § 280A(b)(1) (1980). The statute in its original form defined net income as the institution's federally taxable income plus any "income taxes" imposed by the state. See MD. ANN. CODE art. 81, § 280A(b)(2) (1975). In 1977, the statute was amended, clarifying that the income taxes required to be added back meant state "taxes based on income." Act of June 1, 1977, ch. 759, 1977 Md. Laws 3006. Maryland National Bank reasoned that the change in wording meant that the bank had been wrong to treat the franchise tax over the years as one of the "income taxes" to be added back to federal taxable income for purposes of computing its state franchise tax liability under MD. ANN. CODE art. 81, § 128A (1980). In other words, the bank claimed a refund because the franchise tax was not an "income tax" but was rather a "tax based upon income." The court held that the change in wording in the statute did not change its meaning. "Income taxes" means "taxes based upon income" and therefore franchise taxes always have been and still are required to be added back to federal taxable income for purposes of computing the franchise tax itself. 57 Md. App. at 273, 469 A.2d at 909.


80. The purpose of a retaliatory tax is to assure that insurance companies chartered in the home (i.e., retaliating) state are not subjected to a greater tax burden in other states than the insurance companies chartered in those states are subjected to in the home state. Id. at 459, 473 A.2d at 934.

The Maryland Code provision for the retaliatory tax states in relevant part:

(1) When by or pursuant to the laws of any other state . . . any taxes . . . are or would be imposed upon Maryland insurers . . . which are in excess of such taxes . . . directly imposed upon similar insurers . . . of such other state . . . under the statutes of this State . . . the same taxes . . . shall be imposed by the Commissioner upon the insurers . . . of such other state.


81. A retaliatory tax was upheld in Maryland in 1891. Talbort v. Fidelity & Casualty Co., 74 Md. 536, 22 A. 995 (1891).

82. The New York State tax was 1.75%, N.Y. INS. LAW § 552 (McKinney 1966) and the New York City tax was 0.4% of gross direct premiums allocable to New York City. 58 Md. App. at 460, 473 A.2d at 935. The Insurance Commissioner's formula calculates the effect of the local tax by looking at the experience of all Maryland insurance companies doing business in New York State during the year in question (1971). It compares the total premium taxes actually paid by those compa-
Metropolitan claimed that allowing the Insurance Commissioner to develop an allocation formula "vests legislative taxing authority in an executive official in contravention of Md. Declaration of Rights art. 8 (Separation of Powers)." The court rejected this argument and held that the grant of discretion to the Commissioner was limited to devising a method or formula which "is a far cry from a delegation of the actual power to levy a tax." Metropolitan also argued that the statute was void for vagueness because it set no standards or guidelines. Once again the court rejected Metropolitan's argument, noting that grants of discretion to administrative officials in order to facilitate the administration of the laws are permissible because of the growing complexity of governmental and economic conditions.

2. County Tax Rates for Personal and Real Property.—In Rosecroft Trotting & Pacing Assoc., Inc. v. Prince George's County, the county claimed the power to levy taxes at different rates for personal and real property, arguing that the Express Powers Act gave it this right. The taxpayer, however, argued that the Maryland Code requires a county property tax to be imposed at a single rate on all

nies to New York City with the total premiums which they earned throughout New York State that were subject to the New York State premium tax.

Id. at 465, 473 A.2d at 937.

83. 58 Md. App. at 461, 473 A.2d at 935. This argument was based on the fact that the Insurance Commissioner had "unbridled discretion" to develop an allocation formula.

84. Id. at 467, 473 A.2d at 938. The court said that the Insurance Commissioner was not given the power to make law, but was given "the authority to implement and enforce the expressed legislative will." Id. at 473, 473 A.2d at 942.

85. Id. at 461, 473 A.2d at 935.

86. Id. at 472, 473 A.2d at 941 (citing with approval Governor v. Exxon Corp., 279 Md. 410, 440-41, 370 A.2d 1102, 1119 (1977), aff'd, 437 U.S. 117 (1978)). The court noted that "[t]he failure to provide any standards for the exercise of administrative discretion has been held to render the delegation of authority to the agency invalid." 58 Md. App. at 472, 473 A.2d at 941 (quoting Truitt v. Board of Public Works, 243 Md. 375, 388, 221 A.2d 370, 379 (1966))). However, "the modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases." Pressman v. Barnes, 209 Md. 544, 555, 121 A.2d 816, 822 (1956).


88. Id. at 584, 471 A.2d at 721. The argument was based on the first paragraph of § 5(O) of the Express Powers Act, which provides that a charter county has the power "[t]o direct the class or subclass of improvements on land and personal property which shall be made subject to the county tax levy, and to provide for the levy thereupon and upon the value of [the] land . . . ." Md. Ann. Code art. 25A, § 5(O) (1981).
property subject to that levy.\(^8^9\) The court held that when there is a conflict between the Express Powers Act and a subsequent public general law, the latter controls.\(^9^0\) Therefore, Prince George's County could not tax separate classes of property at different rates.

3. Repeal of the Definition of "Homestead."—The Maryland Legislature has repealed the statute defining the term "homestead,"\(^9^1\) most likely because of the recent case of *Supervisor of Assessments v. Sloan.*\(^9^2\) In that case the taxpayer claimed that his two adjacent subdivided lots should be assessed as one homestead property, rather than as two separate properties.\(^9^3\) An assessment as one property would have been lower than the assessment of each of the properties on an individual basis. The Maryland Court of Special Appeals held that the definition of homestead did not include subdivided buildable lots and therefore each lot must be assessed on an individual basis.\(^9^4\) The court noted that the statutory section that had necessitated the enactment of a definition of homestead\(^9^5\) had been repealed in 1979.\(^9^6\) Thus, the definition of homestead, which was

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89. 298 Md. at 584, 471 A.2d at 721. The taxpayer's argument is based on article 81, § 30(a) which reads:

(a) *Full County and City rate.* — Except as hereinafter in this section provided and as provided in § 12, all property subject to ordinary taxation in this State shall pay the full county and/or city rate prevailing for the time being in the county and/or city in which under this article the same is taxable . . . .

90. 298 Md. at 584, 471 A.2d at 721. 298 Md. at 598, 471 A.2d at 728-29. The court found that the rule that a later public general law controls is found in the Express Powers Act itself in section 5(S):

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council . . . to pass all . . . resolutions . . . not consistent with . . . the laws of the State . . . .

Provided, that the powers herein granted shall only be exercised to the extent that the same are not provided for by public general law . . . .


93. Id. at 287, 469 A.2d at 916.

94. Id. at 293, 469 A.2d at 919.


96. Act of July 1, 1979, ch. 314, 1979 Md. Laws 989-91. The court considered the title to that act to aid in its determination of whether or not the definition of homestead
not repealed at that time, remained in the Maryland code but did not refer to any other statutory provisions. Had the legislature repealed the definition of homestead in 1979 when it became obsolete, this entire controversy would have been avoided.

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included subdivided buildable lots. The court concluded that assessment was to be based on current value and that required the lots to be assessed individually. See 57 Md. App. at 293, 469 A.2d at 919.
XI. Torts

A. Negligence

1. Duty. — In Carlotta v. T.R. Stark Associates,¹ the Court of Special Appeals considered whether a property owner had a cause of action against a surveyor who negligently prepared a plat of adjoining property² when the negligence allegedly caused damage to the property owner.³ The court held that the property owner did not have a cause of action because the surveyor owed no duty to the property owner that could be breached.⁴ This was so because the surveyor prepared the plat for the adjoining landowner; therefore, there was no privity of contract between the plaintiff and the surveyor.⁵ Moreover, the surveyor could not have reasonably foreseen the third-party reliance that might give rise to liability, in the absence of privity.⁶ Finally, the plaintiff did not rely on the plat.⁷

2. Contributory Negligence. — In Cohen v. Rubin,⁸ a driver fatally injured a pedestrian crossing a street outside the designated crosswalk.⁹ When sued for negligence, the driver contended that the pedestrian was guilty of contributory negligence as a matter of law¹⁰

³ 57 Md. App. at 470, 470 A.2d at 839.
⁵ 57 Md. App. at 470, 470 A.2d at 839. The court, however, did not state that privity is an absolute necessity.
⁶ The court cited three cases in which the surveyor’s ability to foresee that third persons would rely on the plat was the basis for holding that the plaintiff-landowner had a cause of action: Kent v. Bartlett, 49 Cal. App. 3d 724, 122 Cal. Rptr. 615 (1975); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969); and Tartera v. Palumbo, 224 Tenn. 262, 453 S.W.2d 780 (1970).
⁷ See 57 Md. App. at 471-72, 470 A.2d at 839-40 (referring to plaintiff as “non-reliant third party adjacent landowner”). The court did not discuss whether liability could be imposed in other circumstances in the absence of reliance. Other sources of liability can be hypothesized, as when a person assumes a duty to a third party in an agreement with a contracting party. See, e.g., Cutlip v. Lucky Stores, Inc., 22 Md. App. 673, 325 A.2d 432 (1974) (architect’s liability to injured construction worker predicated on contractual assumption of duty to inspect and supervise the course of construction).
⁹ Id. at 87, 460 A.2d at 1049.
¹⁰ Id. at 90, 460 A.2d at 1050.
because a Maryland statute requires pedestrians outside of crosswalks to yield the right of way to any approaching vehicle. The Court of Appeals, however, has consistently held that where a pedestrian crosses the street outside of a crosswalk, a factual issue of negligence is raised, but that fact standing alone is insufficient to establish that the pedestrian is negligent as a matter of law. Therefore, the Cohen court held that the trial court properly submitted the issue of contributory negligence to the jury.

3. Last Clear Chance. — The Cohen court also held that the trial court did not err in giving an instruction on the doctrine of last clear chance. The driver in Cohen was primarily negligent for driving in excess of eighty miles per hour in a forty mile per hour zone. Assuming the pedestrian had been contributorily negligent in crossing the street outside the designated crosswalk, the plaintiff argued that the driver still had an opportunity to avoid an accident by slowing down and taking evasive action after he saw the pedestrian.

The doctrine of last clear chance was also applied in Ritter v. Portera. In Ritter, the plaintiff negligently climbed onto the hood of the defendant’s stationary automobile, but the defendant had the last clear chance to avoid an accident by refusing to move his vehicle. However, the defendant failed to avail himself of this opportunity and quickly accelerated his car, causing the plaintiff to fall and sustain serious injuries.

In both Cohen and Ritter, the court misapplied the doctrine of last clear chance. To invoke the doctrine, the negligence of the defendant must be sequential to that of the plaintiff and not concur-

13. Id. at 92, 460 A.2d at 1051.
15. Id. at 91, 460 A.2d at 1051.
16. The doctrine of last clear chance is applied when the defendant has been primarily negligent, the plaintiff has been contributorily negligent, and the defendant fails to avail himself of a fresh opportunity to avert the consequences of his original negligence and the plaintiff’s contributory negligence. Id. at 92, 460 A.2d at 1051.
17. Id., 460 A.2d at 1052.
19. Id. at 72, 474 A.2d at 559.
20. Id.
21. Id. at 68, 474 A.2d at 557. Plaintiff fell off the defendant’s car and was dragged approximately 20 feet.
rent. In Cohen, the pedestrian was negligently crossing the street at the same time that the driver was exceeding the speed limit. In Ritter, the plaintiff was climbing onto the hood of a car when the driver moved the car. In each case, both the plaintiff and the defendant were simultaneously negligent. Jurisdictions with comparative negligence statutes decide cases like Cohen and Ritter without involving the doctrine of last clear chance. In Maryland, however, a finding of contributory negligence on the part of a plaintiff bars recovery. Therefore, in cases like Cohen and Ritter, the court is forced to twist the doctrine of last clear chance in an apparent effort to allow contributorily negligent plaintiffs to recover.

B. Invasion of Privacy

Maryland has recognized the tort of invasion of privacy since 1962 and has adopted the Restatement (Second) of Torts definition, which recognizes four distinct branches of the tort. In Lawrence v. A.S. Abell Co., Maryland adopted another Second Restatement concept, the incidental use exception, in an invasion of privacy action based on the appropriation of a person's name or likeness. The incidental use exception establishes that there is no invasion of privacy when a person's likeness is published for a reason other than taking advantage of that person's reputation or prestige for purposes of publicity.

In Lawrence, a photographer for the Sunpapers requested and received permission to photograph two children attending a festival in downtown Baltimore. Permission was granted by the mother of one of the children, who was watching both of them. The photograph appeared the next day on the front page of The Evening Sun in an


(2) The right of privacy is invaded by
(a) unreasonable intrusion upon the seclusion of another . . . or
(b) appropriation of the other's name or likeness . . . or
(c) unreasonable publicity given to the other's private life . . . or
(d) publicity that unreasonably places the other in a false light before
the public . . .
27. Restatement (Second) of Torts § 652C comment d (1976).
28. Id.
article about the festival. After that, *The Evening Sun* began an advertising campaign, and a reproduction of the issue with the children’s photograph was displayed on billboards, commercials, and rack cards. The mothers of the children brought suit for compensation, based on theories of invasion of privacy and unjust enrichment. In rejecting the mothers’ argument, the court relied upon several New York cases that have developed this incidental use exception, and upon the *Second Restatement*. In considering whether an invasion of privacy had occurred, the court adopted a two-prong test: “(1) whether the initial use of the photograph was proper; and (2) whether the republication of the photograph was ‘merely incidental’ [to the purpose of the publication] or rather whether it amounted to an appropriation of the plaintiffs’ likenesses to promote the sale of the newspaper.” In addition, the court held that “a person’s name or likeness must have ‘commercial or other value’ before an appropriation is actionable.” And, even if a person’s likeness does have commercial value, the incidental use exception allows a newspaper to use reproductions of past issues, when the purpose of the reproduction is to show the quality and content of the publication, and not to imply that the person whose picture is reproduced is endorsing the publication. Applying the incidental use exception, the court found that the children’s identity had no proven value, and the reproduction was done “to show a realistic sample of the product of the newspaper.” Hence, there was no invasion of privacy.

With the decision in *Lawrence*, Maryland joins a small number of jurisdictions that have interpreted and adopted the incidental use exception. This is a common sense approach that protects the existence of the newspaper industry. The incidental use exception

29. 299 Md. at 698-99, 475 A.2d at 449.
30. Id.
32. Restatement (Second) of Torts § 652C comment d (1965).
33. 299 Md. at 705, 475 A.2d at 453.
34. Id. at 706, 475 A.2d at 453 (quoting Restatement (Second) of Torts § 652C comment d (1965)).
35. See id. at 707, 475 A.2d 453.
ensures that a newspaper will not be potentially liable to every person whose name or likeness is published.

C. Defamation

1. Private Figure. — In Hearst Corp. v. Hughes, the Court of Appeals addressed the issue of whether actual impairment of reputation must be proved in a negligent defamation action in order to recover compensatory damages, or whether proof of emotional distress caused by the defamation is sufficient. The court held that proof of actual impairment of reputation is not required to establish the tort of negligent defamation.

In a preliminary discussion, the court traced the history of defamation and clarified the effect of historical and constitutional requirements on Maryland law. During this discussion, the court adopted the Second Restatement definitions of "injury," "harm," and "damages." The court then framed a series of formulas summarizing the rules of defamation law at various stages of development.

The Hughes trial court found that the plaintiff sustained no out-

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38. A negligent defamation action is brought by a private individual who cannot prove that a false defamatory statement was made with actual malice. Id. at 114 n.1, 466 A.2d at 487 n.1.

39. Id. at 114, 466 A.2d at 487.

40. Id. at 118-26, 466 A.2d at 489-93.

41. Id. at 118, 466 A.2d at 489. Injury is "the invasion of any legally protected interest of another." Restatement (Second) of Torts § 7(1) (1965).

42. 297 Md. at 118, 466 A.2d at 489. Harm is "the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts § 7(2) (1965) (emphasis in original).

43. 297 Md. at 118, 466 A.2d at 489. Damages are "a sum of money awarded to a person injured by the tort of another." Restatement (Second) of Torts § 12A (1965).

44. The court stated the rules for cases not involving punitive damages nor questions of privilege as follows:

Common Law rule:
Where \( P \) is any person and \( D \) is any person, then defamatory publication + falsity = cause of action for compensatory damages. 297 Md. at 119, 466 A.2d at 489-90.

New York Times/Butts rule:
Where \( P \) is a public figure and \( D \) is any person, then defamatory publication + falsity + fault by constitutional malice standard = constitutionally permissible state cause of action for compensatory damages (punitive damages also permitted). Id. at 120, 466 A.2d at 490.

Gertz rule:
Where \( P \) is a private person and \( D \) is engaged in media expression, then defamatory publication + falsity + fault by a standard less than constitutional malice = consti-
of-pocket loss or impairment of reputation but did suffer personal humiliation and mental anguish. The court then awarded compensatory damages. The Hearst Corporation appealed, contending that proof of emotional distress is an insufficient basis for compensatory damages in a defamation action. Hearst asked the court to require proof of actual harm to reputation before awarding compensatory damages.

In holding that proof of harm to reputation is not essential to establish negligent defamation, the court stressed three factors. First, the court emphasized the common law presumption of harm to reputation which flows from words actionable per se. The reason for the presumption of harm from words actionable per se was the difficulty in proving harm to a reputation. A second factor in the court's analysis was its reading of Gertz v. Robert Welch, Inc. The court argued that, under Gertz, "compensable harm is not limited to harm to reputation," and thus an award of damages for defamation would be proper after proof of emotional distress. The third factor considered by the court was the fact that a defendant in a negligent defamation case is protected by the prohibition against constitutionally permissible cause of action for compensatory damages (punitive damages not allowed). Id. at 122, 466 A.2d at 491.

\[ \text{Jacron rule:} \]
\[ \text{Where } P \text{ is a private person and } D \text{ is any person, then defamatory publication + falsity + fault by negligence standard + harm } = \text{Maryland cause of action for compensatory damages (punitive damages not allowed). Id.} \]

\[ \text{Firestone rule:} \]
\[ \text{Where } P \text{ is a private citizen and } D \text{ is engaged in media expression, then defamatory publication + falsity + fault by negligence standard + harm by way of emotional distress without proof of harm to reputation } = \text{constitutionally permissible cause of action for compensatory damages (punitive damages not allowed). Id. at 125, 466 A.2d at 492.} \]

45. Id. at 117, 466 A.2d at 488.
46. Id. The Court of Appeals defined "emotional distress" as including personal humiliation and mental anguish and used that phrase throughout the opinion. Id. at 114 n.1., 466 A.2d at 487 n.1.
47. Id. at 117, 466 A.2d at 488-89.
48. Id. at 114, 466 A.2d at 487.
49. Id. at 118-19, 466 A.2d at 489. "[A]s a matter of Maryland law, the presumption of harm to reputation still arises from the publication of words actionable per se." Id. at 125, 466 A.2d at 493.
50. Id. at 129, 466 A.2d at 495. "[I]njury to reputation is extremely difficult to demonstrate, even when it is obvious that serious harm has resulted." Id.
52. 297 Md. at 122, 466 A.2d at 491. The court also noted that the Supreme Court had specifically allowed a recovery in defamation for emotional distress in Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976), cited in id. at 123-24, 466 A.2d at 492.
liability without fault. Because compensatory damages are limited to compensation for proven harm, the court found it unnecessary to further protect the defendant by requiring that proven harm be limited to impairment of reputation.

Judge Davidson, joined by Judge Eldridge, wrote a lengthy and vigorous dissent criticizing the analysis and authorities relied upon by the majority and citing a number of authorities to support the position that proof of harm to reputation is essential to recover damages in a defamation action. Judge Davidson conceded that "federal constitutional law does not preclude recovery of damages for actual injury in a negligent defamation action despite the absence of proof of impairment of reputation." However, she argued that Maryland law requires proof of impairment of reputation in a negligent defamation action, basing this conclusion on several factors. One factor is that Maryland courts historically have recognized that "the purpose of defamation actions is to permit recovery for impairment of reputation." Allowing recovery in negligent defamation actions without proof of impairment of reputation would mean that "the insult, not the injury, is the cause of action." Judge Davidson also pointed out that Maryland already recognizes a cause of action for infliction of emotional distress, whether negligently or intentionally inflicted. A cause of action for negligent infliction of emotional distress requires proof of physical injury. Therefore, allowing damages for emotional distress in a negligent defamation action without proof of physical injury created an inconsistency within Maryland tort law.

The dissent is well reasoned, but it fails to address the issue of the difficulty of proving damage to reputation. Because of this difficulty, the common law rule of presumption of injury to reputation

53. Id. at 130, 466 A.2d at 495. See Jacron Sales Co. v. Sindorf, 276 Md. 580, 594-97, 350 A.2d 688, 696-98 (1976) (adopting negligence standard in cases of purely private defamation).
54. 297 Md. at 130-31, 466 A.2d at 495.
55. Id. at 138, 466 A.2d at 499 (Davidson, J., joined by Eldridge, J., dissenting).
56. Id. at 138-44, 466 A.2d at 500-02.
57. Id. at 146, 466 A.2d at 503.
58. Id.
59. Id. at 144, 466 A.2d at 502.
61. 297 Md. at 145, 466 A.2d at 502.
62. Id.
63. Id. at 146, 466 A.2d at 503.
evolved. The majority's recognition of this difficulty makes their position the stronger one.

2. Public Figure. — In Phillips v. Washington Magazine Inc., the Court of Special Appeals held that the plaintiff's pleadings were insufficient to state a cause of action in libel or invasion of privacy because the pleadings did not allege facts that would show that the statements were defamatory, and the pleadings failed to allege actual malice. The actual malice standard was applied because the plaintiff conceded that he was a public figure.

The plaintiff, a former Central Intelligence Agency officer, claimed an article published in The Washingtonian magazine defamed him and invaded his privacy, by inaccurately linking him with the assassination of President Kennedy and the overthrow of Salvadore Allende. The plaintiff cited two portions of the article, which he claimed demonstrated defamation and actual malice on the part of the author and the publisher. The court rejected these contentions and found that the plaintiff failed to allege defamation in regard to the first portion, and failed to plead actual malice. The court held that the actual malice standard had not been met in this instance because the only allegation in the pleadings that pertained to the actual malice issue was clearly refuted in the article itself, which indicated that the author had conducted carefully the investi-
In a somewhat confusing footnote, the court stated that “[r]egardless of whether a declaration is styled as a defamation action or an invasion of privacy action, the same considerations and legal standards apply.”\textsuperscript{70} The court then concluded that the failure to meet the actual malice standard also defeated the invasion of privacy claim. Presumably, the assertion that public figures must meet the actual malice standard in invasion of privacy claims as well as in defamation claims was limited to the type of invasion of privacy case arising under the false light theory where, as defined by the Second Restatement, “the right of privacy is invaded by . . . publicity that unreasonably places the other in a false light before the public.”\textsuperscript{71} The false light theory has not been interpreted by the Maryland Court of Appeals in the wake of Gertz,\textsuperscript{72} which modified earlier constitutional analysis. However, in a carefully reasoned opinion, a federal district court interpreting Maryland law held a limited public figure in a false light case to the actual malice standard.\textsuperscript{73} Other jurisdictions have recognized the Gertz public/private figure distinction in invasion of privacy cases and have held that private individuals need only show negligence in a false light suit.\textsuperscript{74}

\textsuperscript{70} Id. at 40, 472 A.2d at 103. The allegation of actual malice was that the defendant had fabricated the link to Maurice Bishop. The court noted that the author had carefully investigated the possible connection between Phillips and Bishop. \textit{id.}

\textsuperscript{71} Id. at 36 n.1, 472 A.2d at 101 n.1. To support this proposition, the court cited Harnish v. Herald-Mail Co., 264 Md. 326, 286 A.2d 146 (1972), and Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (1979). Although Bilney involved public figures (University of Maryland basketball players), it was inapposite here because the cause of action was grounded upon “unreasonable publicity given to the other's private life.” \textit{id.} at 571, 406 A.2d at 659. The applicable standard in that situation is “reasonableness under the facts presented.” \textit{id.} at 573, 406 A.2d at 660. Bilney did not discuss the actual malice standard. \textit{Harnish} did hold the plaintiff in a false light invasion of privacy case to an actual malice standard, but it did so by relying on Time Inc. v. Hill, 385 U.S. 374 (1967), and Rosenbloom v. Metromedia, 403 U.S. 29 (1971), both of which have been modified by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).


\textsuperscript{73} Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). “Rather than asking if the publication is newsworthy or concerns a public issue to determine if the actual malice standard applies, \textit{Gertz} requires that courts inquire into the type of damages (actual or punitive) and the type of plaintiff (private or public) involved in a case.” Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1091 (5th Cir. 1984).


3. **Newspaper Privilege.**—In Maryland, a newspaper has a qualified privilege to publish reports of arrests and the charges on which arrests are made.\(^\text{76}\) In *Steer v. Lexleon, Inc.*,\(^\text{77}\) the Court of Special Appeals applied the qualified privilege doctrine to a new fact situation. In *Steer*, the police made an arrest and then issued a press release that listed plaintiff’s name as the perpetrator of the crime.\(^\text{78}\) Based on the official news release, the newspaper printed an article stating the plaintiff had been arrested.\(^\text{79}\) In fact, he had been the victim of the crime and had not been arrested at all. The plaintiff sued for defamation. In considering the defendant’s argument that the publication of the article fell under the qualified privilege, the court stated that to enjoy this privilege, there must be “legitimate reliance on an authorized governmental account of an official action.”\(^\text{80}\) The court found that this article was protected by the privilege of the newspaper to publish reports of arrests, emphasizing the fact that the newspaper obtained the erroneous information from an authorized release through an established and official channel.\(^\text{81}\)

The court relied on its decision in *Koren v. Capital-Gazette Newspapers, Inc.*,\(^\text{82}\) which reaffirmed the qualified privilege for a newspaper that reported the arrest of someone erroneously arrested and subsequently released. The court rejected the plaintiff’s contention that the qualified privilege existed only if an arrest is actually made, stating that “the defamation is the same whether one is actually but erroneously arrested or not arrested but erroneously described as having been arrested.”\(^\text{83}\) The nature of the error in the governmental account is immaterial.\(^\text{84}\) It appears that a qualified privilege will exist in Maryland as long as there is legitimate reliance on a governmental account.

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78. *Id.* at 201, 472 A.2d 1022.
79. *Id.* at 201-02, 472 A.2d at 1022-23.
80. *Id.* at 210, 472 A.2d at 1027.
81. *Id.* at 205, 472 A.2d at 1024. The column “Police Blotter,” in which the error appeared, was based on the weekly press release prepared by the desk sergeant at the Leonardtown Barracks of the Maryland State Police. While preparing the press release, the desk sergeant erred and substituted the name of the victim for that of the arrestee. The newspaper representative picked up the press release and printed it in the Police Blotter column. *Id.* at 201-02, 472 A.2d at 1022-23.
83. 58 Md. App. at 206, 472 A.2d at 1025.
84. *Id.* at 210, 472 A.2d at 1027.
D. Loss of Consortium

In a case of first impression, Gillespie-Linton v. Miles, the Court of Special Appeals declined to expand the right to recover for loss of consortium to couples who marry shortly after one of them suffers an injury at the hands of a negligent third party. Linton filed a joint claim for loss of consortium with Gillespie. Gillespie had been injured in an automobile accident with another driver, Miles; four days after the accident, Gillespie married Linton. The Court of Special Appeals denied recovery, holding that only injury to a marital relationship that exists at the time of the injury can support an action for loss of consortium. The court reasoned that, if it allowed recovery to couples who were not married at the time of the injury, it would have to apply a vague and indefinite standard to decide what relationship sufficed to support a loss of consortium claim. With Gillespie, Maryland joins the majority of jurisdictions that limit recovery in loss of consortium claims to couples who are married at the time of the injury.

E. Malicious Prosecution and Abuse of Process

Maryland courts recently considered two cases involving the torts of malicious prosecution and abuse of process. These cases affirmed existing law on the tort of abuse of process and clarified an area of confusion in the law relating to malicious prosecution.

In a suit for malicious prosecution, the plaintiff must prove four elements:

(1) That criminal proceeding was instituted or continued by the defendant against the plaintiff;

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86. Id. at 487, 473 A.2d at 949.
87. Id. at 486-87, 473 A.2d at 948-49.
88. Id. at 487, 473 A.2d at 949.
89. Id. at 495, 473 A.2d at 953.
90. Id.
(2) That the proceeding was terminated in favor of the accused;
(3) That there was no probable cause for the proceeding; and
(4) That malice or a purpose other than bringing the offender to justice motivated the accuser.\textsuperscript{92}

Malicious prosecution actions are not favored by the courts because they run counter to policies that encourage proceedings against those who are apparently guilty.\textsuperscript{93} Because of this attitude, the cause of action has been made difficult to maintain; a key barrier to suit is the requirement that the plaintiff prove that the defendant, who initiated the proceeding against the plaintiff, did so without probable cause.\textsuperscript{94}

In \textit{Palmer Ford, Inc. v. Wood},\textsuperscript{95} the major issue before the court was whether the plaintiff had satisfied that burden of proving the absence of probable cause for the underlying criminal proceeding.\textsuperscript{96} At the malicious prosecution trial, the plaintiff, Wood, used the fact that criminal charges against him were dismissed as evidence that the defendant, Palmer Ford, had no probable cause to have had Wood prosecuted for embezzlement. During a trial on the merits,\textsuperscript{97} the jury was instructed to determine, \textit{inter alia}, whether the defendant had had probable cause to prosecute.\textsuperscript{98} The jury found Palmer Ford guilty of malicious prosecution\textsuperscript{99} and awarded significant dam-

\textsuperscript{92} W. Keeton, Prosser and Keeton on the Law of Torts §§ 119, 871 (1984); Restatement (Second) of Torts § 653 (1965).
\textsuperscript{93} W. Keeton, supra note 92, at 876.
\textsuperscript{94} Id.
\textsuperscript{95} 298 Md. 484, 471 A.2d 297 (1984).
\textsuperscript{96} Id. at 485, 471 A.2d at 297. The facts of the case were complicated. The plaintiff, Wood, had his Mustang repaired by the defendant, Palmer Ford, Inc. The bill for the work "shocked" and "outraged" him and he could not pay for the release of his car. He received a phone call from an unknown caller (whom he later identified as the defendant's employee), telling him to put $400 under a trash can on the defendant's property and he would find his bill marked "paid" and the keys to his car. The plaintiff did so; the defendant, discovering no record of receipt of payment, met with the plaintiff to find out what had happened, and learned of the illicit payment. In a disputed sequence of events, the plaintiff agreed to pay the bill (allegedly after a promise that he would not be prosecuted) and charges were filed against him for embezzlement. The plaintiff eventually paid the bill, but amended charges were entered; several postponements occurred, and a hearing "of some sort" was held. Although the plaintiff testified that the charges were dropped, the record reflected a finding of not guilty. Id. at 487-92, 471 A.2d at 298-301.
\textsuperscript{97} In the initial trial, summary judgment was granted for the defendant. The Court of Special Appeals reversed and remanded for a new trial because there were issues of fact concerning the institution of the embezzlement prosecution. Id. at 492, 471 A.2d at 301.
\textsuperscript{98} Id. at 493, 471 A.2d at 301.
\textsuperscript{99} Id. The trial court also found Palmer Ford guilty of abuse of process. \textit{See infra} text accompanying notes 119-28.
ages to Wood. The Court of Special Appeals affirmed, noting that the jury could have inferred from the dismissal a lack of probable cause for the embezzlement prosecution. The Court of Appeals reversed, holding that the pretrial dismissal of charges against Wood was insufficient evidence of lack of probable cause. Moreover, the court held that the judge should have found the evidence insufficient, as a matter of law, and should not have given the case to the jury.

To reach this determination, the court specified what constitutes probable cause for bringing a criminal prosecution, and clarified the law on who determines whether probable cause exists. The court found that "[f]or probable cause purposes the focus is on those facts known to, and genuinely believed by, the one initiating or continuing the prosecution." Prior to Palmer Ford, Maryland law on who determines what facts are known and who determines existence or absence of probable cause was unclear. The Wood court looked to the leading early decision on the issue, Boyd v. Cross, and noted that Boyd required the jury to determine the existence of facts relied on to establish probable cause, and the judge to determine whether, as a matter of law, those facts indicated the presence or absence of probable cause. Later cases noting Boyd have been confused as to whether, if the facts are contested, the jury is required not only to find the facts but also to find whether the facts establish lack of probable cause. After examining a number of decisions, the Wood court held that the rule of Boyd, that the judge

100. 298 Md. at 493, 471 A.2d at 301.
101. Id. at 507, 471 A.2d at 309.
102. Id. at 495, 471 A.2d at 302.
103. 35 Md. 194 (1872).
104. 298 Md. at 501, 471 A.2d at 306.
105. See, e.g., W.T. Grant Co. v. Guercio, 249 Md. 181, 187, 238 A.2d 855, 858-59 (1968) (question of whether there is probable cause is one of fact and not law, for jury to decide). In a case considered during the period that Palmer Ford was being decided, Cottman v. Cottman, 56 Md. App. 413, 468 A.2d 131 (1983), the Court of Special Appeals indicated that it would follow the line of cases deviating from the Boyd rule and allow the jury to determine probable cause if facts were in dispute. Id. at 421, 468 A.2d at 135 (quoting Exxon Corp. v. Kelly, 281 Md. 689, 697-98, 381 A.2d 1146, 1151-52 (1978)).
106. The court stated that cases allowing the jury to determine the ultimate issue of probable cause confuse the jury's function in negligence cases and malicious prosecution cases. 298 Md. at 503, 471 A.2d at 306. The court noted that the Boyd line of cases held that, unlike in negligence cases, the jury in malicious prosecution cases does not decide the reasonableness of the defendant's actions. Id. at 498, 471 A.2d at 304. The only reason stated in the opinion as to why the jury should not decide that issue in malicious prosecution cases was that "courts have always distrusted malicious prosecution actions." Id. at 499, 471 A.2d at 304 (quoting W. Prosser, HANDBOOK ON THE LAW
rules on the existence of probable cause, was still valid. The court then applied the *Boyd* rule, examined the facts pertaining to the probable cause issue,\(^107\) and determined that the defendant's motion for a directed verdict should have been granted when the plaintiff failed to rebut evidence showing there was probable cause for the embezzlement prosecution.\(^108\)

In *Cottman v. Cottman*,\(^109\) the court considered the related issue of malicious use of process, a tort with elements similar to malicious prosecution, and found that, as in *Palmer Ford*,\(^110\) there were sufficient facts to show that the defendants had had probable cause to institute civil proceedings.\(^111\) Accordingly, the summary judgment in favor of the defendants was affirmed.\(^112\)

Both *Palmer Ford* and *Cottman* also involved abuse of process claims. "The tort of abuse of process occurs when a party has wilfully misused criminal or civil process after it has issued in order to obtain a result not contemplated by law."\(^113\) In a suit for abuse of process, the plaintiff must prove two elements: (1) an ulterior purpose not legitimate in the use of the process, and (2) a willful act which is an improper or unauthorized use of the process.\(^114\) One can be liable for abuse of process even if he had probable cause to institute the proceedings and can, therefore, be guilty of abuse of process though innocent of malicious prosecution.

In *Cottman*,\(^115\) the Court of Special Appeals used language

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\(^{107}\) The court looked at Wood's testimony about leaving the $400 under the trash can, uncontroverted evidence that he had been an accessory to embezzlement, and at the fact that the case against Wood was dismissed. Finding that the dismissal could not rebut Wood's uncontroverted testimony on his actions, the court ruled that the dismissal created neither a presumption of lack of probable cause nor even an inference of that lack. 298 Md. at 507-10, 471 A.2d at 309-10.

\(^{108}\) Id. at 511, 471 A.2d at 310.


\(^{110}\) Although the court in *Cottman* noted in dictum an incorrect rule of law related to determining probable cause, the court did not use that standard as the facts were undisputed. The court ruled that, as a matter of law, probable cause existed. 56 Md. App. at 438, 468 A.2d at 140.

\(^{111}\) In litigation during divorce proceedings, defendants sought to impose a constructive trust on property held by the plaintiff. *Id.* at 419, 468 A.2d at 134.

\(^{112}\) *Id.* at 432, 468 A.2d at 140.

\(^{113}\) *Palmer Ford*, 298 Md. at 511, 471 A.2d at 310 (quoting Krashes v. White, 275 Md. 549, 555, 341 A.2d 798, 802 (1975)).

\(^{114}\) *Id.* at 511, 471 A.2d at 311 (quoting W. Prosser, *supra* note 106, at 857); 56 Md. App. at 430, 468 A.2d at 140.

\(^{115}\) 56 Md. App. 413, 468 A.2d 131 (1983). Ms. Cottman had sought to impose a
which suggested that, if a party had reasonably believed that he had grounds for maintaining suit, he could not be found to have had an ulterior purpose or to have committed an improper act, the two elements of abuse of process.\textsuperscript{116} If the court meant that one could not commit the tort once probable cause to initiate the proceeding is found, the court was wrong.\textsuperscript{117} A better reading of \textit{Cottman} would be that, when there is no evidence in the record suggesting the existence of either element, a court, considering a motion for summary judgment, should not infer their existence once probable cause is established.\textsuperscript{118}

The discussion of abuse of process in \textit{Palmer Ford} centered on whether liability under that tort required the improper act to occur after the process is instituted.\textsuperscript{119} The defendant contended that the trial court should have granted its directed verdict because there was no evidence that it had engaged in any improper act after the process was instituted.\textsuperscript{120} While apparently conceding liability if it had so acted, Palmer Ford argued that there is no liability when one passively allows the prosecution to proceed and takes no action after process is instituted, other than accepting the debt.\textsuperscript{121} This argument was supported by dicta in Maryland cases and by a majority of decisions from other jurisdictions.\textsuperscript{122}

Because the court found that there was sufficient evidence that Palmer Ford had acted improperly after process issued,\textsuperscript{123} it avoided deciding whether or not abuse of process occurs when a criminal proceeding is instituted in order to coerce the payment of a debt, when no improper act is taken after instituting the process.

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\textsuperscript{116} Id. This position was rejected in \textit{Palmer Ford}.

\textsuperscript{117} See supra notes 113-14 and accompanying text.

\textsuperscript{118} The plaintiff had submitted no evidence to counter the defendant's motion for summary judgment. 56 Md. App. at 422, 468 A.2d at 135.

\textsuperscript{119} 298 Md. at 511-14, 471 A.2d at 310-12.

\textsuperscript{120} Id. at 513, 471 A.2d at 311.

\textsuperscript{121} Id.

\textsuperscript{122} The court collected the cites to the relevant Maryland cases. Id. at 513, 471 A.2d at 312. The court also cited Annot., 27 A.L.R.3d 1202 (1969). That annotation, \textit{Use of Criminal Process to Collect Debt as Abuse of Process}, states that most states hold that an improper act must occur after the process is instituted. Id. at 1206. Only two cases are cited as holding that a tort is committed merely by instituting a criminal process for the purpose of collecting a debt. Id. at 1207.

\textsuperscript{123} 298 Md. at 514, 471 A.2d at 312.
Though the opinion started with quotes from Prosser that forcefully state that there is no liability in the latter case,\(^{124}\) it then quoted Harper and James,\(^{125}\) who would impose liability for using the criminal process to collect debts, even if no act was taken subsequent to its initiation.\(^{126}\) The court cited many Maryland cases which state that it is the improper acts that occur after process is issued which constitute the tort, but then distinguished those cases as not involving the use of criminal process to collect a debt.\(^{127}\) The court then mooted its argument by finding that there was sufficient evidence to support a jury finding that Palmer Ford had attempted to use criminal proceedings to collect its debt after the proceeding was instituted.\(^{128}\) Thus, there is still no Maryland case that decides whether a party is or is not liable for commencing a criminal proceeding for the purpose of collecting a debt, if that party makes no effort to use the process to accomplish that end after it is instituted.

### F. Legal Malpractice

In *Fishow v. Simpson*,\(^{129}\) the plaintiff brought a legal malpractice action based on a breach of contract theory,\(^{130}\) alleging that her attorney had failed to present her case adequately in a medical malpractice action.\(^{131}\) The Court of Special Appeals held that legal malpractice gives rise to a breach of contract action only in "cases involving employment of [the] attorney to perform a specific service in accordance with clearly stated instructions from the client-employer."\(^{132}\)

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124. *See* W. Prosser, *supra* note 106, at 857 ("[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.") *quoted in* 298 Md. at 513, 471 A.2d at 311.


126. 1 F. Harper & F. James, *supra* note 125, would only look to the motive in instituting the criminal process and would hold one liable whenever a party "attempts to attain some collateral objective . . . [A] person using the processes of criminal law to enforce payment of a debt is abusing legal process and is liable in damages." *Id.* at 331.

127. 298 Md. at 513, 471 A.2d at 312.

128. *Id.* at 514, 471 A.2d at 312.


130. The plaintiff also brought a negligence claim against her attorney. She failed on the negligence count because, unlike a contract claim, the negligence count required expert testimony because the defendant's alleged conduct was not so flagrant that a layman could infer or recognize negligence. *Id.* at 316-19, 462 A.2d at 544.

131. *Id.* at 317, 462 A.2d at 543.

132. *Id.* at 318, 462 A.2d at 544. Cases cited by the plaintiff involving breach of contract actions were distinguished because the attorneys in those cases had been hired to perform specific services. In Caltrider v. Weant, 147 Md. 338, 128 A. 72 (1925), the plaintiff hired the attorney for the express purpose of obtaining a mechanic's lien, which
attorney to adopt a particular theory in pursuing her claim, concluded that a breach of contract action could not be supported.\textsuperscript{133}

\section*{G. Accrual of an Action}

In \textit{Pierce v. Johns-Manville Sales Corp.},\textsuperscript{134} the Court of Appeals held that a cause of action for cancer resulting from exposure to asbestos accrues at the time the cancer is discovered, rather than at the time asbestosis is discovered.\textsuperscript{135} The plaintiff filed a wrongful death\textsuperscript{136} and survival action\textsuperscript{137} based on the death of her husband from cancer, which allegedly resulted from exposure to asbestos products manufactured by Johns-Manville.\textsuperscript{138} The decedent was employed by Wallace and Gale Co. from 1949 until he resigned in 1973, when he discovered that he had asbestosis.\textsuperscript{139} Though Pierce had developed asbestosis in 1973, he never sought recovery for that injury.\textsuperscript{140} He contracted cancer in 1979 and died in 1980,\textsuperscript{141} and his widow filed suit shortly thereafter.\textsuperscript{142} Johns-Manville contended that the cause of action arose upon the discovery of the asbestosis in 1973, and that the 1980 action was therefore barred by the three-
year statute of limitations. The Court of Appeals held that the cause of action for the lung cancer arose upon its discovery in 1979, and, therefore, the plaintiff's 1980 claim was timely and not barred by the statute of limitations.

Johns-Manville conceded that, under the Maryland discovery rule, a cause of action accrues at the time the plaintiff discovers or should discover the nature and cause of the injury, but maintained that the cause of action accrued in 1973, when Pierce first discovered the asbestosis. Johns-Manville argued that Pierce's contention that a cause of action accrued in 1979 amounted to an application of the maturation of harm rule, which Maryland courts have consistently rejected. Under the maturation of harm rule, a cause of action does not accrue until all damages or harm arising out of a single wrong are fully ascertainable. Johns-Manville argued that the point of discovery took place when Pierce became aware of the initial harm, asbestosis, rather than when he became aware of the full extent of the harm arising out of asbestos exposure.

The Court of Appeals, however, found that Pierce's cause of action accrued in 1979, when Pierce discovered the lung cancer.

143. Id. at 663, 464 A.2d at 1024-25. Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984) provides in pertinent part: "A civil action at law shall be filed within three years from the date it accrues unless another provision in the Code provides a different period of time within which an action shall be commenced."
144. 296 Md. at 669, 464 A.2d at 1028.
145. Id. at 663, 464 A.2d at 1025. Because the term "accrues" is not defined in the statute, the question of when a cause of action accrues is left to judicial determination. The Court of Appeals first applied the rule in 1917 to malpractice cases, Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917), and extended the application of the rule to cases involving latent diseases in 1978, Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 39 A.2d 299 (1978). In 1981, the court held the rule to be applicable in all cases. Poffenberger v. Risser, 290 Md. 631, 636, 431 A.2d 667, 680 (1981).

The result in Pierce is not a straightforward application of Harig, which held that a cause of action accrues for a latent disease when the claimant knew or reasonably should have known of the nature and cause of the harm. Unlike the plaintiff in Harig, Pierce developed another disease prior to contracting the latent disease. The issue in Pierce was whether the prior discovery of asbestosis barred a later action on the cancer claim. 296 Md. at 664, 464 A.2d at 1025.
146. 296 Md. at 663, 464 A.2d at 1024-25.
147. Id., 464 A.2d at 1025.
149. 296 Md. at 663, 464 A.2d at 1025.
150. Id.
151. Id. at 669, 464 A.2d at 1028.
The court held that this result was not an application of the matura-
tion of harm rule because there were two separate injuries involved,
each caused by exposure to asbestos.  

The court reasoned that Pierce did not discover the extent of the harm in 1979; rather, he
discovered a new and separate harm for which a separate cause of
action arose.

Johns-Manville also argued that a finding that a new cause of
action arose in 1979 because a separate injury was involved violated
the doctrine of res judicata, which states that one wrong gives rise to a single indivisible cause of action. Even if the lung cancer
could be accurately characterized as a separate and distinct injury,
both of the injuries resulted from the same wrong, asbestos exposure. The court agreed with Johns-Manville's interpretation of
the doctrine of res judicata that one wrong gives rise to a single
cause of action, but dismissed the argument because, if, as in Pierce,
no recovery is sought for asbestosis, there is only "a single action
for damages resulting from asbestos exposure."

In determining that Pierce's cause of action accrued when can-
cer was discovered, rather than at the discovery of asbestosis, the
court looked to the policy rationale underlying the statute of limita-
tions. The rationale supports the finding that the cause of action
accrued when Pierce discovered the lung cancer in 1979. The policy
of encouraging a timely suit in order to prevent the loss of evidence,
the disappearance of witnesses, and the fading of memories would
not be furthered by finding that the earlier asbestosis barred the
cancer claim. In suits involving latent diseases, evidence relating to
a latent disease tends to develop rather than disappear over time.
The court recognized that the policy of fostering repose would not

152. The court found that asbestosis and lung cancer are two separate injuries, point-
ing out that the only evidence in the record were studies showing that there is no medi-
cally accepted relationship between the two diseases. Id. at 662, 464 A.2d at 1024.
153. Id.
154. Brief, supra note 137, at 18.
155. See Frontier Van Lines, Inc. v. Maryland Bank & Trust Co., 274 Md. 621, 625,
336 A.2d 778, 780 (1975); In re Carlin's Estate, 212 Md. 526, 532-33, 129 A.2d 827, 831
156. Brief, supra note 137, at 18.
157. 296 Md. at 668 n.9, 464 A.2d at 1027 n.9.
158. Id. at 664-65, 464 A.2d at 1025. The Court of Appeals in Pierce quoted the
Supreme Court: "Statutes of limitation find their justification in necessity and conven-
ience rather than in logic. They represent expedients rather than principles." Id. (quot-
ing Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)).
159. Id. at 666, 464 A.2d at 1026.
be furthered by allowing the later accrual, but determined that fairness to the litigant overrode this policy.

The last reason given by the court for allowing the later accrual was judicial efficiency. If potential plaintiffs who have manifested asbestosis but have been compensated by workmen's compensation know that there is a possibility of a second disease manifesting itself, they would ordinarily have no reason to initiate litigation until the second disease arose. If it never does, then there would be no litigation. But if they knew that recovery for the second disease would be time-barred, they would sue on the possibility of contracting the second disease.  

Finding that there were strong policy reasons for the cause of action for lung cancer to accrue when the cancer was discovered, the court reversed the trial court's granting of summary judgment. The decision is, however, limited to the facts of this case, in which the tort recovery for asbestosis was never sought. Had Pierce sued on the initial asbestosis injury, he would probably have been unable to recover for the cancer, because future damages can only be recovered in Maryland when the plaintiff can show a reasonable medical probability or a greater than 50% chance that such damages will occur. Thus, plaintiffs stricken with asbestosis still face the possibility that, if they sue for asbestosis and later develop cancer, recovery for the later disease may be barred.

**H. Agency**

In *Cox v. Prince George's County*, the plaintiff sought to hold Prince George's County liable for the acts of county police officers who allegedly intentionally allowed and encouraged a police dog to attack and bite Cox. Prince George's County argued that it could not be held liable under the doctrine of *respondeat superior* because,

160. *id.* at 667, 464 A.2d at 1027.
161. *Id.* at 668-69, 464 A.2d at 1027-28.
162. See Davidson v. Miller, 276 Md. 54, 344 A.2d 422 (1975) (medical prognosis cannot be admitted into evidence unless it is based on a reasonable medical certainty). Although there was evidence in the record that asbestosis is associated with an increased risk of lung cancer, the only evidence in *Pierce* indicating the degree of correlation was one study estimating that 17.8% of those suffering from asbestosis subsequently developed lung cancer. 296 Md. at 666 n.7, 464 A.2d at 1026 n.7.
163. At least one court has allowed a second suit in this situation. See generally *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976).
165. *Id.* at 164, 460 A.2d at 1039.
166. Under the doctrine of *respondeat superior*, an agent-principal relationship must exist before the principal can be held liable for the acts of the agent. *Id.* at 165, 460 A.2d
in *Wynkoop v. Hagerstown*, the court had held that police officers were agents of the state rather than agents of the municipality, and, as agents of the state, were insulated from liability by the state's governmental immunity.

The Court of Appeals in *Cox* correctly distinguished *Wynkoop* from *Cox*. The issue in *Wynkoop* was whether the municipality was immune from liability for injuries sustained as a result of the allegedly tortious acts of police officers appointed by the city. *Wynkoop* addressed the question of governmental immunity, rather than the agent-principal relationship.

The question of governmental immunity was not an issue in *Cox* because Prince George's County waived its immunity from suit. Pursuant to its charter, Prince George's County can be held liable as principal for the acts of its police officers if the officers are found to be agents of the county acting within the scope of their employment. One of the issues in *Cox*, therefore, was whether the officers were agents of the county. Because the question of agency is a factual one to be determined by a jury, the Court of Appeals held that the circuit court should not have sustained the county's demurrer on the grounds that it did, that the police officers were not agents of the county as a matter of law.

The Court of Appeals in *Cox* also held that the circuit court erroneously sustained the county's demurrer, which was based on the ground that the county, assuming it was found to be the principal, could not be held liable for the intentional acts of its agents. Maryland law holds that a principal may be held liable for the inten-
tional torts of his agent when the agent was acting within the scope of his employment. The question of what constitutes the scope of employment is a factual issue to be decided by the jury. The demurrer therefore should not have been granted on the ground that, as a matter of law, the officers acting intentionally were not acting within the scope of their employment.

After Cox, a county that has waived its governmental immunity may be found liable as a principal for the acts of its police officers acting within the scope of their employment.

I. Interspousal Immunity

In Boblitz v. Boblitz, the Maryland Court of Appeals abrogated the interspousal immunity doctrine in negligence actions. The court looked to the status of the doctrine in other jurisdictions and concluded that because the majority of jurisdictions had abrogated the doctrine in such cases, it was appropriate for Maryland to follow.

The court in Boblitz rejected the argument that any change in a

175. Id. at 170, 460 A.2d at 1042 (citing Tea Co. v. Roch, 160 Md. 189, 192, 153 A. 22, 23 (1931); Amusement Co. v. Spangler, 143 Md. 98, 121 A. 851 (1923); Cate v. Schaum, 51 Md. 209 (1879)). The court in Cox found that a jury could conclude that the officers were acting within the scope of their employment. Id. at 171, 460 A.2d at 1043.

An agent is acting within the scope of his employment when he acts in furtherance of the principal's business and the harm complained of is foreseeable. Id., 460 A.2d at 1042-43.

176. Id. at 170, 460 A.2d at 1042 (citing Drug Fair v. Smith, 263 Md. 341, 283 A.2d 392 (1971)).

177. Id. at 171, 460 A.2d at 1043.


179. Before Boblitz, the court had abrogated the interspousal immunity doctrine in cases involving intentional torts. In 1978, in Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978), the Court of Appeals allowed a wife to sue her husband for an outrageous, intentional tort. Id. at 335, 390 A.2d at 77. In 1983, in Bender v. Bender, 57 Md. App. 593, 471 A.2d 335 (1983), the Court of Special Appeals held that Lusby had abrogated the immunity in all intentional torts, not just in those which were outrageous. Id. at 602-03, 471 A.2d at 339.

180. 296 Md. at 275, 462 A.2d at 522. Ms. Boblitz alleged that she sustained serious, painful and permanent injuries as a result of her husband's negligent operation of a motor vehicle. Id. at 243, 462 A.2d at 506. The trial judge granted summary judgment to Mr. Boblitz, holding that he was immune from suit as a matter of law under the common law doctrine of interspousal immunity. Id. at 244, 462 A.2d at 506. The Court of Appeals granted certiorari prior to the Court of Special Appeals' consideration of the case and reversed. Id. at 242, 462 A.2d at 506.

181. Id. at 251-73, 462 A.2d at 510-21. As of the date of the Boblitz decision, a total of 36 states had abrogated the doctrine fully or partially. The opinion in Boblitz contained a chart listing the status of the rule in various states. Id. at 276-81, 462 A.2d at 522-24.

182. Id. at 273, 462 A.2d at 521.
well-established common law rule should emanate from the legislature and not the courts. 183 The court reasoned that a common law rule may be changed by judicial decision when a court finds "in light of changed conditions or increased knowledge that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people." 184

Until Jennings v. Government Employees Insurance Co. 185 was decided, Boblitz had little practical effect on negligence suits brought by an automobile passenger against a driving spouse. Prior to Jennings, automobile liability insurance policies routinely contained household exclusions, which prevented recovery on the policy for bodily injury caused by an insured to any family member of an insured. Therefore, a guest spouse could sue a driver spouse but was barred from recovery on the spouse's insurance policy.

In Jennings, the court held that the exclusion was inconsistent with the public policy of Maryland 186 and was therefore invalid and unenforceable. 187 When read together, the Boblitz and Jennings results indicate that, in future suits by passengers against negligent driving spouses, the spouse's insurance policy will become a source of recovery.

Eileen Lunga
Rosamond S. Mandell

183. Id. at 273-74, 462 A.2d at 521-22.
184. Id. at 274, 462 A.2d at 522 (quoting Harrison v. Montgomery County, 295 Md. 442, 459, 456 A.2d 894, 903 (1983)).
187. Jennings, slip op. at 14. The court noted that a clear majority of jurisdictions requiring mandatory automobile insurance have invalidated the exclusion. Id. at 12.