Survey of Developments in Maryland Law, 1984-85

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I. ADMINISTRATIVE LAW

A. Worker's Compensation

1. Statutory Construction.—In Mayor & City Council of Baltimore v. Hockley,¹ the Court of Appeals distinguished the Baltimore City Code provisions authorizing payment of ordinary disability benefits to city police officers and firefighters from those authorizing payment of special disability benefits.² Separate sections of the Baltimore City Code entitle officers to ordinary retirement disability benefits if they are "mentally or physically incapacitated"³ and to special disability benefits if they are "totally and permanently incapacitated as the result of an injury arising out of and in the course of the actual performance of duty."⁴ The court construed the distinction between ordinary and special benefits as a legislative attempt to award officers injured in the line of duty greater financial support than that provided to officers whose incapacity does not arise from on-the-job injuries.⁵ Thus, the class of benefits to which an applicant is entitled depends upon the source of the incapacitation.⁶

The court rejected the distinction suggested by the claims ex-

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2. Id. at 289, 477 A.2d at 1180-81.
3. BALTIMORE CITY, MD. CODE art. 22, § 34(c) (1983) provides:
   Ordinary disability retirement benefit. Any member who has acquired five (5) or more years of service and who has been determined by a claims examiner to be mentally or physically incapacitated for the further performance of the duties of the member's job classification in the employ of Baltimore City, and that such incapacity is likely to be permanent, shall be retired by the Board of Trustees on an ordinary disability retirement, not less than thirty (30) and not more than ninety (90) days next following the date of filing his application for ordinary disability retirement benefits.

(Emphasis added.)

4. BALTIMORE CITY, MD. CODE art. 22, § 34(e) (1983) provides:
   Special disability benefits. Any member who has been determined by the claims examiner to be totally and permanently incapacitated for the further performance of the duties of his job classification in the employ of Baltimore City, as the result of an injury arising out of and in the course of the actual performance of duty, without wilful negligence on his part, shall be retired by the Board of Trustees on a special disability retirement.

(Emphasis added.)

5. Benefits under the § 34(e) special disability provisions are more generous than those under the § 34(c) ordinary retirement disability provisions. 300 Md. at 281 n.2, 477 A.2d at 1176 n.2.

aminers. The examiners argued that entitlement to special as opposed to ordinary disability benefits turned on whether the officer was totally and permanently incapacitated or was still capable of performing certain sedentary duties required of police officers. Because the officers in question were able to perform some, but not all, of the duties of their jobs, the examiners awarded ordinary disability benefits.

The Court of Appeals held that "the level of incapacity necessary to sustain a claim for disability benefits is the same for purposes of both provisions." Finding that the word "incapacitation" denotes a total loss of ability, the court implied that officers are not incapacitated when they are capable of performing some, but not all, of the duties of their job. The court remanded the case to the circuit court for further proceedings in accordance with its opinion.

In Mayor & City Council of Baltimore v. Oros, the Court of Appeals refused to allow the city to reduce its statutory obligation to pay workers' compensation benefits for permanent partial disability by the amount that the city had paid in excess of its coincident obligation to pay temporary total disability benefits. The court found nothing in the language or history of the Workers' Compensation Act to warrant the proposed set-off. To the contrary, such a construction of the statute would "fly in the teeth of the basic legislative design—that an injured worker (or his dependents) is enti-

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7. 300 Md. at 289, 477 A.2d at 1181.
8. Id. at 285, 477 A.2d at 1178.
9. Id. at 281, 477 A.2d at 1176.
10. Id. at 289, 477 A.2d at 1180.
11. Id. at 288-89, 477 A.2d at 1180. Based on dictionary definitions relating to "incapacity," the court concluded that the adjective "totally" in the § 34(e) phrase "totally and permanently incapacitated" is redundant. Id.
12. Id. at 289, 477 A.2d at 1180-81.
13. Id. at 290-91, 477 A.2d at 1181.
15. The city paid the plaintiffs, police officers injured on the job, full wages during their period of temporary total disability, rather than the partial wages awarded by the Workers' Compensation Commission. When ordered to make payments for permanent partial disability, the city requested that the extra benefits paid out for the temporary total disability be set off against the permanent partial disability payments. 301 Md. at 462-63, 483 A.2d at 749.
17. 301 Md. at 470, 483 A.2d at 753. See Jackson v. Beth-Fair Shipyard, 185 Md. 335, 44 A.2d 811 (1945) (period of temporary total disability does not include any part of period of permanent disability); Gorman v. Atlantic Gulf & Pacific Co., 178 Md. 71, 75-77, 12 A.2d 525, 529 (1940) (statute describes four different compensable injury classifications).
tled to receive seriatim the benefits for each of the separate disabilities as were caused by the nature and extent of his injury."¹⁸ Thus, section 33¹⁹ of the Act merely discharges a self-insured employer such as the city "from liability for such of the separate and distinct obligations imposed by the Act as to which it has provided equal or greater benefits."²⁰

2. Subsequent Injury Fund.—In Subsequent Injury Fund v. Kraus,²¹ the Court of Appeals held that, when both an employer and the Subsequent Injury Fund (Fund) are liable for portions of a permanent total disability award, the employer is responsible only for the determinate sum necessary to compensate the employee for that disability which the subsequent injury would have caused, absent the prior impairment.²² The Fund must pay the balance of the award, even though the obligation to make payments may continue indefinitely.²³ The Fund need not make any payments, however, until the employer has satisfied its maximum total liability for the disability.²⁴

James Paul Kraus, a Baltimore City firefighter, became permanently and totally disabled as a result of the combined effects of high blood pressure and two myocardial infarctions.²⁵ The Workers' Compensation Commission found that seventy percent of Kraus' disability was reasonably attributable to occupational disease and ascribed the remaining thirty percent to a preexisting condition.²⁶ The Commission ordered the city and the Fund to pay Kraus disa-

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¹⁸. 301 Md. at 470, 483 A.2d at 753.
¹⁹. The City's set-off argument was predicated on the following language from Md. ANN. CODE art. 101, § 33(c):

Whenever by statute, charter, ordinances, resolution, regulation or policy adopted thereunder, whether as part of a pension system or otherwise, any benefit or benefits are furnished employees of employers covered under § 21(a)(2) of this article, the dependents and others entitled to benefits under this article as a result of the death of such employees, the benefit or benefits when furnished by the employer shall satisfy and discharge pro tanto or in full as the case may be, the liability or obligation of the employer and the Subsequent Injury Fund for any benefit under this article. If any benefits so furnished are less than those provided for in this article the employer or the Subsequent Injury Fund, or both shall furnish the additional benefit as will make up the difference between the benefit furnished and the similar benefit required in this article.

²⁰. 301 Md. at 470, 483 A.2d at 753 (emphasis in original).
²². Id. at 112, 482 A.2d at 468.
²³. Id.
²⁴. Id. at 115, 482 A.2d at 470.
²⁵. Id. at 112, 482 A.2d at 468.
²⁶. Id. at 112-13, 482 A.2d at 468.
bility benefits for as long as the permanent total disability persisted.27

Pursuant to section 66(1) of the Workers' Compensation Act,28 the Commission ordered the employer to begin making the weekly payments.29 The Commission determined the date on which the city could terminate payments by calculating the employer's total liability, a figure derived from the maximum payment period for permanent partial disability awards (500 weeks),30 the percentage of disability that the subsequent injury alone would cause (70%),31 and

27. Id. In 1973, the legislature effectively repealed the § 36(1)(a) language that established a limit on total compensation payable for permanent total disability by adding the following proviso to that section:

Provided, however, that if the employee's total disability shall continue after a total of $45,000.00 has been paid, then further weekly payments at the rate previously paid shall be paid to him during such disability.

Act of May 24, 1973, ch. 671, 1973 Md. Laws ch. 1398 (codified at MD. ANN. CODE art. 101, § 36(1)(a) (1985)). The amendment made possible open-ended awards such as Kraus'.

28. MD. ANN. CODE art. 101, § 66(1), para. 1 (1985) provides in pertinent part:

Whenever an employee who has a permanent impairment due to previous accident or disease or any congenital condition, which is or is likely to be a hindrance or obstacle to his employment, incurs subsequent disability by reason of a personal injury, for which compensation is required by this article resulting in permanent partial or permanent total disability that is substantially greater by reason of the combined effects of the impairment and subsequent injury than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be liable only for the compensation payable under this article for such injury. However, in addition to such compensation to which the employer or his insurance carrier is liable, and after the completion of payments therefor provided by this article, the employee . . . shall be paid additional compensation from [the Fund] . . . .

(Emphasis added.)

29. 301 Md. at 113, 482 A.2d at 468-69.

30. The Commission applied the permanent partial disability provisions because it found that the subsequent injury alone would have resulted in only a 70%, or permanent partial disability. Id. at 116, 482 A.2d at 470. In cases involving permanent partial disability, the Commission must determine the percentage of loss of use and "award compensation in such proportion as the determined loss bears to 500 weeks. . . ." MD. ANN. CODE art. 101, § 36(4)(a) (1985).

31. To determine the amount of compensation payable for a subsequent injury resulting in permanent total disability, the factfinder must first determine the percentage loss of industrial use that the subsequent injury would have caused had the prior impairment not existed, then apply that percentage to the total award. See 301 Md. at 117-119, 482 A.2d at 471-72, where the following cases are discussed: Subsequent Injury Fund v. Pack, 250 Md. 306, 242 A.2d 506 (1968); Anchor Motor Freight v. Subsequent Injury Fund, 278 Md. 320, 363 A.2d 505 (1976); Leach v. John T. Clark & Son, Inc., 20 Md. App. 109, 314 A.2d 689, cert. denied, 271 Md. 759 (1974); Reliance Ins. Co. v. Watts, 16 Md. App. 71, 293 A.2d 836 (1972). The Watts court's hypothetical illustrates the rationale behind the rule:

If one should assume that a person with perfect sight in one eye, though blind in the other, may retain 90% of the industrial use of his body as a whole,
the rate of weekly payments. After the employer made payments equal to its total liability, the Fund had the responsibility for continuing the weekly payments. Because the award essentially provided for payments over the life of the claimant, the Fund's potential obligation, unlike the employer's, was indeterminate.

The Fund argued that the employer and the Fund should make concurrent weekly payments. Under the Fund's plan, the employer would pay the seventy percent of each weekly payment "attributable" to the subsequent injury, and the Fund would pay the remaining thirty percent "attributable" to the preexisting condition.

The court rejected the proposal as contrary to both the language and the intent of the statutory provisions governing awards from the Fund. The court noted that concurrent payments would

it would be clear that loss of his remaining sight would render him totally disabled. It could be said as a medical fact that the subsequent injury resulted in the loss of the 90% industrial use of the body as a whole which he had before the second injury. If the contention of the Subsequent Injury Fund were sound, the current employer and his insurer would be responsible for this 90% loss. The risk of this responsibility is precisely the risk against which § 66(1) protects the employer. If it did not afford that protection, the purpose of the legislation, "to persuade the employer to employ the handicapped individual by limiting the liability, which the employer may otherwise have incurred" would be defeated at the start.

16 Md. App. at 75, 293 A.2d at 838.

32. Two weekly payment rates are relevant to the calculation. First, in calculating the city's maximum potential liability, the Commission used the weekly rate established for permanent partial disability awards. See supra note 30. Under § 36(4a), such awards are subject to a weekly payment cap equal to two-thirds of the state average weekly wage. In Kraus' case, the city would have had to pay $135 each week due to that liability cap. That weekly rate ($135) multiplied by the appropriate number of compensation weeks under the same section (467 weeks) equaled the city's maximum total liability for the subsequent injury ($63,045).

The Commission's award to Kraus, however, represented compensation for a permanent total disability. The permanent total disability provisions in § 36(1)(a) authorize weekly payments at up to two-thirds of the claimant's average actual weekly wage. The Commission found that, based on his weekly wage of $287.17, Kraus was entitled to a $192 weekly payment for permanent total disability. Since the city had to make payments at the $192 weekly rate, it would satisfy its obligation as soon as the payments equaled $63,045, its maximum potential liability (approximately 334 weeks). See 301 Md. at 116-117, 482 A.2d at 470-71.

33. See supra note 28, which sets forth the "employer first, Fund last" payment formula established in § 66(1).

34. The case reached the Court of Appeals after both the Circuit Court for Baltimore City and the Court of Special Appeals affirmed the order of the Commission. The Court of Special Appeals opinion was not reported. 301 Md. at 113, 482 A.2d at 469.

35. Id. at 115, 482 A.2d at 470.

36. Id. at 113, 482 A.2d at 469.

37. Id. at 114-123, 482 A.2d at 469-74.
contravene the express instruction in section 66(1) that the Fund make payments only after the completion of payments by the employer. The court then dismissed the Fund's argument that the Commission should have determined the employer's maximum payment period by applying the open-ended permanent total disability provisions rather than the finite permanent partial disability provisions. The court concluded that section 66(1) requires the Commission to apply the permanent partial limits when, as here, the subsequent injury alone would have caused only permanent partial disability.

The Fund asserted alternatively that the legislature implicitly repealed any ceiling on employer liability in subsequent injury cases involving permanent total disability when it repealed the ceiling on total compensation payable for permanent total disability. The court rejected the argument, again because it rested on the discredited notion that the percentage of disability assigned to the subsequent injury reflects a determination that the subsequent injury caused that portion of the permanent total disability, and that the preexisting condition caused the complementary portion. The court noted that such a "stream of causation analysis" contradicts the rule that the disability percentage attributed to the subsequent injury reflects the loss of industrial use the subsequent injury would have caused had the prior impairment not existed and not the percentage of the claimant's actual total disability caused by the subsequent injury. Absent a clear expression of legislative intent to overturn that rule, the court refused to adopt a contrary construction.

Finally, the court distinguished Kraus from C & P Telephone Co. v. Subsequent Injury Fund, in which the court approved the use of stream of causation analysis to allocate responsibility for death awards. Such awards arise under paragraph three of section 66(1), while disability awards arise under paragraph one.

38. Id. at 114-115, 482 A.2d at 469-70.
39. Id. at 120, 482 A.2d at 472. See supra notes 27 and 30.
40. Id.
41. Id. at 120, 482 A.2d at 472.
42. Id. at 121, 482 A.2d at 473.
43. Id. In other words, when the Commission attributes 70% of the permanent total disability to the subsequent injury, it is saying that alone the subsequent injury would have caused a 70% permanent partial disability. It is not saying that the employer is responsible for 70% of the existing permanent total disability. See supra note 31.
44. See 301 Md. at 121-22, 482 A.2d at 473.
46. 53 Md. App. at 512-13, 453 A.2d at 1245-46.
Because the language in paragraph one differs materially from that in paragraph three, the court found that C & P Telephone did not control.\textsuperscript{49}

In \textit{Barbee v. Hecht Co.},\textsuperscript{50} the Court of Special Appeals overruled \textit{Ferretto v. Subsequent Injury Fund}\textsuperscript{51} and held that compensation from the Subsequent Injury Fund\textsuperscript{52} may not be computed at serious disa-

If the subsequent injury of such an employee shall result in the death of the employee and it shall appear that death was due in part to the previous impairment and in part to the subsequent accidental injury, the Commission shall determine the proportion of such death which is reasonably attributable to the subsequent accidental injury and the proportion thereof which is reasonably attributable to the previous impairment, and the employer or his insurance carrier, or the State Accident Fund shall be liable for the compensation payable for that proportion of the employee's death which is reasonably attributable to the subsequent accidental injury, and the Subsequent Injury Fund shall be liable for the balance of benefits payable as in death cases resulting solely from an accidental injury.

\textsuperscript{48} Id. para. 1 provides:

Whenever an employee who has a permanent impairment due to previous accident or disease or any congenital condition, which is or is likely to be a hindrance or obstacle to his employment, incurs subsequent disability by reason of a personal injury, for which compensation is required by this article resulting in permanent partial or permanent total disability that is substantially greater by reason of the combined effects of the impairment and subsequent injury than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall be liable only for the compensation payable under this article for such injury. However, in addition to such compensation to which the employer or his insurance carrier is liable, and after the completion of payments therefor provided by this article, the employee shall be entitled to receive and shall be paid additional compensation from a special fund to be known as the "Subsequent Injury Fund," created for such purpose in the manner described hereafter in this section, it being the intent of this section to make the total payments to which such employee shall become entitled equal to the compensation that would be due for the combined effects of the impairment and subsequent injury resulting in permanent total disability or a substantially greater permanent partial disability.

\textsuperscript{49} 301 Md. at 123, 482 A.2d at 474.

\textsuperscript{50} 61 Md. App. 356, 486 A.2d 785 (1985).

\textsuperscript{51} 53 Md. App. 514, 454 A.2d 866 (1983). Ferretto sustained a permanent partial disability that amounted to 85% industrial loss of his body. The Workers' Compensation Commission attributed 50% of the loss to an accidental, on-the-job injury and 35% to a preexisting impairment. The Commission then ordered both the employer and the Subsequent Injury Fund to pay awards based on the serious disability rates in Md. Ann. Code art. 101, § 36(4a). 53 Md. App. at 515, 454 A.2d at 887. The Court of Special Appeals determined that § 36(4a) applied to the preexisting impairment only if that condition met the statutory requirements. Since the percentage disability attributable to Feretto's preexisting condition did not meet the statutory definition of serious disability, the court held that he should be compensated at the straight rates prescribed by Md. Ann. Code art. 101, § 36(4a). 53 Md. App. at 525, 454 A.2d at 872. The decision also corrects dicta in Duckworth v. Kelly-Springfield Tire Co., 30 Md. App. 348, 353 A.2d 1, aff'd per curiam, 278 Md. 361, 363 A.2d 965 (1976).

\textsuperscript{52} When a claimant seeks compensation for disabilities attributable in part to on-
bility rates. Under *Ferretto*, a claimant awarded 250 or more weeks of compensation for preexisting impairments could receive the higher rates and additional payments available to serious disability claimants. In *Barbee*, the court concluded, however, that the serious disability provisions in section 36 of the Workers' Compensation Act should have no effect on Subsequent Injury Fund payments under section 66 of the Act.

Both the stated purpose of the Fund and subsequent amendments to sections 36 and 66 indicate the legislature's intent to restrict Subsequent Injury Fund benefits. Thus, the court found that the creators of the Fund intended it to pay out at the "straight rates" specified in section 36(4)(a), in the expectation that "such payments would, when combined with the employer/insurer payments, compensate injured workers for the 'combined effects.'” Furthermore, because Fund benefits necessarily contemplate compensation for both preexisting impairments and subsequent injuries, disabilities compensated from the Fund cannot arise "from one accident” as Section 36(4a) requires. Consequently, serious disability rates only affect "payments made by the employers/insurers when a

the-job injuries and in part to preexisting impairments, the Subsequent Injury Fund relieves the employer of liability for all payments other than those that compensate for the disability that the subsequent injury alone would have caused had there been no preexisting impairment. *See Md. Ann. Code* art. 101, § 66 (1985); Subsequent Injury Fund v. Kraus, 301 Md. 111, 112, 482 A.2d 468, 473 (1984). Claimant Kenneth Barbee was awarded compensation for a preexisting impairment to his right eye and a subsequent back injury sustained in the course of his employment with the Hecht Company. 61 Md. App. at 358, 486 A.2d at 786.


A person who, from one accident, receives an award of compensation for a period of two hundred and fifty (250) weeks or more ... is thereby considered to have a serious disability. ... The weeks for such award shall be increased by one third (computed to the nearest whole number); and the compensation shall be for sixty-six and two-thirds per centum of the average weekly wages. ... (Emphasis added.)


55. 61 Md. App. at 363, 486 A.2d at 788; *cf. Duckworth*, 30 Md. App. at 355-56, 353 A.2d at 4-5 (recognizing legislature's intent to make survivorship provisions of § 36(d)(1) inapplicable to Fund benefits).

56. The Fund is designed to encourage employers to hire workers despite their impairments, 61 Md. App. at 361, 486 A.2d at 787, and to compensate workers "for the combined effects of the impairment and subsequent injury resulting in permanent total disability or a substantially greater permanent partial disability.” *Md. Ann. Code* art. 101, § 66(1) (1985).


58. 61 Md. App. at 362, 486 A.2d at 788.

59. *Id.* at 363-64, 486 A.2d at 788-89.
single accident results in their paying 250 weeks or more of compensation." 60

3. Last Injurious Exposure Rule.—The Occupational Disease Act 61 assigns liability for an employee’s occupational disease to the employer in whose service the employee was last injuriously exposed to the hazards that caused the disease. 62 In Lowery v. McCormick Asbestos Co., 63 the Court of Appeals held that the last injurious exposure rule bars a separate lawsuit against any prior employers in whose service the employee also may have been injuriously exposed. 64 Consequently, prior causal employers enjoy immunity from tort liability in multiple employer occupational disease cases.

The Occupational Disease Act limits victims of occupational disease to the statutory remedies established under the Workers’ Compensation Act, 65 unless “injury or death for which compensation is payable under [the Act] was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof.” 66 When circumstances create liability in a third party, the worker is entitled to nonstatutory legal remedies. 67

60. Id. at 364, 486 A.2d at 789.
64. Id. at 51, 475 A.2d at 1180.

Now, therefore, The State of Maryland, exercising herein its police and sovereign power, declares that all phases of extra-hazardous employments be, and they are hereby withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous employments and their families and dependents are [sic] hereby provided for, regardless of questions of fault and to the exclusion of every other remedy, except as provided in this Act.

66. Md. ANN. CODE art. 101, § 58 (1985) provides:

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

(Emphasis added).

67. Id.
After pursuing the prescribed administrative remedies, Lucille Lowery filed suit against McCormick and fourteen other employers for whom her late husband had worked as an asbestos insulator. Ms. Lowery argued that all prior causal employers are “persons other than the employer” with potential legal liability to pay damages. Hence, they should be amenable to an action at law for damages.

The court interpreted the argument as an attempt to construe “persons other than the employer” as “persons other than the employer liable under the Act to provide compensation.” The court concluded that such a construction was contrary to legislative intent and the plain meaning of the provision. Historically, the last injurious exposure rule has been justified both as an attempt to eliminate the causation difficulties inherent in multiple employer occupational disease cases and to spread the risk of occupational disease liability among employers and their insurers. The court stressed that the legislature enacted the rule with full knowledge of these purposes.

The court also regarded the rule as harmonious with the stated goals of the Workers’ Compensation Act because it provides “greater likelihood for ‘sure and certain relief’ to workers disabled by occupational diseases” and promotes “fair distribution of the heavy burden of occupational disease coverage by spreading liability among all employers on the theory that all causal employers will be last causal employers a proportionate share of the time.” In contrast, the court found that subjecting prior causal employers to a separate civil lawsuit would undermine the certainty of relief and destroy the “time-honored principle of exclusivity from liability by any other remedy for disabilities caused by the environment in the workplace.” The court further noted that plaintiff’s construction of “some person other than the employer” suffered from the inconsistency and illogic inherent in suing persons based on their past

68. 300 Md. at 29, 475 A.2d at 1169.
69. Id. at 32, 475 A.2d at 1170.
70. Id.
71. Id.
72. Id. at 40, 475 A.2d at 1174. The court found the decision and opinion in Farrall v. Armstrong Cork Co., 457 A.2d 763 (Del. Super. Ct. 1983) very persuasive. 300 Md. at 43, 475 A.2d at 1176.
73. See 300 Md. at 33-40, 475 A.2d at 1171-1174 (reviewing extrajurisdictional and historical authority).
74. Id. at 46-47, 475 A.2d at 1178.
75. Id. at 48-49, 475 A.2d at 1179.
76. Id. at 49, 475 A.2d at 1179.
status as employers on the legal theory that they are “some person other than the employer.”

4. **Percentage of Disability.**—In *Gly Construction Co. v. Davis*, the Court of Special Appeals held that the Workers’ Compensation Commission and the courts are free to find a percentage of disability greater or lesser than the disability percentages presented in medical evaluations. Otherwise, to impose such boundaries on the fact finder’s decisions “would impermissibly shift the legal determination of ‘disability’ to physicians.”

Louis Davis suffered severe and extensive injury to his left hand in the course of his employment. The circuit court upheld the Workers’ Compensation Commission finding of 100 percent disability despite the medical evidence that established the highest amount of disability at 90 percent. The Court of Special Appeals affirmed. The court rejected the argument that “100 percent loss of use” means that “the hand [is] no more than a useless piece of flesh and bone attached to the arm only as a decoration that is aesthetically more pleasing than a prosthesis.” In addition to medical evaluations, the legal determination of percentage of disability may reflect the claimant’s testimony and the fact finder’s observations of both the claimant and the results of the injury.

In reaching its decision, the court distinguished the present case from *Gillespie v. R & J Construction Co.* Unlike Davis, the claimant in *Gillespie* testified in court that he retained some sight (use) in

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77. *Id.*
79. *Id.* at 608, 483 A.2d at 1333-34.
80. *Id.* at 607, 483 A.2d at 1333.
81. *Id.* at 605, 483 A.2d at 1332.
82. *Id.* at 606, 483 A.2d at 1332.
83. *Id.* at 609, 483 A.2d at 1334.
84. Under Md. Ann. Code art. 101, § 36(3)(c) (1985), 100 percent (or “permanent”) loss of use is the equivalent of loss of the appendage or organ in question. A finding of “100 percent loss of use” entitled Davis to almost $22,000 more in disability compensation. If Davis suffered only a 90 percent loss of use, as the highest medical evaluation of disability suggested, all disability payments would have been made at a lower weekly rate, the total period of compensation would have been reduced from 333 weeks to 308 weeks under § 36(3), and 83 weeks of “serious disability” payments under § 36(4a) would have been eliminated.
85. 60 Md. App. at 607, 483 A.2d at 1333.
86. *Id.*
87. 275 Md. 454, 341 A.2d 417 (1975) (affirming judgment *non obstante veredicto* when highest percentage of loss presented to jury was less than percentage found by jury).
his injured eye. Consistent with this testimony, medical evaluations rated the disability at 45-90 percent loss of use. In Davis, the court implied that only in those circumstances would a finding of "100 percent loss of use" be so unsupported by the evidence as to require a legal determination of something less than total disability.

5. Judicial Review.—In Glidden-Durkee (SCM) Corp. v. Mobay Chemical Corp., the Court of Special Appeals held that a circuit court may not remand a case to the Workers' Compensation Commission without first considering the issues raised on appeal. Such judicial review ordinarily requires a hearing on the merits of the claim. The court also held that an identical standard of review now governs both occupational disease and accidental injury cases.

Lawrence Cook filed a claim with the Workers' Compensation Commission for disability benefits as a result of lead poisoning that he experienced while employed by Mobay Chemical Corporation at a plant formerly owned by SCM. The Commission conducted a hearing to determine which of the two employers would be liable for the occupational disease claim. SCM and Mobay each argued that it was not liable for Cook's medical expenses and disability payments. The Commission heard testimony from Mobay's medical expert and agreed to hear SCM's expert at a later time.

The hearing was held approximately two months prior to the effective date of a statute that transferred original jurisdiction over occupational disease cases from the Medical Board to the Commission. At the hearing, the Commissioner suggested that he would

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88. 275 Md. at 455-56, 341 A.2d at 418.
89. Id.
90. 60 Md. App. at 608, 483 A.2d at 1333.
92. Id. at 591, 487 A.2d at 1199-1200.
93. Id.
94. Id. at 597, 487 A.2d at 1202.
95. Cook was an SCM employee initially. He suffered a series of hospitalizations from lead poisoning as a result of his employment at the SCM plant. During Cook's temporary total disability, SCM sold the plant to Mobay. Cook subsequently returned to work at the Mobay plant. Two and a half years later, he was hospitalized again and placed on disability leave for treatment of lead poisoning. Cook filed a claim against SCM, who, in turn, impleaded Mobay. Id. at 586-87, 487 A.2d at 1197.
96. Id. at 587, 487 A.2d at 1197-98.
97. Id.
98. Id.
delay further proceedings and a decision on liability until the effective date of that jurisdictional statute.\textsuperscript{100} After that date, but without holding another hearing,\textsuperscript{101} the Commission issued its decision imposing liability on Mobay.\textsuperscript{102} Mobay moved unsuccessfully for a re-hearing\textsuperscript{103} and then petitioned the circuit court for remand to the Commission "so that a proper hearing might be conducted and a proper decision issued based on such a hearing."\textsuperscript{104} At a nonevidentiary hearing on the petition, the court remanded the case "to determine the loss of wage earning capacity of the claimant, if any, and such other pertinent matters as may be properly heard by the Commission in connection therewith."\textsuperscript{105} SCM appealed the order,\textsuperscript{106} arguing that the circuit court exceeded its jurisdiction when it remanded the case without holding a hearing on the merits of the appeal.\textsuperscript{107}

The Court of Special Appeals agreed with SCM.\textsuperscript{108} Section 56(a) of the Workers' Compensation Act\textsuperscript{109} entitles parties aggrieved by certain Commission decisions to judicial review. Specifically, the statute directs the circuit court to determine whether the Commission has justly considered

\textsuperscript{100} Id. at 587, 487 A.2d at 1198.
\textsuperscript{101} Id. at 588-89, 487 A.2d at 1198.
\textsuperscript{102} Id. at 589, 487 A.2d at 1198.
\textsuperscript{103} Id. at 589, 487 A.2d at 1199.
\textsuperscript{104} Id. at 589, 487 A.2d at 1199.
\textsuperscript{105} Id. at 593 n.12, 487 A.2d at 1201 n.12. The trial judge apparently issued a preliminary bench order to remand the case "for any testimony anybody wants to present." Id. at 589, 487 A.2d at 1199. The Court of Special Appeals found that the remand was for the purpose of clarifying or expanding the record, despite the fact that the written order specified that the Commission proceedings were for the purpose of determining the extent of Cook's disability and did not mention any of the issues critical to a determination of which employer would be liable. See id. at 593 n.12, 487 A.2d at 1201 n.12.
\textsuperscript{106} Orders to remand to the Commission are appealable final orders. Id. at 590 n.6, 487 A.2d at 1199 n.6 (citing Eastern Stainless Steel v. Nicholson, 60 Md. App. 659, 484 A.2d 296 (1984), cert. granted, 303 Md. 20, 491 A.2d 586 (1985)).
\textsuperscript{107} Id. at 590, 487 A.2d at 1199.
\textsuperscript{108} Id. at 591, 487 A.2d at 1199.
all the facts concerning the injury, whether it has exceeded the powers granted it by the article, and whether it has misconstrued the law and facts applicable in the case decided. . . . If the Court shall determine that the Commission has acted within its powers and has correctly construed the law and facts, the decision of the Commission shall be confirmed; otherwise it shall be reversed, modified, or remanded to the Commission for further proceedings.¹¹⁰

Finding this language "clear and unambiguous,"¹¹¹ the court concluded that the statute creates conditions precedent to the court’s authority to remand.¹¹² In particular, the court construed the word "determine" as a requirement that "the reviewing court . . . ascertain or decide whether the Commission has properly construed the facts and law within its lawful grant of authority."¹¹³ Only after making this determination may the court remand the case to the Commission.¹¹⁴ As a necessary corollary, then, the circuit court lacks authority to remand to the Commission until it considers the facts and law relevant to the original claim.

The court found that this construction of limited judicial power to remand is supported by case law, judicial practice and legislative intent.¹¹⁵ In 1977, the legislature added the remand provision to section 56(a).¹¹⁶ Prior to that amendment, the court had prohibited remands to the Commission merely "for the purpose of making a more understandable record."¹¹⁷ Furthermore, a court could remand "only for a determination of those issues 'which under the statute the commission alone had the jurisdiction to decide in the first instance.' "¹¹十八 From this precedent, the court concluded that the practice prior to the 1977 amendment required a determination of the issues raised on appeal before remand.¹¹⁹ The court construed the amendment as merely a codification of the common law

¹¹¹. 61 Md. App. at 592, 487 A.2d at 1200.
¹¹². Id.
¹¹³. Id. at 592-93, 487 A.2d at 1200.
¹¹⁴. Id. at 593, 487 A.2d at 1200.
¹¹⁵. Id. at 593-96, 487 A.2d at 1200-02.
¹¹⁸. 61 Md. App. at 595, 487 A.2d at 1202 (quoting McCulloh & Co. v. Restivo, 152 Md. 60, 67, 136 A. 54, 56 (1927)).
¹¹⁹. 61 Md. App. at 595, 487 A.2d at 1202.
The court also noted that restricting transfers of workers' compensation cases comports with the goal of the Workers' Compensation Act to provide "simple, speedy, and economical procedures consistent with practical justice." Finally, recognizing the jurisprudential problems posed by a deficient administrative record, the court emphasized that the court's authority to hear additional testimony not presented to the Commission "militat[es] against the need for a remand to clarify the record."

Because the record presented the issue, the court then considered the proper standard of review in occupational disease cases. The court held that "different standards of review of occupational disease cases and accidental injury cases are no longer viable" because the legislature repealed the statutory provisions that had distinguished occupational disease claim procedures from accidental injury claim procedures. Accordingly, the court reversed the order remanding the case to the Commission and remanded the case to the circuit court for an "essentially de novo" trial.

Although the holding on the remand issue applies only to appeals from workers' compensation proceedings, the court's opinion may have import for judicial review of cases arising from other administrative adjudications. Section 10-215 of the Administrative Procedure Act (APA) also authorizes the court to remand to an administrative agency. The APA, however, does not expressly condition that authority as does section 56(a) of the Workers' Compensation Act. Even without such conditional language, the Court of Special Appeals recently found that the APA remand provision presents sufficiently analogous issues to warrant extension of the rationale in Glidden-Durkee to any judicial remand for further ad-

120. Id. at 596, 487 A.2d at 1202.
121. Id. (citing Yellow Cab Co. v. Biasasky, 11 Md. App. 491, 275 A.2d 193 (1971)).
122. Id. at 598, 487 A.2d at 1203; cf. MD. STATE GOV'T CODE ANN. § 10-215(e) (1984) (circuit court may not take additional evidence in appeals under the Administrative Procedure Act). The court also concluded that the circuit judge erred in remanding the case because the remand petition was an improper appeal from the denial of the motion for rehearing. 61 Md. App. at 598 n.13, 487 A.2d at 1203 n.13. The Court of Special Appeals declined to reach the merits of the issues raised on appeal. 61 Md. App. at 598, 487 A.2d at 1203.
123. 61 Md. App. at 596-97, 487 A.2d at 1202.
124. Id. at 597, 487 A.2d at 1202. See supra note 99.
125. Id. at 598, 487 A.2d at 1203.
126. MD. STATE GOV'T CODE ANN. § 10-215(g)(1) (1984) provides that "[i]n a proceeding under this section, the court may: (1) remand the case for further proceedings. . . ."
ministative proceedings. 127

B. Judicial Review of Administrative Action

1. The "Contested Case".—In Warwick Corp. v. Department of Transportation, 128 the Court of Special Appeals held that an administrative proceeding to decertify a company as a minority business enterprise ("MBE") 129 may ripen into a "contested case" entitled to judicial review. 130 The Court of Appeals has long required that judicial review of administrative actions be specifically authorized by statute. 131 The Administrative Procedure Act establishes a right to judicial review for parties "aggrieved by a final decision in a contested case." 132 A "contested case" is "a proceeding before an agency in which the legal rights, duties, statutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." 133

Although the statute does not address decertification hearings, 134 the Department of Transportation has adopted regulations 135 that entitle MBEs to notice of the proposed decertification and an opportunity to show cause why certification should not be withdrawn. 136 The court concluded that these regulations made the MBE decertification proceeding one "required by law . . . to be determined after an agency hearing." 137 Under Warwick, then, an administrative proceeding mandated by regulation, but not by statute,
may be a "contested case" entitled to judicial review.\textsuperscript{138}

In \textit{Donocam Associates v. Washington Suburban Sanitary Commission},\textsuperscript{139} the Court of Appeals held that an administrative determination resulting in the assessment of water and sewer front-foot benefit charges was a "contested case" from which an aggrieved property owner could appeal.\textsuperscript{140} The court observed that the nature of the hearing, not its underlying function, determines whether a matter is a contested case.\textsuperscript{141} In this case, the statute\textsuperscript{142} entitled the property owner to a hearing that was "more than an opportunity for a property owner to cry out in rage and frustration at what he may regard as unreasonably high costs."\textsuperscript{143} The court found that the hearing afforded the property owner an opportunity to challenge and to obtain a ruling on the correctness of the assessment.\textsuperscript{144} Because the administrative agency actually determined the rights and duties of the property owner at the hearing, the proceedings were a "contested case" entitled to judicial review under the Administrative Procedure Act.\textsuperscript{145}

2. \textit{Exhaustion of Remedies}.—Ordinarily, judicial review of administrative action is limited to cases in which aggrieved parties have exhausted their administrative remedies.\textsuperscript{146} Maryland courts have

\textsuperscript{138} In reaching its decision, the court relied in part on Murray v. State Dep't of Social Services, 260 Md. 323, 272 A.2d 16 (1971), in which the Court of Appeals determined that a hearing regarding a claim under the Aid to Families with Dependent Children program may be a "contested case" because validly promulgated agency regulations afforded recipients a pretermination hearing.

\textsuperscript{139} 302 Md. 501, 489 A.2d 26 (1985).

\textsuperscript{140} The Washington Suburban Sanitary Commission levied "front foot benefit charges" against Donocam pursuant to a statute authorizing such assessments in order to recoup costs incurred in constructing and providing water and sewer lines. 302 Md. at 505-06, 508, 489 A.2d at 28, 29. Donocam had constructed certain of the assessed lines and given them to the Commission. \textit{Id.} at 503, 489 A.2d at 27. The other assessed lines did not benefit the Donocam property, and Donocam had not requested them. \textit{Id.} at 506, 489 A.2d at 28-29. The Commission upheld the assessments after public hearings at which Donocam objected. \textit{Id.} at 508-09, 489 A.2d at 30. The circuit court voided the assessments as "arbitrary and capricious." \textit{Id.} The Court of Special Appeals reversed, holding that the hearing was not a "contested case" entitled to judicial review. Washington Suburban Sanitary Comm'n v. Donocam Assocs., 57 Md. App. 719, 727, 471 A.2d 1097, 1101 (1984). The Court of Appeals reinstated the circuit court's order. 302 Md. at 515, 489 A.2d at 33.

\textsuperscript{141} 302 Md. at 512, 489 A.2d at 31.

\textsuperscript{142} \textit{Md. Ann. Code} art. 67, § 5-1 (recodified at \textit{Md. Ann. Code} art. 29, § 5-101(c) (1983)) provides that assessments may be challenged at a hearing.

\textsuperscript{143} 302 Md. at 513, 489 A.2d at 32.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 512-13, 489 A.2d at 32.

\textsuperscript{146} A party aggrieved by an administrative action must pursue all of the available
excepted from this general rule cases that make constitutional challenges either to the validity of the statute as a whole or to "the power or authority (including whether it was validly enacted) of the legislative body to adopt the legislation from which relief is sought." In Goldstein v. Time-Out Family Amusement Centers, Inc., the Court of Appeals reiterated that constitutional attacks on the manner in which a statute has been applied do not fall within this constitutional exception to the exhaustion of remedies doctrine.

Time-Out had sought declarations that certain statutory exceptions to the operation of an admissions and amusement tax denied equal protection. It also argued that the regulation pursuant to which the tax was levied violated its right to equal protection by denying it the economic advantage available to similar businesses. The court concluded that Time-Out did not attack the power of the legislature to enact exceptions to a general scheme of taxation, but merely challenged the discriminatory effects created by those discrete statutory exemptions and regulatory interpretations that benefitted businesses similar to Time-Out. Therefore, the court ruled that the case did not fall within the "constitutional exception" administrative remedies, including those prescribed by statute, as a condition precedent to judicial review by a circuit court. See DuBois v. City of College Park, 280 Md. 525, 533, 375 A.2d 1098, 1104 (1977) and cases collected therein.


149. 301 Md. 583, 483 A.2d 1276 (1984).

150. Id. at 590, 592, 483 A.2d at 1280, 1281. This distinction between attacks on the application of a statute and attacks on the validity of the statute as a whole was first discussed in Poe v. Baltimore City, 241 Md. 303, 308-10, 216 A.2d 707, 709-10 (1966). A later discussion, and one on which the Time-Out court particularly relied, can be found in State Dep't of Assessments and Taxation v. Clark, 281 Md. 385, 403-04, 380 A.2d 28, 39 (1977).

151. 301 Md. at 586, 483 A.2d at 1278. Md. ANN. CODE art. 81, § 406 (1980 & Supp. 1985) creates exemptions from the tax for nonprofit and charity institutions and for certain recreational businesses, including bowling lanes, boxing and wrestling matches, tennis courts, and charter fishing. Time-Out operated "family amusement centers" featuring coin-operated games. 301 Md. at 585, 483 A.2d at 1278.

152. 301 Md. at 591, 483 A.2d at 1281. Md. ADMIN. CODE tit. 03, § 01.01.01 (1985) permits businesses that derive gross receipts from the amounts charged for "admissions," as defined in the act, to pass on the cost of the tax by charging a "tax included" admission price. The "tax included" option was not available to Time-Out because the company's receipts were not derived from "admissions."

153. 301 Md. at 590-91, 483 A.2d at 1280-81.
3. Discovery in Administrative Proceedings.—In *Public Service Commission v. Patuxent Valley Conservation League*, the Court of Appeals limited judicial discretion to order the deposition of administrative decisionmakers in an action for judicial review of an administrative decision. The court held that mere allegations of bad faith and impropriety cannot justify a discovery order requiring an administrative decisionmaker to appear for a deposition regarding a decision in which he participated. Furthermore, any order permitting such discovery is immediately appealable.

After extended testimony and upon the recommendation of the hearing examiner, the Maryland Public Service Commission granted a Certificate of Public Convenience and Necessity for the construction of a voltage transmission line between Howard and Montgomery Counties. Howard County and a group of property owners brought an action in circuit court seeking judicial review of the administrative decision. Before trial, the property owners sought to take the depositions of the individual commissioners who participated in the agency decision. The Commission filed a motion for a protective order to prevent the discovery. At a hearing on the motion, the plaintiffs alleged that the Commission had used improper procedures in reaching its decision and that the hearing examiner may have been biased. Citing these allegations of bad faith and improper procedure, the circuit court ordered the commissioners to appear for the depositions, but stayed its order pending appeal.

The Court of Appeals first considered whether the circuit court’s discovery order was immediately appealable. Faced with a similar question twenty years earlier in *Montgomery County Council v.*
Kaslow, the court held that a circuit court order granting a request to depose administrative adjudicators was not immediately appealable because it was not a "final judgment." In Patuxent Valley, the court agreed that "ordinarily an appeal will lie only from a final judgment," but here, "[r]egardless of the outcome of the trial, the disruption to the administrative process . . . is incurred at the first instance . . . [and] it would be impossible to cure the harm done . . . once the depositions have been taken." The court held that under the collateral order doctrine, developed after the Kaslow decision, this type of discovery order "may be immediately appealed by the agency itself, or, if a party, by the government of which the agency is a part."

Having overcome the threshold procedural issue, the court considered the propriety of the circuit court's discovery order. Generally, a party challenging an agency action should not be permitted to inquire into the mental processes of an administrative official. If the agency did not make administrative findings of fact and the record does not reveal the basis for the administrative decision, however, a court may look to other methods to fill the information gap. Although the court has the power to require

166. 235 Md. 45, 200 A.2d 184 (1964).
167. Id. at 53, 200 A.2d at 188.
168. 300 Md. at 206, 477 A.2d at 762.
169. Id. at 207, 477 A.2d at 763. Cf. Montgomery County Council v. Kaslow, 235 Md. at 50-51, 200 A.2d at 186-87 (court did not consider disruptive effect on administrative process).
170. Under the collateral order doctrine, an aggrieved party may take an immediate appeal from "a limited class of orders which do not terminate litigation in the trial court." 300 Md. at 206, 477 A.2d at 762. Such orders "must [(1)] conclusively determine the disputed question, [(2)] resolve an important issue [, (3) be] completely separate from the merits of the action, and [(4)] be effectively unreviewable on appeal from a final judgment." Clark v. Elza, 286 Md. 208, 213, 406 A.2d 922, 925 (1979) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).
171. 300 Md. at 210, 477 A.2d at 764. The court did not consider whether the individual administrative officials may appeal such discovery orders. Id. at 210 n.3, 477 A.2d at 764 n.3.
172. Id. at 210, 477 A.2d at 764.
173. Id. at 212, 477 A.2d at 765. Although in Kaslow the court failed to reach the substantive discovery issue, the opinion contained dicta that a trial court might exercise its "power to inquire into the matters dehors the [administrative] record . . . by utilizing the discovery processes." 235 Md. at 53, 200 A.2d at 188.
174. 300 Md. at 214, 477 A.2d at 766 (citing United States v. Morgan, 313 U.S. 409, 422 (1941); 3 Davis, Administrative Law Treatise, §§ 17.4-17.7 (2d ed. 1980)).
administrative adjudicators to explain their actions, the Court of Appeals recommended instead that the circuit court remand the action to the administrative agency for the necessary findings of fact.176

Because judicial review of administrative decisions focuses on the sufficiency of the administrative record, the court also noted that the testimony of the individual decisionmaker generally is not "relevant" material for discovery purposes.177 Neither would such testimony be admissible as "additional evidence" to be considered during judicial review of the administrative decisions.178 Only a strong showing that the adjudicator acted in bad faith or behaved improperly during the decisionmaking process will justify an intrusion into the thoughts of the decisionmaker and a disruption of the administrative process.179

C. Other Developments

1. Employment Discrimination.—In B & O Railroad v. Bowen,180 the Court of Special Appeals decided for the first time the proper allocation of the burden of proof in a handicap discrimination case.181 The court held that the burden of persuasion as well as the burden of production may be shifted to the employer during the course of the evidentiary hearing.182

B & O Railroad rejected Robert Bowen's application for employment on the ground that the heavy lifting requirements of the job might dislodge a bullet embedded near Bowen's spine.183 Believing that B & O had unlawfully discriminated against him because


177. "[T]he scope of permissible discovery is not without limits.... [M]atters which either are not relevant or are subject to a privilege are not discoverable." 300 Md. at 216, 477 A.2d at 767-68. See Md. R. P. 2-402 (formerly Md. R. P. 400 (1977)); Md. ANN. CODE art. 78, § 96 (1980).

178. 300 Md. at 217, 477 A.2d at 768.

179. Id. at 218, 477 A.2d at 768.


181. Md. ANN. CODE art. 49b, § 16(a)(1) (1979), provides:

(a) It shall be an unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment. . . .

182. 60 Md. App. at 309, 482 A.2d at 926.

183. Id. at 301-02, 482 A.2d at 922.
of his physical handicap, Bowen filed a complaint with the State Commission on Human Relations. Bowen presented evidence that he had successfully performed the heavy lifting requirements of several different jobs following the injury. The Commission found that B & O had committed unlawful employment discrimination in refusing to hire Bowen.

On appeal, B & O contended that the hearing examiner had erroneously transferred the burden of persuasion from the plaintiff to B & O. In the absence of a statute allocating the burdens of production and persuasion, B & O suggested that the court adopt the allocation established for Title VII discrimination cases by the Supreme Court in McDonnell Douglas Corp. v. Green. McDonnell Douglas contemplates two shifts in the burden of production, but none in the burden of persuasion, which remains on the plaintiff throughout the proceedings.

The court noted initially that burden of proof issues do not involve the specialized knowledge or expertise of administrative adjudicators. Thus, courts should not defer to administrative decisions regarding such issues. It then declined to follow a strict McDonnell Douglas approach in handicap discrimination cases. Actions under Title VII challenge discrimination on the basis of race, sex, religion or national origin. Because the law prohibits any discrim-

184. Id. at 302, 482 A.2d at 923.
185. Id.
186. Id. at 304, 482 A.2d at 924.
187. Id.
189. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 252-53 (citations omitted).
191. 60 Md. App. at 306, 482 A.2d at 925.
192. 42 U.S.C. §§ 2000e-2000h-6 (1982). Note that the antidiscrimination language in article 49B, supra note 181, covers these types of discrimination as well as discrimina-
inination on those bases, Title VII cases focus on whether the employment rejection resulted from the employer’s unlawful discriminatory intent. In contrast, liability in handicap discrimination cases turns on whether the employment rejection resulted from admittedly discriminatory treatment that was not justified by the circumstances of the employment and the handicap in question. Thus, the relevant inquiry in handicap discrimination cases concerns objective facts regarding the physical demands of the job and the physical capabilities of the applicant.

To account for the issues unique to handicap discrimination cases, the court authorized a shift in the burden of persuasion to the employer. Once [a plaintiff] has established a prima facie case of handicap discrimination—that he was physically able to perform the duties of [the job]—the burden of persuasion shift[s to the employer] to establish to a ‘reasonable probability’ its defense that [plaintiff’s] physical handicap would create a future hazard to his health or safety.

Shifting this heavy burden ensures that discrimination against handicapped individuals is limited to circumstances evidencing necessity. In Bowen’s case, the court found that B & O had failed to establish anything more than a “mere possibility” that Bowen’s handicap would pose a safety threat.

2. Arbitration of Teacher Grievances.—In Howard County Board of Education v. Howard County Education Association, the Court of Special Appeals upheld the validity of a grievance arbitration clause in

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193. 60 Md. App. at 307, 482 A.2d at 925.
194. See id.
195. With regard to the burden of production, the court concluded that the employer’s “special knowledge, expertise and [the] facts within his control” make it fair that he produce evidence concerning the qualifications and physical demands of the job. 60 Md. App. at 311, 482 A.2d at 927. This position is consistent with McDonnell Douglas.
196. Id. at 309, 482 A.2d at 926 (emphasis added).
197. Id. The court cited with approval similar holdings in other jurisdictions. See, e.g., Maine Human Rights Comm’n v. Canadian Pacific Ltd., 458 A.2d 1225, 1234 (Me. 1983).
198. In upholding the findings of the Human Relations Commission and the circuit court, the Court of Special Appeals emphasized that B & O’s medical testimony that the work “might possibly dislodge” the bullet did not establish a “probability” of risk. 60 Md. App. at 312-13, 482 A.2d at 928.
an employment agreement between a local school board and a local teachers union.\textsuperscript{200} A Howard County teacher sought expungement of an unsatisfactory observation report on the grounds that it constituted disciplinary action without cause in violation of the teachers' employment agreement.\textsuperscript{201} Under that agreement, the teachers' association had the right to submit grievances to "'binding arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association.'"\textsuperscript{202}

Initially, the Board challenged the validity of the agreement to arbitrate.\textsuperscript{203} Although the agreement did not expressly invoke the Maryland Arbitration Act,\textsuperscript{204} the court held that the common law rule disfavoring executory agreements to arbitrate\textsuperscript{205} did not render the arbitration provision unenforceable.\textsuperscript{206} The court found such a common law construction contrary to the parties' expressed intent,\textsuperscript{207} the modern trend toward arbitration,\textsuperscript{208} and the legislature's approval of binding arbitration agreements between local boards of education and teachers' associations.\textsuperscript{209} Although it was not clear that the agreement to arbitrate covered disputes concerning classroom observations, the court also held that the arbitrator should make the initial determination of arbitrability under the terms of the agreement.\textsuperscript{210}

\textsuperscript{200} Id. at 636-40, 487 A.2d at 1222-24.
\textsuperscript{201} Id. at 636, 487 A.2d at 1222. Article V, § M of the employment agreement provided that "[n]o teacher will be disciplined, reprimanded or reduced in rank or compensation without cause." Id.
\textsuperscript{202} Id. at 635-36, 487 A.2d at 1222 (quoting Article III, § C of the Master Agreement).
\textsuperscript{203} Id. at 638, 487 A.2d at 1223. At common law, in the absence of legislation to the contrary, executory agreements to arbitrate the ultimate rights of the parties were unenforceable. See id. at 637, 487 A.2d at 1223 (quoting Bel Pre Medical Center v. Frederick Contractors, 21 Md. App. 307, 316-17, 320 A.2d 558, 564 (1974), rev'd on other grounds, 274 Md. 307, 334 A.2d 526 (1975)). The Maryland Arbitration Act, Md. Cts. & Jud. Proc. Code Ann. §§ 3-201 to -234 (1984), does not displace that common law rule "unless it is expressly provided in the agreement [to arbitrate] that [the act] shall apply." Id. § 3-206(b). The Board argued that, since the employment agreement did not invoke the Maryland Arbitration Act, the court should apply the common law rule.
\textsuperscript{205} See supra note 203.
\textsuperscript{206} 61 Md. App. at 639-40, 487 A.2d at 1224.
\textsuperscript{207} Id. at 639, 487 A.2d at 1224.
\textsuperscript{208} Id.
\textsuperscript{210} 61 Md. App. at 643-44, 487 A.2d at 1226.
The Board argued alternatively that arbitration of grievances concerning teacher discipline impermissibly delegates the Board's statutory responsibility to review matters concerning the proper administration of the school system. The court recognized that the Board may not delegate certain responsibilities to a third party arbitrator. In particular, the Board may not submit to arbitration any matter concerning the establishment of educational policy and those matters concerning the implementation of educational policy that have been statutorily prescribed. The court concluded, however, that disputes regarding classroom observation reports involve neither statutorily prescribed matters concerning the implementation of educational policy nor "disputes 'in which the ingredient of educational policy is so comparatively heavy that even voluntary arbitration would be excluded.'"

3. Content of Referendum Petitions.—In City of Takoma Park v. Citizens for Decent Government, the Court of Appeals invalidated a referendum petition that failed to inform prospective voters which portions of the challenged statute the petition proposed to modify. The court concluded that the language of the petition failed to inform the voter whether all or only some words were to be deleted from the challenged act and whether only discrete terms or the entire provisions in which the words appear were to be deleted from the act. Furthermore, the petition failed to set forth the lengthy

211. 61 Md. App. at 644, 487 A.2d at 1226.
212. Id. at 647, 487 A.2d at 1228.
216. Id. at 450, 483 A.2d at 354. A successful referendum petition suspends operation of the challenged provisions of a statute pending a vote on the referendum question(s) at the next general election. MONTGOMERY COUNTY CHARTER art. 1, § 115 (1977). The petition sponsors proposed deletions of certain words in a Montgomery County act that prohibits discrimination in employment, housing, and public accommodations on the basis of sexual orientation. 301 Md. at 443, 483 A.2d at 350. MONTGOMERY COUNTY CODE § 16-5 (1977) requires that the petition identify the title of the challenged act and the challenged provisions of that act. The petition in this case identified the act by bill number and stated "'[t]hose certain provisions hereby petitioned for a referendum vote are any mention or definition within the bill of the terms, 'sexual orientation, homosexuality, heterosexuality, or bisexuality.'" 301 Md. at 443, 483 A.2d at 350 (emphasis added).
217. The court found that the use of the word "or" in listing the terms to be deleted caused these ambiguities. 301 Md. at 449-50, 483 A.2d at 354.
Because the sponsors of the petition failed to "strictly adhere to those provisions of the law which grant them the concession of the referendum," the petition failed.

The court explained that a valid referendum petition must reasonably advise petition signers which laws are to be suspended if the petition is successful in forcing a referendum vote. Preelection publicity regarding the purpose of the petition is not relevant to a determination of whether signatories were properly advised. Because of the ambiguities inherent in the petition under review, the court could not determine whether the signatories understood that the effect of the petition would be to preempt the act in the manner advocated by the petition sponsors. Given these uncertainties, the court refused to allow a small minority to suspend the operation of a law enacted pursuant to the will of the majority.

4. Motion Admission to Maryland Bar.—The Court of Appeals adopted a case-by-case approach to motion admissions to the state bar in In re Application of Mark W. The court held that "employment as a hearing examiner for the Maryland Department of Employment and Training does not constitute practice of law so as to permit an individual to become a member of the Maryland Bar without taking the usual bar examination." The Maryland Code provides for bar admission for a "member of the bar of any state, district or territory of the United States, who, for five of the preceding seven years, has been engaged as a practi-

218. Id. at 449, 483 A.2d at 354. The full title of the act filled more than a double spaced page in elite sized type. Id. at 443, 483 A.2d at 350.
219. Id. at 449, 483 A.2d at 353-54 (quoting Gittings v. Board of Sup. of Elections, 38 Md. App. 674, 681, 382 A.2d 349, 353 (1978)). It is well established that those seeking to exercise the referendum privilege must, as a condition precedent, strictly comply with the prescribed petition format and procedure. Id. at 447-449, 483 A.2d at 352-54, and cases discussed therein.
220. Id. at 450, 483 A.2d at 354.
221. Id.; cf. Pickett v. Prince George's County, 291 Md. 648, 659, 436 A.2d 449, 455 (1981) (in a postelection challenge, court may consider preelection publicity to determine whether voters were properly informed before referendum vote).
222. 301 Md. at 449-50, 483 A.2d at 354.
223. Section 114 of the Montgomery County Charter authorizes a referendum vote upon petition by five percent of the qualified voters in the county. Id. at 442, 483 A.2d at 350. The courts have recognized the right of referendum as a "concession to an organized minority and a limitation upon the rights of the people." Tyler v. Secretary of State, 229 Md. 397, 402, 184 A.2d 101, 103 (1962).
224. 303 Md. 1, 491 A.2d 576 (1985).
225. Id. at 2, 491 A.2d at 576.
tioner, judge, or teacher of law." The State Board of Law Examiners evaluates each petition in light of the statute and any additional rules promulgated by the Court of Appeals. The Rules Governing Admission to the Bar permit the Board to consider, among other factors, the extent of the petitioners' experience and reputation within their specialties, the type of employment, the nature and extent of petitioners' professional duties and responsibilities, the extent of their contacts with and responsibility to clients, and the extent of their professional contacts with practicing lawyers and judges. Petitioners have the burden of proving that their work qualifies them as "practitioners of law."

In 1974, Mark W. passed the Pennsylvania bar exam. Since 1975, he had maintained a limited law practice in Pennsylvania and had been employed by the Maryland Department of Employment and Training. He had served, at various times, as a hearing officer, a hearing examiner, and a supervisor of Appeals Division hearing examiners. His duties primarily required the interpretation and enforcement of article 95A of the Maryland Unemployment Insurance Law.

Mark W. sought admission to the Maryland bar without passing the usual bar examination upon the basis of his employment with the Department of Employment and Training. The Board of Law Examiners denied his petition, and he appealed.

A survey of statutes and case law from other jurisdictions convinced the court that "no broad rule can be laid down" and that "each application must be judged on its own facts." Applying the strict construction rule applicable to motion admissions, the court found that this petitioner's employment did not fall within the

227. 303 Md. at 18, 491 A.2d at 585.
228. Rules Governing Admission to the Bar, Rule 14d(ii) (1980).
229. Id. Rule 14d(iii).
230. Id. Rule 14g.
231. 303 Md. at 4, 491 A.2d at 577.
232. Id.
233. Id. at 4-5, 491 A.2d at 577.
234. Id. at 5-6, 491 A.2d at 577.
235. Mark W. failed the Maryland bar examination eight times between 1973 and 1977. Id. at 4, 491 A.2d at 577.
236. Id.
237. Id. at 6, 491 A.2d at 578.
238. Id. at 7-18, 491 A.2d at 579-85.
239. Id. at 18, 491 A.2d at 585.
240. See In re Lohmeyer, 218 Md. 575, 580, 147 A.2d 703, 706 (1959) (rules for admission on motion must be strictly construed).
"fair intendment" of the term "practice of law," although his job involved work with legally related matters.\footnote{303 Md. at 19, 491 A.2d at 585. The court rejected invitations to define the term "practice of law" and refused to adopt the Court of Special Appeals' definition in Lukas v. Bar Ass'n, 35 Md. App. 442, 371 A.2d 669 (1977) (enumerating three general areas constituting the practice of law: instructing and advising clients in regard to the law, preparing documents requiring more than a layperson's knowledge of legal principles, and representing clients before public tribunals). 303 Md. at 6, 491 A.2d at 578. The court concluded instead that "[t]he more practical approach is to consider each state of facts and determine whether it falls within the fair intendment of the term ['practice of law']." 303 Md. at 8, 491 A.2d at 579 (quoting Grievance Comm. v. Payne, 128 Conn. 325, 329, 22 A.2d 623, 625 (1941)).} The court emphasized that the petitioner's work was narrow, specialized and did not involve either public or private clients.\footnote{Id. at 18, 491 A.2d at 585.} The court also rejected attempts by the petitioner to liken his functions to that of a judge and found instead that employment as a hearing examiner did not expose the petitioner to the wide range of legal problems faced by judges.\footnote{303 Md. at 19, 491 A.2d at 585.}

The court's decision and opinion suggest that even a strong demonstration of experience and competence as a government specialist in a limited area of administrative law, with nothing more, will not qualify a petitioner for admission to the Maryland bar without taking the usual bar examination. Given the court's case-by-case approach, however, the parameters of "specialist" and "limited area of administrative law" may be flexible enough to warrant different results in subsequent cases. In any event, the decision highlights the court's commitment to a competency standard defined not only by depth of legal knowledge, but also by breadth.

Karen Sherwood Payne
II. CIVIL PROCEDURE

A. Final Judgments

1. Creation of Final Judgments.—In State Central Collection Unit v. Columbia Medical Plan, the Court of Appeals held that an order sustaining a demurrer must prohibit amendment of the pleadings before it is considered an appealable final judgment. Columbia Medical Plan's (CMP) demurrer to a suit for costs was granted, and the State's motion to reconsider the order was denied. Neither order stated whether the State had leave to amend the pleadings. One year later, the trial court entered final judgment at the State's request, and the State appealed.

The Court of Special Appeals considered the second order a final judgment and, thus, dismissed the appeal as untimely. Although it acknowledged that the terms of the order did not indicate finality, the court found that the State's assertion that it "had no means to amend its declaration" transformed the second order into a final, appealable judgment.

The Court of Appeals rejected this analysis of the State's intentions and reiterated its position that only the express terms of the order determine finality. Thus, to be considered a final judgment, an order sustaining a demurrer must expressly prohibit amendment.

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2. Id. at 325, 478 A.2d at 306.
3. Id. at 321-22, 478 A.2d at 304-05. Columbia Medical Plan's (CMP) demurrer was granted on March 5, 1982, and the State's motion for reconsideration was denied on May 5, 1982. No further action was taken by either party until a year later when the State's request for entry of final judgment in favor of CMP was granted on March 29, 1983. On April 21, 1983, the State filed an appeal with the Court of Special Appeals, which was dismissed as untimely. Id.
4. Id. CMP's demurrer requested dismissal with prejudice and without leave to amend the pleadings. The State's motion for reconsideration asked, as an alternative to rescinding the demurrer, that a final judgment be entered in CMP's favor since the State had "no means to amend its declaration." Id. at 321, 478 A.2d at 304.
5. Id. at 322, 478 A.2d at 305.
6. Id. at 323-25, 478 A.2d at 305-06.
7. Id. at 323-24, 478 A.2d at 305-06.
8. Id. at 324, 478 A.2d at 306. The court relied on Griffin v. Board of Trustees, 258 Md. 276, 265 A.2d 757 (1970). In Griffin, the trial judge sustained the defendant's demurrer, but granted the plaintiff 15 days leave to amend. The plaintiff failed to amend and filed an appeal one month later, stating that he did not elect to amend his declaration. The court dismissed the appeal because the trial court order was not a final judgment. Id. at 279, 265 A.2d at 758-59.
to the pleadings. Furthermore, a judgment is final under section 12-301 of the Courts and Judicial Proceedings Article only if a party has no further opportunity to prosecute or defend the action. The second order did not extinguish the State’s right to proceed, and the statutory definition of finality had not been satisfied. Therefore, the State appropriately requested entry of final judgment and timely appealed from that order.

In *Oroian v. Allstate Insurance Co.*, the Court of Special Appeals further defined what constitutes a final judgment. The plaintiff brought a declaratory judgment action that contained two separate claims, but omitted one of them from its trial memorandum and oral argument. In its order, the trial court addressed only the argued claim. The parties feared that this order was not an appealable final judgment because all claims had not been adjudicated.

The Court of Special Appeals held that the trial court’s failure to address the claim in its order was the functional equivalent of

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9. 300 Md. at 324, 478 A.2d at 306.
10. *Md. Cts. & Jud. Proc. Code Ann.* § 12-101(f) (1984) provides in relevant part: “Final judgment” means a judgment, decree, sentence, order, determination, decision, or other action by a court, including an orphans’ court, from which an appeal, application for leave to appeal, or petition for certiorari may be taken. *See also id.* § 12-301, which provides in relevant part:
Except as provided in § 12-302, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law.
11. 300 Md. at 325, 478 A.2d at 306; Fred W. Allnutt, Inc. v. Commissioner of Labor and Indus., 289 Md. 35, 40, 421 A.2d 1360, 1363 (1980).
12. 300 Md. at 325, 478 A.2d at 306.
13. *Id.* at 326, 478 A.2d at 307.
15. *Id.* at 657, 490 A.2d at 1322.
16. *Id.* at 664, 490 A.2d at 1325.
17. *Id.* at 665, 490 A.2d at 1326.
18. *Id.* at 664, 490 A.2d at 1325. *Md. R. P.* 2-602 (1984) provided that any order . . . 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 trial court could enter a partial judgment if it determined that no just cause for delay existed. *Id.* In 1985, Rule 2-602 was rewritten without substantive change. *Md. R. P.* 2-602 editor’s note.

At a hearing on the finality of the judgment, the parties and the trial judge agreed that the claim omitted from the order would be treated as withdrawn, but defendants later claimed on appeal that the trial judge erred in not addressing the claim. 62 Md. App. at 664-65, 490 A.2d at 1325-26.
granting a motion for voluntary dismissal of the deleted claim under Maryland Rule 2-506(b). The court reasoned that plaintiff's failure to address the claim in its trial memorandum or in oral argument "was tantamount to a motion for voluntary dismissal," which the court effectively granted with its order. Thus, the order adjudicated all claims as required by Maryland Rule 2-602 and could be appealed as a final judgment.

2. Denial of Final Judgment Status.—In Snowden v. Baltimore Gas & Electric Co., the Court of Appeals held that the trial court's refusal to certify the plaintiffs' suit as a class action was not a final judgment for purposes of appeal. The trial court had directed that its denial of class certification be entered as a final judgment pursuant to former Rule 605 a. The Court of Appeals rejected this use of the rule. The court noted that it had not previously considered whether denial of class certification could be made final because the denial disposed of the claim as to the unnamed plaintiffs. Federal courts, however, had decided the issue, and their opinions were especially persuasive because the Maryland class action rule used substantially the same language as the corresponding federal one.

The United States Supreme Court has characterized orders refusing class certification as inherently interlocutory. Although interlocutory orders may be appealable under the collateral order

19. 62 Md. App. at 667, 490 A.2d at 1327. Md. R. P. 2-506(b) provides that a plaintiff may dismiss an action only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded prior to the filing of plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who pleaded the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.

20. 62 Md. App. at 668, 490 A.2d at 1327.
21. Id.
23. Id. at 559, 479 A.2d 1331.
24. Id. at 558-59, 479 A.2d at 1331. Former rule 605 a was recodified, without substantive change, as Md. R. P. 2-602. See supra note 18.
25. 300 Md. at 559, 479 A.2d at 1331.
26. Id. at 561, 479 A.2d at 1332.
27. Id. Former Md. R. P. 605 a (1977) was modeled after Fed. R. Civ. P. 54(b). 300 Md. at 561, 479 A.2d at 1332; Diener Enters. v. Miller, 266 Md. 551, 554, 295 A.2d 470, 472 (1972).
28. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978). Fed. R. Civ. P. 23 provides for revision of class certification orders; thus, the Court found that denial of such certification is not a final judgment. See 437 U.S. at 469-70. Md. R. P. 2-231, which
doctrine, denial of class certification does not satisfy that doctrine's requirements. The Supreme Court has suggested that the Federal Interlocutory Appeals Act may apply to denial of certification of class actions, but Maryland does not have a similar statute. Because the Supreme Court did not discuss whether such a denial is appealable under the federal counterpart to former Maryland Rule 605 a, the Court of Appeals found that the rule did not permit such an appeal.

The Court of Appeals also relied on West v. Capitol Federal Savings & Loan Association, in which the United States Court of Appeals for the Tenth Circuit held that orders denying class certification were not appealable final judgments. The district court had dismissed the action to all but the named plaintiffs and entered judgment in favor of the defendants with respect to all but the named plaintiffs. The Tenth Circuit noted, however, that before class certification and notice to all unnamed plaintiffs in a class action, those persons cannot be considered parties. Thus, judgment cannot be entered against them.

The Maryland Court of Appeals found this reasoning persuasive and dismissed Snowden's appeal. The trial court's order did not extinguish the rights of the named plaintiff, who could still proceed with his claim. The order also did not preclude other persons from maintaining an identical claim against the defendants since any judgment against them without notice would not comport with due process.

FED. R. Civ. P. 23. 300 Md. at 562 n.5, 479 A.2d at 1333 n.5.
29. 437 U.S. at 468-69. For a discussion of the collateral order doctrine, see infra notes 108-110 and accompanying text; CRIMINAL LAW, notes 754-67 and accompanying text.
30. 437 U.S. at 469.
32. See 437 U.S. at 474-75.
33. 300 Md. at 563 n.7, 479 A.2d at 1333 n.7.
34. FED. R. Civ. P. 54(b).
35. 300 Md. at 563, 479 A.2d at 1333.
36. 558 F.2d 977 (10th Cir. 1977).
37. Id. at 982.
38. Id. at 979.
39. Id. at 980.
40. Id. The Court of Appeals also noted that the Seventh Circuit had reached the same conclusion in Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983).
41. 300 Md. at 566-67, 479 A.2d at 1334-35.
42. Id. at 567, 479 A.2d at 1335.
43. See id. at 565, 479 A.2d at 1334.
modification of an initial denial of class status, permitting an incorrect order to be rectified during a trial on the merits.\textsuperscript{44}

Finally, in \textit{Dean v. State},\textsuperscript{45} the court decided that a criminal defendant's successful motion for a new trial is not an appealable final judgment.\textsuperscript{46} The State requested an en banc\textsuperscript{47} review of a trial court order granting a new trial to a criminal defendant.\textsuperscript{48} The panel vacated the lower court order, reinstated the convictions, and remanded for sentencing.\textsuperscript{49} The Court of Appeals reversed and held that a court en banc must adhere to the same standard of appealability as the Court of Special Appeals.\textsuperscript{50}

The court followed the general rule that a final judgment does not exist in criminal cases until after conviction and sentencing.\textsuperscript{51} In \textit{Sigma Reproductive Health Center v. State},\textsuperscript{52} the court had provided examples of appealable and nonappealable orders in criminal actions\textsuperscript{53} and concluded that a defendant's motion for a new trial, if granted, would not be an appealable final judgment.\textsuperscript{54}

3. Settlement Orders Distinguished from Final Judgments.—In \textit{Mitchell Properties v. Real Estate Title Co.},\textsuperscript{55} the Court of Special Appeals distinguished settlement orders from final judgments.\textsuperscript{56} Although a

\begin{itemize}
\item \textsuperscript{44} See \textit{id.} at 562 n.5., \textit{479 A.2d} at 1333 n.5.
\item \textsuperscript{45} \textit{302 Md.} 493, 489 A.2d 22 (1985).
\item \textsuperscript{46} \textit{id.} at 494, 489 A.2d at 22.
\item \textsuperscript{47} \textit{Md. Const.} art. IV, § 22 allows appeals in certain circumstances to a panel of three circuit court judges. In \textit{Estep v. Estep}, 285 Md. 416, 420 n.4, 404 A.2d 1040, 1042 n.4 (1979), the Court of Appeals determined that normal appellate procedures applied to en banc reviews.
\item \textsuperscript{48} \textit{302 Md.} at 494, 489 A.2d at 22. Dean was convicted of first degree rape, second degree rape, battery, and assault with intent to rape. After the trial judge granted Dean's motion for a new trial, the State invoked \textit{Md. Const.} art. IV, § 22 and filed a reservation of points for a court in banc. \textit{302 Md.} at 495, 489 A.2d at 23. The State alleged that the trial court had abused discretion in granting the motion and suggested that the court applied the improper standard when considering the motion. \textit{id.} at 494-95, 489 A.2d at 22-23.
\item \textsuperscript{49} \textit{302 Md.} at 496, 489 A.2d at 23. Dean appealed the en banc decision to the Court of Special Appeals. The Court of Appeals granted certiorari before the hearing in the intermediate appellate court. \textit{id.}
\item \textsuperscript{50} \textit{id.} at 497, 489 A.2d at 24.
\item \textsuperscript{51} \textit{id.} at 498, 489 A.2d at 24.
\item \textsuperscript{52} 297 Md. 660, 467 A.2d 483 (1983).
\item \textsuperscript{53} \textit{id.} at 666-67, 467 A.2d at 486. Immediately appealable orders include those involving double jeopardy, in forma pauperis petitions, and incompetency determinations. Interlocutory orders that may not be appealed immediately include those involving speedy trial violations, venue selection after removal, suppression orders, and pretrial discovery orders. \textit{id.}
\item \textsuperscript{54} \textit{id.} at 667, 467 A.2d at 486.
\item \textsuperscript{55} \textit{62 Md. App.} 473, 490 A.2d 271 (1985).
\item \textsuperscript{56} \textit{id.} at 482-83, 490 A.2d at 276.
\end{itemize}
settlement agreement is called a settlement order upon entry by a court, it is not a court order by definition. A settlement agreement provides for the future discharge of an existing claim by a substituted performance. The settlement order suspends the original claim pending performance and therefore cannot be deemed final because it does not extinguish the rights of the parties.

In Mitchell Properties, the parties entered a settlement agreement with the circuit court in October 1983. Later the plaintiff moved to vacate the agreement. The court denied this motion as well as the plaintiff's subsequent motion for reconsideration. The Court of Special Appeals determined that these orders were not final judgments. Neither order extinguished the rights of the parties; instead the orders validated the settlement agreement. Such orders may be appealed only when the court reduces the agreement to a money judgment.

4. Revision of Judgments.—In Fleisher v. Fleisher Co., the Court of Special Appeals was asked to balance the finality of judgment rule against the possibility that an earlier judgment was obtained by fraud and, therefore, did not deserve the protection otherwise afforded final judgments. The court recognized that in exceptional cases judgments may be vacated when specific criteria are met.

To vacate a final judgment, the moving party must show that

57. Id. at 482, 490 A.2d at 276.
58. See Clark v. Elza, 286 Md. 208, 214, 406 A.2d 922, 925 (1979). In Clark, the Court of Appeals distinguished executory accords from substitute contracts. If the parties to an agreement intend for it to be a complete substitute for the prior claim, the entire claim is discharged. Without clear evidence of the requisite intent, however, the agreement will be regarded as an executory accord. Id. at 214-15, 406 A.2d at 925-26.
59. 62 Md. App. at 482-83, 490 A.2d at 276.
60. Id. at 483-86, 490 A.2d at 277-78.
61. Id. at 478-80, 490 A.2d at 274-75. The settlement order provided 30 days for Mitchell to receive $14,000 from three defendants. Id. at 478, 490 A.2d at 274.
62. Id. at 480, 490 A.2d at 275. In January 1984, the judge denied Mitchell's motion to vacate the settlement order since it involved only minor changes from the tentative agreement. Mitchell's motion for reconsideration of the January order was denied in April 1984. Id.
63. Id. at 483-84, 490 A.2d at 277.
64. Id. at 484, 490 A.2d at 277.
65. Id. at 483, 490 A.2d at 277.
67. Md. R.P. 2-535 (former Md. R.P. 625 a (1977)). This rule recognizes that "there must be a definite and foreseeable end to litigation and that ordinarily judgments should not be vacated once the thirty-day review period has elapsed." 60 Md. App. at 568, 483 A.2d at 1313. See also Md. CTS. & JUD. PROC. CODE ANN. § 6-408 (1984) (defining revisionary power of court).
68. 60 Md. App. at 568, 483 A.2d at 1313.
the judgment in question resulted from fraud, mistake, or irregularity. After establishing one of these grounds, the party must also demonstrate good faith and ordinary diligence in acting to vacate the judgment as well as a meritorious defense to it. The appellee sustained its burden in this case, and the trial court correctly vacated the judgments against it.

In Platt v. Platt, however, the court found that the appellant failed to satisfy the requirements for revision of a final judgment. Mr. Platt filed a petition to amend a five-year-old divorce decree. The support order in the divorce decree differed from the support provisions in the separation agreement, which the decree purported to incorporate. Although Mr. Platt had a meritorious claim, he did

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69. The fraud must be extrinsic: it must prevent the actual dispute from being submitted to the factfinder. Id. at 571, 483 A.2d at 1315. See United States v. Throckmorton, 98 U.S. 61 (1878):

Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

Id. at 65-66.


72. 60 Md. App. at 570, 483 A.2d at 1314.

73. Id. at 572-73, 483 A.2d at 1315-16. The appellees moved to vacate the judgment as soon as they learned of and investigated the additional facts in this case. They also had at least two meritorious defenses to the underlying judgment: lack of consideration and fraud. Id.


75. Id. at 13-17, 485 A.2d at 252-54.

76. Id. at 11-12, 485 A.2d at 251.
not act with ordinary diligence to correct the decree's mistake. Based on his familiarity with the tax consequences of support orders, the court found that Mr. Platt should have moved to revise the decree within the thirty days that the trial court has complete discretion to do so. Thus, the trial court correctly denied Mr. Platt's petition.

5. Judge's Ability to Reform Jury Verdicts.—In Polkes & Goldberg Insurance v. General Insurance Co., the Court of Special Appeals considered a trial judge's authority to reform a jury verdict. Generally, a judge has no power to reform such a verdict. In an exceptional case, however, a trial judge may "correct, remold or reform the verdict of a jury so as to express the jury's intent if that intent is, beyond doubt, clearly and definitely manifested." Under Maryland law, a trial judge may change a verdict if the modification is one of form. To alter content, however, would be to write a new verdict—

77. Id. at 16-17, 485 A.2d at 254. Because he had received a copy of the decree, he was charged with knowledge of its contents. Id.


79. 302 Md. at 17, 485 A.2d at 254.


81. Id. at 167, 481 A.2d at 810.

82. Id. In this case, the court found that the jury's intent was "crystal clear." Id. at 168-69, 481 A.2d at 811. When the jury returned a verdict that the insurance company was vicariously liable for its agent's failure to write an adequate amount of insurance for a restaurant subsequently damaged by fire, the trial judge correctly concluded that the agent was also negligent; this alteration was a change of form because the language of the verdict and the record made clear that no other conclusion was possible. Thus, the judge could reform the verdict to conform to the jury's intention. The judge went beyond this change, however, and included a judgment against the agent for the entire amount of damages assessed against the principal ($168,386.95), although the jury had indicated a lesser amount of contribution ($2,479.00). This reform was a change of content; the judge changed the substance of the jury's verdict on the extent of the agent's liability. Id. at 170, 481 A.2d at 812.

83. Id. at 169, 481 A.2d at 811-12. The intention of the jury must be "manifest and beyond doubt." Id. (emphasis in original). For example, in Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705 (1975), the jury returned a verdict for the plaintiff in the amount of $1,350.00. The defendant subsequently questioned whether the judgment included attorney's fees. The only dollar amounts contained in the record were $1,000 in lost salary and $350 in attorney's fees. The judge reformed the verdict to reflect this apportionment, and the Court of Appeals upheld this change in form. Id. at 446-47, 340 A.2d at 708-09.

In Traylor v. Grafton, 273 Md. 649, 332 A.2d 651 (1975), the jury had returned a verdict for the plaintiff, but failed to specify damages. Since a "liquidated damages"
not only eroding the notion of trial by jury but in fact eradicating it.\textsuperscript{84} "We think the right to a trial by jury does not mean a jury trial with an ultimate verdict by a judge."\textsuperscript{85}

6. **Partial Adjudication of Claims.**—In Potter v. Bethesda Fire Department,\textsuperscript{86} the Court of Appeals dismissed an appeal from the Court of Special Appeals and remanded for lack of an appealable final judgment.\textsuperscript{87} The intermediate appellate court had affirmed a circuit court order in which the trial judge erroneously applied former rule 605 a\textsuperscript{88} and entered final judgment for part of a single claim.\textsuperscript{89}

Former rule 605 a, now Rule 2-602,\textsuperscript{90} applies only when a complaint contains multiple claims and the judgment completely disposes of at least one of them.\textsuperscript{91} A single claim is not converted into a clause specified the amount of damages as $4,000.00, the judge reformed the jury's verdict to include that amount. This was a change of form because no other conclusion was possible from the record. \textit{Id.} at 683, 332 A.2d at 672.

\textsuperscript{84} 60 Md. App. at 170, 481 A.2d at 812. The court also pointed out that the trial judge had other options available to remedy the confusing jury verdict—for example, granting a new trial. \textit{Id.}

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} 302 Md. 281, 487 A.2d 288 (1985).

\textsuperscript{87} \textit{Id.} at 286-87, 487 A.2d at 290-91.

\textsuperscript{88} Former Md. R.P. 605 a (1977) provided:

\begin{quote}
Where more than one claim for relief is presented in an action, whether as an original claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a 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 or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.
\end{quote}

This rule has been replaced by Md. R.P. 2-602, which contains substantially the same language. See generally Commentary on the New Maryland Rules of Civil Procedure, 42 Md. L. Rev. 669, 820-22 (1984) (discussing the minor differences between the new and old rules). Md. R.P. 2-602 was amended in 1985 by dividing its provisions into two sections.

\textsuperscript{89} 302 Md. at 284, 487 A.2d at 289. Potter filed a workers' compensation claim for injuries to his back. Later he reinjured his back and retired under the county's disability retirement program. The county and the Bethesda Fire Department sought a set-off under Md. ANN. CODE art. 101, § 33(c), (d) (1979), arguing that Potter was receiving retirement benefits in excess of any benefits he was entitled to receive under workers' compensation. Upon denial by the Workers' Compensation Commission, they appealed to the circuit court, which granted their motion for partial summary judgment on the issue of set-off. 302 Md. at 283-84, 487 A.2d at 289. This judgment disposed of only one issue, however; other issues, such as the cause of Potter's injury, the amount of disability, and the portion of disability attributable to the incident of question, remained unresolved. \textit{Id.} at 286, 487 A.2d at 290.

\textsuperscript{90} See supra note 88.

\textsuperscript{91} 302 Md. at 285, 487 A.2d at 290.
multiple claim by asserting different legal theories or by seeking different damages or remedies for the same cause of action.\textsuperscript{92} In \textit{Potter}, the plaintiff appealed from an administrative decision, and the partial summary judgment dealt with only one issue of the claim on appeal.\textsuperscript{93} If a single claim contains multiple issues, adjudication of one of these issues cannot be entered as a final judgment.\textsuperscript{94}

In \textit{Washington Suburban Sanitary Commission v. Frankel},\textsuperscript{95} the Commission sought a declaratory judgment that it had no obligation to compensate owners of land benefitted by restrictive covenants,\textsuperscript{96} and the defendants' counterclaim sought a contrary declaration and money damages.\textsuperscript{97} The trial court ordered the Commission to pay the requested compensation, but did not specify who should receive it.\textsuperscript{98} Pursuant to one defendant's request, the court certified this order as final in accordance with former rule 605 a.\textsuperscript{99} The Court of Appeals reversed because the trial court's order did not dispose of the entire claim.\textsuperscript{100} Once the trial court specified the amount of damages to be awarded to the identified parties,\textsuperscript{101} the order would be final, and thus, appealable.\textsuperscript{102}

7. Collateral Order Doctrine.—In \textit{Public Service Commission v. Patuxent Valley Conservation League},\textsuperscript{103} the Court of Appeals held that a circuit court order commanding administrative officials to submit to depositions was immediately appealable under the collateral order doctrine.\textsuperscript{104} The Public Service Commission (PSC) granted a certifi-
cate to the Potomac Electric Power Company to construct a 500 kilovolt overhead transmission line between substations in Howard and Montgomery Counties.\textsuperscript{105} Howard County and others, including the appellee, filed for judicial review of the PSC's decision.\textsuperscript{106} The circuit court ordered PSC officials to participate in discovery.\textsuperscript{107}

Discovery orders are interlocutory in nature and thus generally cannot be appealed.\textsuperscript{108} The collateral order doctrine, however, allows appeals from a limited class of orders that do not terminate litigation in the trial court.\textsuperscript{109} Such orders must meet four requirements: They must conclusively determine the disputed question, resolve an important issue, be completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.\textsuperscript{110}

The court found that the discovery order in \textit{Patuxent Valley} met these criteria.\textsuperscript{111} The order conclusively determined that the PSC officials must be deposed. This decision had the potential to diminish effective, administrative decisionmaking. The discovery order was distinct from any review of the PSC's decision, and the harm of pretrial scrutiny could not be cured by a later appeal.\textsuperscript{112}

\textbf{B. Jurisdiction}

\textit{In re Arlene G.}\textsuperscript{113} discussed the effect of a guardianship appointment on the jurisdiction of the juvenile court. The juvenile court determined three children to be children in need of assistance and committed them to the Department of Social Services (DSS) for placement. DSS subsequently filed a petition in the circuit court to assume guardianship of the children and to divest the natural parents' rights. After the petition was granted, DSS requested that the juvenile court terminate its jurisdiction over the children. The

\begin{footnotes}
\footnotetext[105]{300 Md. at 204, 477 A.2d at 761.}
\footnotetext[106]{Id.}
\footnotetext[107]{Id. at 205, 477 A.2d at 762.}
\footnotetext[108]{Id. at 207, 477 A.2d at 763.}
\footnotetext[109]{Id. at 206, 477 A.2d at 762.}
\footnotetext[110]{Id.}
\footnotetext[111]{Id.}
\footnotetext[112]{Id. at 206-07, 477 A.2d at 762-63.}
\footnotetext[113]{300 Md. 355, 483 A.2d 39 (1984) (per curiam).}
\end{footnotes}
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juvenile court denied the motion.\footnote{Id. at 358-59, 483 A.2d at 40-41. MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e) (1984) provides: “Child in need of assistance” is a child who requires the assistance of the court because (1) He . . . is not receiving ordinary and proper care and attention, and (2) His parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems . . . . Id. § 3-804(a) (Supp. 1985) vests the juvenile court with exclusive jurisdiction over children in need of assistance. MD. FAM. LAW CODE ANN. § 1-201 (1984) gives the circuit court jurisdiction over guardianship petitions; id. § 5-317 allows the Department of Social Services to petition for guardianship.} On appeal, the Court of Appeals held that, as to a child in need of assistance, the jurisdiction of the juvenile court generally prevails over the equity court’s jurisdiction.\footnote{Id. at 360, 483 A.2d at 41; see MD. CTS. & JUD. PROC. CODE ANN. § 3-804 (a) (Supp. 1985).} The juvenile court has exclusive, original jurisdiction over a child alleged to be in need of assistance.\footnote{Id. at 360, 363 n.5, 483 A.2d at 41, 43 n.5; see MD. CTS. & JUD. PROC. CODE ANN. § 3-806(a) (1984). A final decree of adoption, however, would terminate the jurisdiction of the juvenile court. See MD. FAM. LAW CODE ANN. § 5-308(b) (1984).} The continuation of that jurisdiction is within the sound discretion of the juvenile court until the child reaches the age of 21.\footnote{301 Md. at 361, 483 A.2d at 42; see MD. FAM. LAW CODE ANN. § 1-201(c) (1984).}

In contrast, the equity court has exclusive jurisdiction over the adoption of a child.\footnote{301 Md. at 363, 483 A.2d at 43. What the court appears to be saying is that juvenile court jurisdiction controls. Under the facts of this particular case, the juvenile court may well have had good reasons for continuing jurisdiction. In general, though, it remains unclear under what circumstances jurisdiction will be continued. Custody and guardianship petitions may thus have to be approved in both the equity and juvenile courts, with the potential for increased burdens upon the parties and the courts. Unless there is abuse of discretion, however, the juvenile court may continue jurisdiction until a child is adopted or reaches the age of 21.} Its jurisdiction over custody and guardianship, either pendente lite or permanently, does not affect the jurisdiction of the juvenile court with regard to custody or guardianship.\footnote{301 Md. at 360, 483 A.2d at 41; see MD. FAM. LAW CODE ANN. § 1-201(a)(1) (1984).} The mere appointment of a guardian does not mean that the child is not, or may not in the future be, a child in need of assistance.\footnote{301 Md. 328, 487 A.2d 1189 (1985).}

In the following cases, the Court of Appeals further defined the boundaries of a district court’s jurisdiction. In Collins v. Foster,\footnote{301 Md. at 360, 483 A.2d at 42; see MD. FAM. LAW CODE ANN. § 1-201(a)(1) (1984).} the Court of Appeals upheld the power of the district court to grant a
motion to dismiss for failure to exhaust administrative remedies.\textsuperscript{122} It noted that proceedings before a district court are not intended to be as formal as proceedings before a circuit court.\textsuperscript{123} The district court had the discretion to dismiss the action, since each court has the power to determine its own jurisdiction\textsuperscript{124} and the requirements of the rule on motions were met.\textsuperscript{125}

In \textit{Lake Linganore Association v. Jurgens},\textsuperscript{126} the Court of Appeals upheld the district court's jurisdiction to hear a suit by a lot owners' association to recover assessments from a member.\textsuperscript{127} To defeat the jurisdiction of the district court, the cause of action must place title to land "necessarily and directly in issue";\textsuperscript{128} a defendant's mere allegation to this effect is not enough.\textsuperscript{129} Since this case did not require the district court "to decide the ownership of real property or of an interest in real property,"\textsuperscript{130} the court upheld the district court's exercise of jurisdiction.\textsuperscript{131}

Finally, in \textit{Vogel v. Grant},\textsuperscript{132} the Court of Appeals held that the district court did not have jurisdiction over a motion to strike a

\textsuperscript{122} Id. at 333, 487 A.2d at 1191. A Maryland Penitentiary inmate filed a claim in the district court against the warden of that institution, alleging a lack of dental treatment. The warden filed a motion to dismiss, maintaining that the district court lacked jurisdiction because the inmate had failed to exhaust his administrative remedies. The district court granted the motion to dismiss. The circuit court reversed, and the warden petitioned the Court of Appeals for certiorari. \textit{Id.} at 330-31, 487 A.2d at 1190.

It is well established in Maryland law that administrative remedies ordinarily must be exhausted before a court will hear the claim. \textit{Id.} at 330, 487 A.2d at 1190; Oxtoby v. McGowan, 294 Md. 83, 91, 447 A.2d 860, 865 (1982).

\textsuperscript{123} 302 Md. at 333, 487 A.2d at 1191. Compare the more formal requirements of the rule on motions in circuit court, Md. R.P. 2-331, with the district court rule, Md. R.P. 3-311.

\textsuperscript{124} 302 Md. at 333, 487 A.2d at 1191; \textit{see also} Sullivan v. Insurance Comm'tr, 291 Md. 277, 281, 434 A.2d 1024, 1026-27 (1981) ("[A] court has jurisdiction to determine the issue of its own jurisdiction to proceed."). Failure to exhaust administrative remedies does not technically affect the subject matter jurisdiction of court; however, it has been treated like a jurisdictional issue. 302 Md. at 332, 487 A.2d at 1191; Oxtoby v. McGowan, 294 Md. 83, 91, 447 A.2d 860, 864-65 (1982).

\textsuperscript{125} Md. R.P. 3-311 requires that a motion, unless made in open court, (1) be made in writing, (2) state with particularity the grounds for the motion, and (3) set forth the relief or order sought.

\textsuperscript{126} 302 Md. 344, 488 A.2d 162 (1985).

\textsuperscript{127} Id. at 345, 488 A.2d at 162.

\textsuperscript{128} Id.

\textsuperscript{129} Id. at 348, 488 A.2d at 164 (citing 1 G. LIEBMANN, MARYLAND PRACTICE, DISTRICT COURT LAW AND PRACTICE § 100 (1976)).

\textsuperscript{130} Id. at 345, 488 A.2d at 162. Md. CTS. & JUD. PROC. CODE ANN. § 4-402(b) (1984) provides that "[t]he District Court does not have jurisdiction to decide the ownership of real property or of an interest in real property."

\textsuperscript{131} 302 Md. at 345, 488 A.2d at 162.

\textsuperscript{132} 300 Md. 690, 481 A.2d 186 (1984).
demand for a jury trial. The defendants were entitled to and demanded a jury trial in the district court action against them. The district court granted the plaintiff's motion to strike the demand because of alleged procedural defects. Under section 4-402 of the Courts and Judicial Proceedings Article, a proper demand for a jury trial immediately divests the district court of jurisdiction and vests jurisdiction in the circuit court. Thus, a motion to strike the demand because of alleged procedural defects must be made in the circuit court.

C. Pleadings

1. Amendments.—In McSwain v. Tri-State Transportation Co., the plaintiff inadvertently named the wrong defendant in his personal injury action and attempted to remedy it by filing an amended declaration naming the correct defendant. The amendment was denied upon the correct defendant’s motion. The correct defendant was aware of the pending suit and received the suit papers before the statute of limitations had run, but chose not to answer, relying instead upon the defense of the misnaming of the defendant. The Court of Appeals found that the mistake was inadvertent and the defendant was neither prejudiced nor misled by the

133. Id. at 699, 481 A.2d at 190.
134. Md. Const. Decl. of RTS. art. 23 guarantees the right to a jury trial in civil proceedings in which the amount in controversy exceeds $500. In Vogel, the plaintiff sued for breach of contract and claimed damages of $1,084.40. 300 Md. at 692, 481 A.2d at 187.
135. 300 Md. at 692, 481 A.2d at 187.
136. Id. at 693, 481 A.2d at 187. The demand was not a “separate writing,” as required by former Md. D.R. 343 a (1977), because it was combined with requests for postponement and subpoena of records. The demand also did not bear a certificate of service as required by former Md. D.R. 306 a 2. 300 Md. at 693, 481 A.2d at 187. These rules were replaced, effective July 1, 1984, by Md. R.P. 3-325 and 1-323 respectively. The only significant change was in the time period for a defendant to demand a jury trial. 300 Md. at 697 n.5, 481 A.2d at 189 n.5.
137. Md. Cts. & JUD. PROC. CODE ANN. § 4-402(e)(2) (1984) provided that “if a party is entitled to and demands a jury trial, jurisdiction is transferred forthwith and the record of proceeding shall be transmitted to the appropriate court.” The statute was amended in 1985 to require a timely demand for a jury trial for the transfer of jurisdiction. Id. (Supp. 1985).
139. 300 Md. at 697-98, 481 A.2d at 189-90. If the motion to strike is granted, the case is remanded to the district court for a nonjury trial. Id. at 698, 481 A.2d at 190.
141. Id. at 365-366, 483 A.2d at 44.
142. Id. at 366-367, 483 A.2d at 45.
143. Id. at 370, 483 A.2d at 46.
mistake. Thus, it held that the designation of the incorrect defendant was a misnomer rather than a misjoinder and the amendment was proper.\textsuperscript{144}

The court also found that the defendant’s motion to strike the amendment should have been denied as a matter of law.\textsuperscript{145} The court rejected the defendant’s argument that the decision on a motion to amend is within the discretion of the trial court and cannot be reversed absent an abuse of discretion.\textsuperscript{146} The court reasoned that the decision is not within the trial court’s discretion because leave of the court is no longer necessary to make an amendment.\textsuperscript{147} Furthermore, the Maryland Rules of Procedure provide that “amendments shall be freely permitted in order to promote justice.”\textsuperscript{148}

2. Joinder.—In Bodnar v. Brinsfield,\textsuperscript{149} the Court of Special Appeals extended to corporations the rule that individuals who have sufficient knowledge of an action affecting their interest and fail to intervene are bound by the proceeding as effectively as the parties.\textsuperscript{150} Since a corporation acts through its officers and directors, the court reasoned that a corporation should be bound by proceedings of which its officers had knowledge.\textsuperscript{151} In such situations, “all necessary parties [are] in effect before the court.”\textsuperscript{152}

In Bodnar, the stockholders, directors, and principal officers of a closely held corporation actively participated in the litigation and did not object to the nonjoinder of the corporation. Furthermore,
the corporation made no effort to intervene. Thus, the corporation was bound by the proceeding as if it had been a party.153

D. Attorneys' Fees

In Dent v. Simmons,154 the Court of Special Appeals held that the trial court abused its discretion by awarding attorney’s fees solely because the plaintiff attempted to introduce a new cause of action.155 The court reversed the trial judge’s award of attorney’s fees,156 which had been based on plaintiff’s violation of former Maryland Rule 604 b.157 The trial judge had ruled that plaintiff’s claim was brought without any legal or factual justification because it was not currently recognized in Maryland as a tort.158 The court rejected this application of Rule 604 b “[i]n light of the important public policy issue of encouraging innovation and advances in the law.”159 Thus, litigants can assert legitimate new causes of action without the fear of having to pay attorney’s fees if they lose.

In Blanton v. Equitable Bank,160 however, the Court of Special Appeals found Blanton liable for expenses incurred by Equitable as

153. 60 Md. App. at 536, 483 A.2d at 1297.
155. Id. at 129, 485 A.2d at 273. The court noted that no Maryland cases have defined a frivolous action, motion, or appeal; however, the court quoted the Supreme Court of California’s definition that an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.
156. Id. at 125, 485 A.2d at 271.
157. Id. at 125, 485 A.2d at 271. Former Md. R.P. 604 b (1977) provided:

In an action or part of an action if the court finds that any proceeding was had (1) in bad faith, (2) without substantial justification or (3) for purposes of delay the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the reasonable expenses incurred by the adverse party in opposing such proceeding, including reasonable attorneys’ fees.

The substance of this rule is restated in Md. R.P. 1-341. 61 Md. App. at 125 n.1, 485 A.2d at 271 n.1. For a discussion of the new rule, see infra notes 160-165 and accompanying text.
158. 61 Md. App. at 126-27, 485 A.2d at 272.
159. Id. at 129, 485 A.2d at 273. The court also held that appeal of the case more than three months earlier did not deprive the trial court of jurisdiction to award attorney’s fees. Id. at 129-30, 485 A.2d at 273-74. See also Lang v. Catterton, 267 Md. 268, 285, 297 A.2d 735, 744 (1972) (only postappeal orders affecting subject matter of the appeal are prohibited).
a result of Blanton’s appeal of the denial of a continuance.161 The court determined that the defendant’s appeal was without substantial justification because the denial of a continuance is clearly an unappealable interlocutory order162 and the appeal “was not an attempt at ‘innovation or exploration beyond existing legal horizons.’”163 Thus, the court exercised its discretion164 pursuant to Rule 1-341 to award the plaintiff reasonable expenses on the appeal.165

The Court of Appeals held in Simmons v. Perkins166 that an order assessing counsel fees pursuant to former Rule 604 b167 was not immediately appealable.168 Simmons, an attorney, represented

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In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney’s fees, incurred by the adverse party in opposing it.


Former Md. R.P. 604 b also required the award of expenses if the proceeding took place for the purposes of delay. The court determined that the deletion of this phrase from the new rule was not a substantial change: a pleading that is used for delay amounts to bad faith, which brings it under the new rule. 61 Md. App. at 162, 485 A.2d at 696.


164. Although former Md. R.P. 604 b required courts to award expenses if one of the enumerated circumstances was found, Md. R.P. 1-541 grants courts the discretion to award expenses once a basis for the award is found. 61 Md. App. at 166, 485 A.2d at 698.

165. 61 Md. App. at 167, 485 A.2d at 699.


167.See supra note 157.

168. 302 Md. at 233, 486 A.2d at 1192. Md. CTS. & JUD. PROC. CODE ANN. § 12-303(3)(v) (1984) provides in relevant part:

A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case: . . .

(3) An order: . . .
himself in appellees' action that charged him with legal malpractice. In response to the appellees' declaration, he filed a motion *ne recipiatur*, and in the alternative he moved to strike the declaration. The trial court found Simmons' motion to be without substantial justification and ordered him to pay appellees' counsel fees for attending the hearing on the motion. Simmons appealed.

Maryland law allows an immediate appeal from orders in equity requiring payment of money. A party in an action at equity is directly answerable to the court for failure to pay money, which may result in a citation for contempt with subsequent imprisonment. Such orders at law have not been immediately appealable, however, because the party ordered to pay is not personally answerable to the court for noncompliance. The suit in Simmons was an action at law. Thus, Simmons could not appeal the order assessing counsel fees until entry of a final judgment.

E. Other Developments

1. Service of Process.—In Reed v. Sweeney, the Court of Special Appeals held that failure to effect service of process upon a defend-
ant who is aware of the claim will not defeat the plaintiff’s claim if suit is filed within the limitations period. The action in Reed arose from a motor vehicle accident that occurred in October 1979; the plaintiff filed his action in late September 1982. A summons sent to the defendants by registered mail was returned unclaimed on October 14, 1982. Subsequently, Reed’s lawyer received two letters from defendants’ counsel indicating that the latter would represent the defendants once they were served with process.

Reed’s counsel pursued negotiations with the defendants’ insurance carrier until February 1983, when the discussions failed. At the request of the plaintiff’s lawyer, the court clerk then reissued the summons and declaration, and the defendants were served on March 4, 1983. In May 1984, the circuit court granted the defendants’ motion for summary judgment because the plaintiff’s failure to order the summons between October 1982 and February 1983 had caused the limitations period to run.

180. Id. at 238, 488 A.2d at 1019.
181. Id. at 233-34, 488 A.2d at 1017. The accident occurred on October 19, 1979, and suit was filed on September 17, 1982. Id. The applicable statute of limitations was three years. Md. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984).
182. 62 Md. App. at 234, 488 A.2d at 1017.
183. Id. The letters were received by Reed’s counsel on October 20 and November 22, 1982. Id.
184. Id. at 234, 488 A.2d at 1017. The insurance carrier also received a copy of the suit papers. Id.
185. Id. The request for assistance was made on February 17, 1983, with service completed on March 4, 1983, at the same address from which the original papers were returned unclaimed. Id.
186. Id. at 235, 488 A.2d at 1017-18.
187. Id.
188. Id., 488 A.2d at 1017. The defendants argued that Neel v. Webb Fly Screen Mfg. Co., 187 Md. 34, 48 A.2d 331 (1946) and Piersma v. Seitz, 10 Md. App. 439, 271 A.2d 199 (1970), aff’d, 262 Md. 61, 276 A.2d 666 (1971), required the plaintiff’s counsel to reissue immediately suit papers returned unclaimed. The Court of Special Appeals disagreed. 62 Md. App. at 236-37, 488 A.2d at 1018-19. In Piersma, the Court of Special Appeals held that the duty to reissue a non-et summons lay with the clerk, not the plaintiff’s attorney. 10 Md. App. at 444, 271 A.2d at 202. Although the Court of Appeals in Neel found that two attempts at service were required before a summons became dormant, 187 Md. at 42, 48 A.2d at 335, the law regarding summons had changed since the court decided that case. See 62 Md. App. at 237 n.1, 488 A.2d at 1018 n.1. Furthermore, in both Neel and Piersma, the defendants had no notice of the suits against them, while in Reed the defendant had notice and attempted to negotiate a settlement. Id. at 236-37, 488 A.2d at 1018-19.
The Court of Special Appeals rejected this argument. The defendants had actual or constructive notice of the suit as evidenced by the letters from their attorney to the plaintiff's attorney. Furthermore, the court implied that the defendants dishonestly avoided the initial attempt of service because they were eventually served at the same address.

2. Forum Non Conveniens.—In Kontoulas v. A.H. Robins Co., the United States Court of Appeals for the Fourth Circuit held that the federal district court did not abuse its discretion by denying motions to dismiss on the ground of forum non conveniens. The court also determined that the district court properly denied defendants' motion to transfer venue.

These multiple tort suits arose as a result of injuries allegedly caused by the Dalkon Shield, an intrauterine contraceptive. Residents of the United States, Australia, and Canada brought suit in the United States District Court for the District of Maryland against Dr. Hugh J. Davis, the inventor of the Dalkon Shield and a Maryland physician, and the A.H. Robins Co., which manufactured the product and did business in Maryland. Jurisdiction was based on diversity of citizenship, and venue in Maryland was asserted. The defendants filed motions to dismiss for improper venue and/or for forum non conveniens. The district court denied these motions, and

189. 62 Md. App. at 235, 488 A.2d at 1017.
190. Id. at 237, 488 A.2d at 1017. The court also noted that the defendants must have had notice of the suit from their insurance carrier, receipt of the registered mail notice, or a combination of both. Id. at 238, 488 A.2d at 1019.
191. Id. at 238, 488 A.2d at 1019.
192. 745 F.2d 312 (4th Cir. 1984).
193. Id. at 314. Forum non conveniens is a common law doctrine that refers to a court's discretionary power to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. "A forum non conveniens dismissal must be based on the finding that, when weighed against plaintiff's choice of forum, the relevant public and private interests strongly favor a specific, adequate, and available alternative forum." Id. at 315 (quoting Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1245 (5th Cir. 1983)).
194. Id. at 314-15. After noting that the venue issue was not ripe for review, id. at 313 n.1, the court discussed venue changes under 28 U.S.C. § 1404(a) (1982), id. at 314-15. See infra notes 205-210 and accompanying text.
196. 28 U.S.C. § 1391(a), (c) (1982). These subsections require that diversity suits be brought in the forum in which all defendants or all plaintiffs live or the injuries arose. None of the plaintiffs resided, was treated, or suffered injury in Maryland. Venue in Maryland was based upon Dr. Davis' Maryland residence and A.H. Robins' business there. 745 F.2d at 313.
the defendants appealed.\footnote{197}{745 F.2d at 313.}

The Fourth Circuit first considered the forum non conveniens motion as it related to the foreign plaintiffs. Under this doctrine, the defendants were required to show "not only that Maryland was not the best forum, but that a particular other forum [outside the United States] was more appropriate."\footnote{198}{Id. at 315 (emphasis in original).} The defendants did not meet this burden.\footnote{199}{Id. at 315-16. The court noted that defendants presented their strongest arguments and evidence in their motion for reconsideration, but did not explain why any of their arguments could not have been made in their original motion. A party is required to show good reason for his failure " 'to take appropriate action sooner.' " \textit{Id.} at 316 (quoting 11 C. WRIGHT \& A. MILLER, \textit{FEDERAL PRACTICE \& PROCEDURE} \textsection 2857 (1973)).} Thus, the district court correctly denied the motion to dismiss.\footnote{200}{Id. at 316.}

With regard to the domestic plaintiffs,\footnote{201}{Plaintiffs were from at least 16 states. \textit{Id.} at 313.} defendants had to show that they could be sued in the alternative fora and that "for each individual action \ldots no statute of limitations in the plaintiff's home state render[ed] that state ineligible to serve as an alternative forum."\footnote{202}{Id. at 316 (emphasis in original).} Furthermore, they had to explain why the state chosen for each plaintiff was a "preferable alternative."\footnote{203}{Id. (emphasis in original).} The defendants again failed to satisfy their burden.\footnote{204}{Id.}

The Fourth Circuit also agreed with the district court that a change of venue was not appropriate in this case.\footnote{205}{Id. at 314-15. The court's discussion here was dicta since the transfer issue was not before the court. \textit{See supra} note 194. Apparently, the court discussed venue to emphasize its belief that forum non conveniens dismissals have been replaced by the availability of transfers of venue under 28 U.S.C. \textsection 1404(a). \textit{See infra} note 211 and accompanying text.} Transfers may be made to other federal courts only "where the case could have been brought in the first place."\footnote{206}{745 F.2d at 316. 28 U.S.C. \textsection 1404(a) (1982) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."} Lack of personal jurisdiction over Dr. Davis would have precluded bringing these cases in the plaintiffs' domiciles or in the state where the alleged torts occurred,\footnote{207}{Id. (emphasis in original).} the other possibilities under the venue statute.\footnote{208}{Id.} Dr. Davis' subsequent consent to be sued in those alternative fora could

\[\text{197. 745 F.2d at 313.} \]  
\[\text{198. Id. at 315 (emphasis in original).} \]  
\[\text{199. Id. at 315-16. The court noted that defendants presented their strongest arguments and evidence in their motion for reconsideration, but did not explain why any of their arguments could not have been made in their original motion. A party is required to show good reason for his failure " 'to take appropriate action sooner.' " \textit{Id.} at 316 (quoting 11 C. WRIGHT \& A. MILLER, \textit{FEDERAL PRACTICE \& PROCEDURE} \textsection 2857 (1973)).} \]  
\[\text{200. Id. at 316.} \]  
\[\text{201. Plaintiffs were from at least 16 states. \textit{Id.} at 313.} \]  
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\[\text{203. Id. (emphasis in original).} \]  
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\[\text{206. 745 F.2d at 316. 28 U.S.C. \textsection 1404(a) (1982) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."} \]  
\[\text{207. The plaintiffs' Dalkon Shields were apparently manufactured in Virginia, which is identified as the place where the torts occurred. 745 F.2d at 315.} \]  
\[\text{208. Id. Dismissals are not authorized by the statute.} \]
not compensate for the lack of jurisdiction at the time the suits were originally filed;\textsuperscript{209} jurisdiction at the time of the motion to transfer is insufficient.\textsuperscript{210}

Finally, the court noted in dictum that the statutory venue transfer provisions have essentially replaced the doctrine of \textit{forum non conveniens}.\textsuperscript{211} Thus, dismissals generally will not be granted, and transfers will be available only when defendants can make the necessary showing.\textsuperscript{212}

3. \textit{Statute of Limitations}.—In \textit{Himelfarb v. American Express Co.},\textsuperscript{213} the Court of Appeals held that the statute of limitations barred plaintiff’s breach of contract action.\textsuperscript{214} Himelfarb used his American Express card to purchase a diamond ring. He returned the ring and attempted to obtain a credit for the purchase price. After investigation, American Express denied the credit. Himelfarb refused to pay this portion of his American Express bill. More than three years after his initial refusal to pay, American Express sued Himelfarb for breach of his credit card agreement.\textsuperscript{215}

The court first determined that plaintiff’s cause of action accrued when Himelfarb first notified American Express that he refused to pay for the ring.\textsuperscript{216} The plaintiff’s investigation of the validity of the defendant’s excuse for nonpayment did not delay the accrual of the cause of action.\textsuperscript{217}

The court then rejected the plaintiff’s contention that the defendant’s partial payments made after the breach started new periods of limitation running.\textsuperscript{218} The court noted that part payment of

\textsuperscript{209} Id. The court followed Hoffman v. Blaski, 363 U.S. 335 (1960), which required that venue and jurisdiction requirements be met at the time suit is first filed. Id. at 342-43.

\textsuperscript{210} 745 F.2d at 315.

\textsuperscript{211} Id. at 315. In Hoffman v. Blaski, the Supreme Court referred to the “superseded doctrine of \textit{forum non conveniens}.” 363 U.S. 335, 342 (1960). While inclined to agree that the doctrine has been replaced by § 1404(a), the court refrained from so holding because the pending motions to dismiss could not be granted in any event. 745 F.2d at 315.

\textsuperscript{212} See 745 F.2d at 314-15.

\textsuperscript{213} 301 Md. 698, 484 A.2d 1013 (1984).

\textsuperscript{214} Id. at 700, 484 A.2d at 1014.

\textsuperscript{215} Id. at 700-01, 484 A.2d at 1014.

\textsuperscript{216} Id. at 703-04, 484 A.2d at 1015.

\textsuperscript{217} Id. at 705, 484 A.2d at 1016. The applicable statute of limitations was three years. Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984). The statute barred suit if the cause of action accrued at the date of breach, but did not bar suit if it began to run after plaintiff’s investigation of the defendant’s excuse for nonpayment. 301 Md. at 701-04, 484 A.2d at 1014-16.

\textsuperscript{218} 301 Md. at 708, 484 A.2d at 1017.
a larger claim may start a new period of limitations, but only if it is "shown to be a payment of a portion of an admitted debt, . . . paid to and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgement of more being due, from which a promise may be inferred to pay the remainder." The defendant's payments did not meet this standard; instead, they evidenced the defendant's intent to avoid any part payment on the disputed item.

In *Harrison v. Motor Vehicle Administration*, two motorists brought separate actions against the Motor Vehicle Administration (MVA) seeking declaratory judgments that their motor vehicle driving and registration privileges had been illegally suspended. The Court of Appeals held that the MVA had authority to suspend the motor vehicle privileges of negligent uninsured motorists who had unpaid judgments against them. Furthermore, such judgments were judgments taken for the use of the state and as

219. Id. at 706, 484 A.2d at 1018 (quoting H. Wood, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY § 97, at 221-22 (1883)).

220. Id. at 708, 484 A.2d at 1018. The amounts of the payments were identical to the costs of specific items charged to the account subsequent to the charging of the ring. Id. The court did not determine whether the Fair Credit Billing Act, 15 U.S.C. § 1666 (1982), affected the period of limitations because the plaintiff did not give the defendant written notice of a billing error as required to bring the case within the Act. 301 Md. at 708-09, 484 A.2d at 1018.

221. 302 Md. 634, 490 A.2d 694 (1985).

222. In one action, the circuit court denied relief, while in the other proceeding relief was granted. Appeals from the two decisions were consolidated. Id. at 637, 490 A.2d at 695.

223. Id. at 641, 490 A.2d at 697. MD. TRANSP. CODE ANN. § 17-204 (1984) allows the suspension of a driver's license and registration for nonpayment of a judgment; MD. ANN. CODE art. 66 1/2, § 7-629 (1970) provided that the license and registration would not be restored until the Maryland Automobile Insurance Fund was reimbursed and the Financial Responsibility Law complied with. MD. ANN. CODE art. 48A, § 243G(a) (1979) continues the provisions of that section with respect to all claims covered by it.

224. MD. TRANSP. CODE ANN. § 17-201 (1984) provides:

In this subtitle, "judgment" means any final judgment resulting from:

(1) A cause of action for damages arising out of the ownership, maintenance, or use on any highway or other property open to the public of any vehicle of a type required to be registered in this State; or

(2) A cause of action on an agreement of settlement for damages. . . .

Such a final judgment must also be an enforceable judgment. 302 Md. at 645, 490 A.2d at 699. The court went on to hold that the judgments in these cases were indeed enforceable. Id. at 648, 490 A.2d at 701.

225. 302 Md. at 646-48, 490 A.2d at 700-01. The state agencies involved in these cases were performing governmental functions within the meaning of the sovereign immunity doctrine. Thus, entry of a judgment upon which one of these agencies had the right to sue was the legal equivalent of giving such a right ("use") to the state. Id. For a discussion of sovereign immunity, see infra Torts notes 81-85 and accompanying text.
such, were excepted from the twelve-year limitations period for action on a judgment.\textsuperscript{226}

4. Standing.—In \textit{State ex rel. Attorney General v. Burning Tree Club},\textsuperscript{227} the Court of Appeals held that the Attorney General had no standing to bring a declaratory judgment action challenging the constitutionality of a Maryland statute.\textsuperscript{228} Instead, the Attorney General ordinarily has the duty of defending the validity of enactments by the General Assembly.\textsuperscript{229} As the State’s advocate, the Attorney General must present the best arguments possible in support of the State’s position.\textsuperscript{230} No other party has this duty to protect the public interest.\textsuperscript{231}

Burning Tree Club is an all-male golf club in Montgomery County. As a country club, it is entitled to certain tax preferences under Maryland law.\textsuperscript{232} In order to qualify for these advantages, a club may not practice any form of sex discrimination;\textsuperscript{233} clubs that serve or benefit members of a particular sex, however, are exempt from this prohibition.\textsuperscript{234} The Attorney General determines whether a club is in compliance with state law after affording that club a hearing.\textsuperscript{235}

The Attorney General instituted a declaratory judgment action to have declared unconstitutional that portion of the statute which exempts clubs that serve or benefit members of a particular sex. He

\textsuperscript{226} 302 Md. at 645, 490 A.2d at 700. \textmd{Mds. & Jud. Proc. Cod Ann. \textsection{} 5-102(a) (1984) provides a twelve-year limitations period for actions on judgments. Id. \textsection{} 5-102(c), however, exempts judgments for the use of the state. This section apparently codifies the common law rule that the statute of limitations does not run against a state. Act of Aug. 22, 1973, ch. 2, \textsection{} 1, reviser’s note, 1973 Md. Laws Spec. Sess. 207.}

\textsuperscript{227} 301 Md. 9, 481 A.2d 785 (1984).

\textsuperscript{228} Id. at 37, 481 A.2d at 799.

\textsuperscript{229} Id.

\textsuperscript{230} Id. at 36, 481 A.2d at 799.

\textsuperscript{231} Id. at 37, 481 A.2d at 799.


\textsuperscript{233} Id. \textsection{} 19(e)(4).

\textsuperscript{234} Id. In Burning Tree Club v. Bainum, 305 Md. 53, 501 A.2d 817 (1985), the Court of Appeals held that this exemption violated the State’s equal rights amendment, Md. Const. Decl. of Rts. art. 46. 305 Md. at 80, 501 A.2d at 830. The court also determined that this exemption could not be severed from the general ban on sex discrimination in Md. Ann. Code art. 81, \textsection{} 19(e). 305 Md. at 84, 501 A.2d at 832. The 1986 Maryland General Assembly enacted legislation to restore the ban on sex discrimination. Act of May 13, 1986, ch. 334, 1986 Md. Laws _ (to be codified at Md. Tax-Prop. Cod Ann. \textsection{} 8-214 (1986)).

\textsuperscript{235} Md. Ann. Code art. 81, \textsection{} 19(e)(4) (recodified at Md. Tax-Prop. Cod Ann. \textsection{} 8-214(b) (1986)).
contended that the dilemma doctrine and his inherent powers as Attorney General entitled him to maintain such a declaratory judgment proceeding. The Court of Appeals rejected both contentions.236

The dilemma doctrine applies only when officials are responsible for administering a statute that they believe to be unconstitutional.237 An official charged with carrying out the provisions of a challenged statute may face a suit in tort, removal from office, or other penalty.238 This dilemma provides the necessary standing to maintain a declaratory judgment action.239 Since the Attorney General in this case was merely the factfinder who determined whether the country club was entitled to preferential tax treatment, the doctrine did not apply.240

Furthermore, neither constitutional241 nor statutory242 provisions grant the Attorney General standing to bring such a declaratory judgment action.243 Because these provisions delineate the extent of the Attorney General's authority,244 the Attorney General had no common law powers to initiate declaratory judgment actions.245

236. 301 Md. at 18, 481 A.2d at 789.
237. Id. at 19, 481 A.2d at 790. See generally E. Borchard, Declaratory Judgments 771-72 (2d ed. 1941) (discussing dilemma doctrine).
238. 301 Md. at 19, 25-26, 481 A.2d at 790, 793. E. Borchard, supra note 237, at 771, lists tax collectors, sheriffs, and other law enforcement officials as examples of those who may be open to these kinds of risks.
239. 301 Md. at 20, 481 A.2d at 790.
240. Id. at 25, 481 A.2d at 793. The challenged statute is administered by the State Department of Assessments & Taxation, the agency with which eligible country clubs enter into preferential tax agreements. Id.
241. Md. Const. art. V, § 3. The Attorney General's duties include defending all cases on behalf of the State. Id. § 3(a)(1).
243. 301 Md. at 30, 481 A.2d at 795.
244. Id. at 32, 481 A.2d at 796.
245. Id. at 30-32, 481 A.2d at 795-96. In Murphy v. Yates, 276 Md. 475, 348 A.2d 837 (1975), the Court of Appeals held that the Attorney General has only the powers granted by the constitution and statutes of Maryland. Id. at 492, 348 A.2d at 846. In that opinion, the court discussed at length the historical development of the Attorney General's authority, id. at 480-87, 348 A.2d at 840-44, and noted that the Attorney General's common law powers had been transferred to the State's Attorneys, id. at 484, 348 A.2d at 842.
5. **Justiciable Issues.**—The Court of Special Appeals reviewed the requirements to maintain an action pursuant to the Declaratory Judgment Act\textsuperscript{246} in *Anne Arundel County v. Ebersberger*.\textsuperscript{247} Four homeowners sought to have a county ordinance declared ultra vires and, thus, unconstitutional.\textsuperscript{248} The Court of Special Appeals reversed the trial court's finding of ultra vires and held that a justiciable controversy did not exist.\textsuperscript{249} Therefore, the declaratory judgment action could not be maintained.\textsuperscript{250}

Determination of whether a justiciable issue exists turns on the facts presented to the court.\textsuperscript{251} Prior to granting declaratory judgment, courts will wait until an anticipated event occurs, unless special circumstances warrant an exception.\textsuperscript{252} The court provided examples of nonjusticiable issues\textsuperscript{253} and concluded that a showing of actual or imminent injury to a claimant is required before Maryland courts will entertain an action for declaratory judgment.\textsuperscript{254}

\begin{itemize}
\item [\textsuperscript{246}] MD. CTS. & JUD. PROC. CODE ANN. §§ 3-401 to -415 (1984). *Id.* § 3-409(a) provides:
\begin{enumerate}
  \item **In general.**—Except as provided in subsection (d), a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
  \begin{enumerate}
    \item An actual controversy exists between contending parties;
    \itemAntagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
    \item A party asserts a legal relation, status, right or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.
  \end{enumerate}
\end{enumerate}
\item [\textsuperscript{247}] 62 Md. App. 360, 489 A.2d 96 (1985).
\item [\textsuperscript{248}] *Id.* at 362, 489 A.2d at 97. The challenged ordinance authorized the reconstruction and maintenance of a community pool, to be financed by annual special benefit taxes levied against property in the community. *Id.*
\item [\textsuperscript{249}] *Id.* at 371, 489 A.2d at 101-102. At the time of the instant action, the ordinance did not require the work to be done; a budget with an appropriation for the pool had not been approved, and the suggested special benefit tax had not been levied. *Id.*
\item [\textsuperscript{250}] *Id.* at 372, 489 A.2d at 102.
\item [\textsuperscript{251}] *Id.* at 368, 489 A.2d at 100.
\item [\textsuperscript{252}] Tanner v. McKeldin, 202 Md. 569, 579, 97 A.2d 449, 453 (1953). In *Liss v. Goodman*, 224 Md. 173, 167 A.2d 123 (1961), the court found such special circumstances. The Baltimore City Council expressed the intent to reject the budget ordinance submitted by the Board of Estimates. Although the Council had not acted, the Court of Appeals decided that a declaratory judgment action was appropriate because the City's financial status would be seriously impaired if the Council rejected the ordinance late in the Council session. *Id.* at 177-78, 167 A.2d at 125.
\item [\textsuperscript{254}] 62 Md. App. at 371, 489 A.2d at 102.
\end{itemize}
Ebersberger, the court found that the appellees' had not suffered actual injury, nor was injury imminent.255 If the county implemented the ordinance, however, the plaintiffs would have a cause of action.256

6. Intervention.—In County Commissioners v. Gross,257 the Court of Appeals held that the County Commissioners of Carroll County had the right to intervene in a property owner's appeal from the county board of zoning appeals' denial of a variance.258 The county demonstrated that it met the requirements for intervention specified in Montgomery County v. Ian Corporation.259 The application was timely; no existing party represented or advocated the county's interest; and the decision would bind the County Commissioners.260

The court rejected the property owner's argument that Board of Zoning Appeals v. McKinney261 required it to deny the county's intervention.262 McKinney held that the Board of Zoning Appeals of Baltimore City could not appeal the reversal of its own decision because it was not granted that power by the legislature.263 The General Assembly has granted boards of county commissioners the right to appeal zoning decisions, however.264 The court reasoned that it would be anomalous to grant a county the right to appeal a decision, but deny it the right to intervene in the appeal of another from the same decision.265

7. Continuance.—In Reaser v. Reaser,266 the Court of Special Appeals held that this case was "one of those exceptional instances in which the refusal of the trial court to grant a continuance constituted an abuse of discretion."267 Ms. Reaser requested a continu-

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255. Id.
256. Id. at 371-72, 489 A.2d at 101-02.
258. Id. at 474, 483 A.2d at 755.
260. 301 Md. at 481, 483 A.2d at 759.
261. 174 Md. 551, 199 A. 540 (1938).
262. 301 Md. at 477-81, 483 A.2d at 757-59.
263. 174 Md. at 562, 199 A. at 545. In McKinney, the Baltimore City Court reversed the Board of Zoning Appeals' approval of the issuance of a filling station permit, id. at 556, 199 A.2d at 542, and the Court of Appeals dismissed the Board's appeal, id. at 567, 199 A. at 547.
265. 301 Md. at 481, 483 A.2d at 759.
267. Id. at 645, 490 A.2d at 1316.
ance because she had not been able to replace her lawyer. The court pointed to several factors that demonstrated the trial court’s abuse of discretion in denying her request. Plaintiff had only six days notice of the trial date; no emergency required the case to proceed immediately; a continuance would not have prejudiced the defendant, and he did not object; and finally, the plaintiff needed counsel because of the complex issues involved.

8. **Declaratory Judgment.**—In *Pope v. Sun Cab Co.*, the Court of Special Appeals considered a trial court’s authority to issue a declaratory judgment on a question to be decided in another pending action. The court held that the granting of a declaratory judgment is ordinarily within the discretion of the trial court if the pending action is between the same parties and for the same cause. If the issue is the ultimate one to be determined in the pending suit,

268. Id.
269. Id. at 649-50, 490 A.2d at 1318-19.
270. Id. at 649, 490 A.2d at 1318.
271. Id. at 650, 490 A.2d at 1318.
272. Id.
273. Id. at 649, 490 A.2d at 1318. The court noted that “potentially complicated issues involving marital property are involved in this case.” Id. The trial judge did not inquire how long it would take plaintiff to obtain counsel, nor did he give any reason for the denial of the continuance. Id. at 650, 490 A.2d at 1318.
275. Id. at 224, 226-27, 488 A.2d at 1012, 1013-14. In this case, plaintiffs filed tort actions for injuries sustained while passengers in a taxicab operated by Sun Cab. When the drivers of the other vehicles could not be identified, plaintiffs amended their complaints to include uninsured motorist claims against Sun Cab, pursuant to Md. Ann. Code art. 48A, § 541(c) (1979 & Supp. 1985). Sun Cab demurred to these claims, claiming that Md. Ann. Code art. 48A, § 538(b) (1979) excused it from obtaining uninsured motorist coverage. The Maryland Automobile Insurance Fund (MAIF) recognized that plaintiffs would assert their claims directly against MAIF if Sun Cab prevailed on this point. The trial court added MAIF as a party to the action before deciding Sun Cab’s demurrer to appellants’ claims. MAIF immediately filed a declaratory judgment action to determine the proper interpretation of § 538. The trial court sustained Sun Cab’s demurrers on the ground that § 538(b) excluded taxicabs from the § 541(c) uninsured motorist coverage requirements, granted appellants’ petition to sue MAIF, and denied MAIF’s declaratory judgment petition. 62 Md. App. at 222-24, 488 A.2d at 1011-12.
276. Ultimate issues are those issues raised by a defendant that, if resolved in the defendant’s favor, constitute an absolute defense to the pending action. 62 Md. App. at 225, 488 A.2d at 1012. The Court of Special Appeals derived this definition from *Brohawn v. Transamerica Ins. Co.*, 276 Md. 996, 347 A.2d 842 (1975). In that case, appellant was sued in tort by a third party on alternative theories of negligence and assault. Appellant’s insurer filed for a declaratory judgment that it was not required either to defend or indemnify its insured whenever intentional injury was involved. The Court of Appeals held that the trial court did not abuse its discretion in dismissing the declaratory judgment action because the issues raised were ultimate issues to be decided
however, a declaratory judgment is inappropriate. In Pope, the statutory interpretation issue raised in the declaratory judgment action would conclusively determine the pending action as well. Thus, the trial court properly exercised its discretion in denying declaratory judgment.

9. Jury Selection.—In Gladhill v. General Motors Corp., the United States Court of Appeals for the Fourth Circuit held that the district court committed reversible error by refusing to strike for cause a prospective juror who owned stock in the defendant manufacturer. The court found that its earlier decision in Chestnut v. Ford Motor Co. established a per se rule that "a stockholder in a company which is a party to a lawsuit is incompetent to sit as a juror. . . ." Only an intervening Supreme Court decision could overrule this precedent. The court found no such decision and also pointed to congressional action that supported Chestnut.

10. Necessity for Cross-Appeals.—In Automobile Trade Association v. Harold Folk Enterprises, the Court of Appeals held that appellees in the pending tort claim. The Court of Appeals characterized ultimate issues as those that would allow one party "to wrest control of the litigation" from the opposing party. The proper way for MAIF to obtain review of the statutory interpretation issues was through appeal. Id. at 227, 488 A.2d at 1013.

Id. at 225, 488 A.2d at 1012. The proper way for MAIF to obtain review of the statutory interpretation issues was through appeal. Id. at 227, 488 A.2d at 1013.

Id. at 224-27, 488 A.2d at 1012-14. MAIF was made a party, at its request, in time to oppose Sun Cab's demurrers; thus, it was accorded an adequate opportunity to be heard on its interpretation of §§ 538(b) and 541(c). The trial court decided to deny MAIF's declaratory judgment petitions by ruling that the declaratory judgment actions raised ultimate issues more appropriately decided in the pending tort suits. Id. at 224, 488 A.2d at 1012.

743 F.2d 1049 (4th Cir. 1984).

Id. at 1050. Because of the refusal to strike for cause, the plaintiff had to use a peremptory challenge to eliminate the juror, which reduced the number of plaintiff's peremptory challenges by one. Id.

445 F.2d 967 (4th Cir. 1971). In Chestnut, a products liability case against an automobile manufacturer, the court held that the district court committed reversible error by refusing to strike for cause a prospective juror who was a stockholder of the defendant manufacturer because the refusal effectively reduced the number of plaintiff's peremptory challenges. Id. at 971-72.

Id. at 971.

743 F.2d at 1050-51.

Id. at 1051. In 1974 Congress enacted legislation to require that judicial officers disqualify themselves if they, their spouse, or their children have "a financial interest . . . in a party to the proceeding." Pub. L. No. 93-512, 88 Stat. 1609 (codified at 28 U.S.C. § 455(b)(4) (1982)).

could argue an issue resolved against them at trial without filing a cross-appeal. The Motor Vehicle Administration (MVA) notified the appellees, agents for an automobile referral sales business, that their licenses would not be renewed. The appellees sought a declaratory judgment that they were not vehicle salespeople as defined by the statute and, therefore, did not need to be licensed. The trial court found that the statute applied to the appellees, but ordered the MVA to issue the licenses. On appeal, the appellants sought to preclude review of the trial court's finding that the appellees were vehicle salespeople because appellees failed to file a cross-appeal.

The Court of Appeals rejected appellants' contention. As a general rule, parties seeking appellate reversal of trial court judgments must file a timely order for appeal. When appellees receive a favorable judgment at trial, however, they may seek to argue an issue resolved against them as an alternative ground for affirmance. The appellees won below, although the trial court rejected their argument that they were not vehicle salespeople. Since the same issue would serve as an alternative ground for affirmance, the appellees could argue the issue during appellate review without cross-appeal.

11. Tender Resulting from Judgments.—In Chesapeake Bay Distributing Co. v. Buck Distributing Co., the Court of Special Appeals reaffirmed century-old precedent on the law of tender. A tender is an offer, made by someone capable of immediate performance, to per-

287. Id. at 649, 484 A.2d at 615.
288. Id. at 647, 484 A.2d at 614. The MVA's action followed an opinion by the Attorney General that stated the appellees were ineligible for licenses because they were not employed by licensed automobile dealers as required by statute. Id. at 651, 484 A.2d at 616. See Md. Transp. Code Ann. § 15-404 (1984).
289. 301 Md. at 647, 484 A.2d at 614.
290. Id.
291. Id. at 647-48, 484 A.2d at 614-15.
292. Id. at 649, 484 A.2d at 615.
293. Id. at 648, 484 A.2d at 615. See Md. R.P. 812, 1012.
294. 301 Md. at 648-49, 484 A.2d at 615.
295. Id. at 649, 484 A.2d at 615.
form an obligation. Tender is excused, however, if the obligee declares an intention to reject it, so that the tender would be a “futile gesture.” Such pre-tender rejection must be “by express declaration or other equivalent act” to excuse as futile the failure to tender actual money. Thus, the trial court erred in finding a constructive rejection when Chesapeake responded to Buck’s tender by telling Buck that it intended to appeal. The court found that Chesapeake’s purpose in mentioning the appeal was “not to reject the tender, but to treat counsel fairly by notifying him of the status of the case.”

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299. 60 Md. App. at 214, 481 A.2d at 1158.
300. Id.
301. Id. (quoting Shannon v. Howard Mutual Bldg. Ass’n, 36 Md. 383, 392 (1892)) (emphasis added).
302. Id., 481 A.2d at 1159. “The effect of a tender is to arrest the running of interest and to relieve the debtor of liability for costs.” Id.
303. Id. at 216, 481 A.2d at 1159.
304. Chesapeake had won a judgment against Buck for $71,496.50, which included Chesapeake’s lost profits for only three years prior to its suit; Chesapeake planned an appeal to obtain more lost profits. Id. at 212, 481 A.2d at 1157.
305. Id. at 215, 481 A.2d at 1159.
III. COMMERCIAL LAW

A. Banking and Financial Institutions

The Maryland General Assembly passed major legislation during 1985 covering two diverse aspects of banking in Maryland: the savings and loan crisis and regional banking. Both pieces of legislation will have a significant impact upon Maryland financial institutions and their depositors.

1. The Savings and Loan Crisis.—Perhaps the most important aspect of the modern banking system is an abstract quality known as "public confidence." With only a small portion of savings deposits held in reserve, banks rely upon the account holders' willingness to leave their money on deposit. When, for one reason or another, large numbers of people lose faith in the stability of their banking institutions and withdraw funds en masse, the very survival of the bank is jeopardized. Such a loss of faith surrounded the Maryland savings and loan crisis.

The crisis began with financial problems at the Old Court Savings and Loan Association (Old Court). On May 9, 1985, the Maryland Savings-Share Insurance Corporation (MSSIC), a private, State-chartered thrift insurer, replaced the manager of Old Court with one of MSSIC's directors.1 Old Court suffered a run on deposits after The Baltimore Sun reported the managerial change.2 Similarly, negative news reports concerning Merritt Commercial Savings and Loan of Baltimore (Merritt), another MSSIC-insured association, led to mass withdrawals.3 By May 13, both Old Court and Merritt were under conservatorship,4 and the run on deposits had spread to other State-chartered savings and loan associations insured by MSSIC.5 Federal examiners were called into Maryland to aid in the crisis.6

On May 14, Governor Hughes issued a proclamation7 limiting

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4. Id.
5. DEPARTMENT OF LEGISLATIVE REFERENCE, 1985 FIRST SPECIAL SESSION REVIEW GENERAL OF THE ASSEMBLY: SAVINGS & LOAN ASS'NS 2 (May 29, 1985) [hereinafter SPECIAL SESSION REVIEW].
6. Id. More than 300 federal examiners came to Maryland.
withdrawals at Maryland's 102 privately insured savings and loan associations to $1,000 per month per existing account. Governor Hughes also convened an emergency session of the legislature to seek sweeping changes to preserve the State's financial system. The purpose of the Extraordinary Session was three-fold: to investigate what went wrong at Old Court and Merritt; to regulate in such a way that future problems might be averted; and to restore vital public confidence.

New rules on compelled testimony and the creation of a special investigatory office facilitated the investigation. Regulation of the associations was increased by significantly expanding the Governor's emergency powers, liberalizing the conservator-receivership rules, and giving the director of the newly created State of Maryland Deposit Insurance Fund Corporation (SMDIFC) the authority to oversee savings and loan association operations. Public confidence was bolstered by restructuring the deposit insurance system in Maryland: large sums of money were appropriated for temporary State funds to back depositors' accounts, and plans were made to obtain federal insurance for all Maryland savings and loan associations.

proclamation, stating that an emergency existed in Maryland and the withdrawal limitations were necessary to protect the public safety, health, and welfare. The General Assembly subsequently ratified the proclamation in the first chapter of the Extraordinary Session laws. Act of May 18, 1985, ch. 1, 1985 Md. Laws 4105-06.

8. The withdrawal restrictions succeeded in drastically reducing the run on deposits. Depositors withdrew $116 million from MSSIC-insured institutions on May 13. Balt. Sun, May 15, 1985, at 10A, col. 1. The net outflow from the 20 largest institutions was $119 million on May 14. N.Y. Times, May 21, 1985, at D4, col. 4. That net outflow dropped to $4 million by May 16, just two days after the Governor's order. Id.


10. See id.


17. SPECIAL SESSION REVIEW, supra note 5, at 4. Federal insurance is viewed as stable and is thus the ultimate goal for savings and loan associations. Balt. Sun, May 16, 1985, at A22, col. 1.
The Legislation.—The General Assembly passed twelve bills, discussed below according to subject matter.

(a) Governor’s Emergency Powers.—Chapters one and eight contain emergency grants of power to the Governor faced with a savings and loan crisis. Section one of chapter one expands previously codified gubernatorial emergency powers by granting broad new powers to be used “where the health, safety, or welfare of depositors in one or more savings and loan associations is threatened.” The Governor may declare that an emergency exists and then may close, reopen, or regulate the continued operation of troubled savings and loan associations. The Governor must notify the Legislative Policy Committee within forty-eight hours of exercising these powers to allow the Committee to review the decision. The legislation makes it a misdemeanor to violate an executive order issued under this section or to submit false information relating to a declared emergency, punishable by a maximum five years’ imprisonment, or $5,000 fine, or both. These emer-

18. Note that, in general, these twelve bills are expansive; they create funds, debts, or powers to be exercised in addition to, and not in derogation of, any powers previously granted. See 1985 Md. Laws at 4105, 4109, 4115; infra notes 23, 34, 50-65, 69-72 and accompanying text.


23. Specifically, the Governor is authorized to:
   1. proclaim a savings and loan holiday;
   2. set the terms for reopening;
   3. set terms for the limited operation of affected savings and loan associations;
   4. provide a procedure to make any exceptions necessary to avoid injustice;
   5. establish procedures regarding the use of negotiable instruments, including fees and liabilities for dishonor;
   6. exercise the powers of the Board of Savings and Loan Commissioners, the Director of the Division of Savings and Loan Associations, and the Director of the Maryland Deposit Insurance Fund Corporation;
   7. issue cease and desist orders; and
   8. delegate these powers, except for the power to declare an emergency.

24. Id.

25. Id.
ergency powers granted to the Governor expire on July 1, 1986.\textsuperscript{26}

Uncodified sections of chapter one ratified the Governor's proclamation limiting withdrawals,\textsuperscript{27} instructed financial institutions to waive any fees imposed due to dishonored negotiable instruments resulting from the proclamation,\textsuperscript{28} and prohibited the recodification in credit records of any default on an obligation resulting from the order.\textsuperscript{29} The Governor was given three days to submit a plan for allowing exceptions to the proclamation's withdrawal restrictions in cases of inequity.\textsuperscript{30}

Chapters one and eight empower the Governor to act quickly and unilaterally in the face of a savings and loan crisis. The misdemeanor provision ensures that these orders will be obeyed. Legislative review helps to prevent an abuse of these emergency powers, and the July 1, 1986, sunset provision guaranteed the temporary nature of the Governor's new powers.

\textit{(b) Conservator-Receivership.}—Chapter two\textsuperscript{31} expands the conditions under which a court may appoint a conservator.\textsuperscript{32} By authorizing appointment whenever necessary "to preserve the assets of the savings and loan association for the benefit of the depositors and creditors," the Act gives courts greater flexibility in the conserva-

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\item The Governor responded by including in an executive order dated May 21, 1985, the following exceptions to the $1,000 limit:
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\item accounts held in escrow for a previously delineated purpose;
\item accounts held by a business for payroll purposes;
\item accounts held by a business entity in which the savings and loan association has an equity interest; and
\item accounts held by individuals to pay:
\begin{enumerate}
\item closing costs;
\item tuition bills;
\item mortgage payments;
\item health care costs for persons over 65; or
\item certain emergency medical costs.
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In addition, the Governor allowed depositors to carry over to subsequent months any unused portion of the $1,000 limit, 12 Md. Admin. Reg. at 1120, and lifted the withdrawal limitations on 33 privately owned institutions that were found to be soundly operated. Attachment A, 12 Md. Admin. Reg. at 1121-22.

\begin{enumerate}
\item These conditions were previously codified in Md. Fin. Inst. Code Ann. § 9-701 (Supp. 1984).
\end{enumerate}
torship decision. The legislation also gives conservators more authority to address savings and loan association problems, including the powers to make and receive a variety of payments and to borrow money.\(^\text{34}\)

Chapter two recognizes the authority, under the provisions of chapter six\(^\text{35}\) of the Director of the State of Maryland Deposit Insurance Fund Corporation (Fund Director) to institute proceedings for the appointment of a conservator or receiver.\(^\text{36}\) Subsection (c)(1) of chapter six authorizes the Fund Director to institute such proceedings if a “major”\(^\text{37}\) savings and loan association is not likely to qualify for federal insurance and the proceedings are in the public interest.\(^\text{38}\) The Board of Savings and Loan Commissioners previously had the exclusive authority to institute appointment proceedings.\(^\text{39}\)

(c) *Priority of Collateral and Claims.*—Chapter three\(^\text{40}\) serves two purposes: First, it adds a new section\(^\text{41}\) to the Real Property Article. The bill states that whenever a savings and loan association grants a security interest in or assigns a mortgage to any state or federal government agency, the interest granted is fully perfected and takes priority over all other claims and creditors as long as the mortgage is in

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\(^{34}\) Among the new powers granted conservators are the powers to:

1. borrow from, pledge assets to, and repay a Federal Reserve bank or other lenders;
2. make wire transfers;
3. pay withdrawals of deposits, if authorized;
4. pay negotiated order of withdrawal drafts and cashiers checks;
5. receive new deposits;
6. pay a Federal Reserve bank or other bank cash to fund withdrawals; and
7. pay necessary day-to-day operating expenses of the institution, including salaries.


the control of that agency. The recipient agency must promptly notify the state or federal agency that issued the association's charter of the transaction. This provision makes a savings and loan association more liquid by creating a new class of readily marketable collateral.

Second, chapter three creates an exception to the rule that an association must take title to all its investments in its own name. The Board of Savings and Loan Commissioners may permit a savings and loan association to transfer a security interest in collateral given by the association to any state or federal government agency to secure loans, without that assignment's public recordation. This provision was added to avoid public concern and panic over routine borrowing by an association.

Chapter five, which deals with net worth certificates generally, contains priority provisions for such certificates. The right and claim of a holder of a net worth certificate has priority over any claim or right arising out of any other equity interest in the savings and loan association, subject to prior payment of all savings liabilities and debt obligations.

(d) Savings and Loan Association Capital Stabilization and Insurance Loan.—Chapter four authorizes the creation of a $100,000,000 State debt, evidenced by State bonds, to provide monies for the Maryland Deposit Insurance Fund and the Savings and Loan Association Capital Stabilization Fund. The bill also creates the latter Fund and establishes its administration. The monies will be used to insure depositor accounts and to purchase net worth certificates if doing so will qualify a savings and loan association for federal insurance.
(e) Net Worth Certificates.—Chapter five is entirely new law dealing with net worth certificates. A net worth certificate is "a capital instrument issued by a savings and loan association for the purpose of increasing or maintaining the capital of the association." Chapter five authorizes savings and loan associations to issue net worth certificates to the State of Maryland with the prior approval of the Secretary of Licensing and Regulation and the Fund Director. In exchange for these certificates, the State may give money, bond anticipation notes, or any other consideration that the Fund Director approves.

A net worth certificate is convertible into stock of a capital stock association. This provision permits the State to convert the certificate into readily liquid stock when the association is healthy. The issuance of net worth certificates will help a savings and loan association meet the net worth requirement for federal insurance. Chapter five also establishes rules setting priorities of claims or rights for holders of a net worth certificate; prohibiting the payment of a dividend or the making of certain distributions when net worth certificates are outstanding; giving the Secretary of Licensing and Regulation certain powers when certificates are outstanding; providing a punishment of up to a $5,000 fine or five years' imprisonment, or both, for submitting false information concerning


56. Id. at 4116-17 (codified at Md. Fin. Inst. Code Ann. § 9-224(a)).

57. Id.

58. Id.

59. Special Session Review, supra note 5, at 8.

60. The most recent amendments to federal deposit insurance requirements are published in 50 Fed. Reg. 38,636 (1985) (to be codified at 12 C.F.R. §§ 561, 563).


62. When a capital stock association has any net worth certificate outstanding, it may not pay any dividend or make a distribution of any nature with respect to any capital stock. 1985 Md. Laws at 4117 (codified at Md. Fin. Inst. Code Ann. § 9-224(a)).

63. When a savings and loan association has any net worth certificate outstanding, the Secretary of Licensing and Regulation may:

- create and fill new directorship positions for the association;
- fire any and all association officials without cause, or reduce their pay; and
- distribute the assets of the association, subject only to the Governor's approval.

Id.
a net worth certificate, and granting good faith immunity to State officials exercising power under this Act.

(f) The State of Maryland Deposit Insurance Fund Corporation. — Chapter six abolishes the troubled MSSIC and replaces it with the newly created, State-run SMDIFC. Section one of chapter six acknowledges the new fund as an agency within the Department of Licensing and Regulation and changes certain references to MSSIC. Section two entirely repeals title 10 of the Financial Institutions Article, which governed MSSIC. Section three then codifies a new title 10 to govern SMDIFC and to create SMDIFC, the office of a Fund Director, a Board of Directors, and a budgeted staff. SMDIFC purposes include insuring accounts, purchasing capital instruments from member associations to help them qualify for federal insurance, reimbursing account holders for losses incurred upon liquidation of a member association, and providing emergency funds to members. The General Assembly provided that “funds will be appropriated to the Fund to the extent necessary to protect holders of savings accounts in member associations.”

The Fund Director is subject to the authority of the Secretary of Licensing and Regulation. The legislation limits the Director’s permissible outside financial activities to avoid a conflict of interest with the Fund role. The Fund Director may adopt rules and regulations to carry out the provisions of this bill, subject to the approval

64. Id. at 4118 (codified at Md. Fin. Inst. Code Ann. § 9-224(b)).
65. Id. § 3. Good faith immunity is immunity from prosecution based on the good faith judgments of government officials.
68. 1985 Md. Laws at 4121.
70. Id. at 4122-23 (codified at Md. Fin. Inst. Code Ann. §§ 10-102 to -104).
74. The Fund Director may not:
1. be an officer or director of any savings and loan association;
2. conduct any other business relating to financial institutions;
3. become indebted to any member association; or
4. engage or be interested in the financial dealings of others with a member association.
of the Board of Directors, and may institute proceedings for conservatorship or receivership if a member association is being poorly operated.

Section three also describes terms of Fund membership. Any association may apply to the Fund Director to become a member. Once the Division of Savings and Loan Associations Director certifies an association for insurability, the Fund Director may approve its application. A member association may withdraw from the Fund at any time and have returned all or part of any capital advanced to MSSIC or SMDIFC, as approved by the Fund's Board of Directors. These provisions encourage members to leave SMDIFC and obtain federal insurance by helping them meet the Federal Savings and Loan Insurance Corporation's (FSLIC) net worth requirements.

Eligibility for future Fund membership depends upon the size of a given savings and loan association. A "major association" with assets of $40 million or more is not eligible for new or continued membership in the Fund on or after June 1, 1985, subject to a number of listed exceptions. Smaller associations with assets of

75. Id. at 4125 (codified at Md. Fin. Inst. Code Ann. § 10-113).
76. Id. at 4126 (codified at Md. Fin. Inst. Code Ann. § 10-117); see also supra notes 41-42 and accompanying text.
78. A member association can withdraw only if it is doing so to join the Federal Savings and Loan Insurance Corporation (FSLIC). A Maryland savings and loan association must have its savings accounts insured by either SMDIFC or FSLIC. Md. Fin. Inst. Code Ann. § 9-901 (1980 & Supp. 1985).
79. Special Session Review, supra note 5, at 10. The net worth requirements for federal insurance are discussed supra at note 63.
80. A major association may remain a member of the Fund beyond June 1, 1985, only under the following circumstances:
1. if the association has applied for federal insurance on or before June 1, 1985, it may remain a member:
   a. for a maximum of seven additional months, if the Fund Director determines that it is likely that the association will qualify for federal insurance; and
   b. for an extended period of up to three months after its application has been denied, if the Fund Director determines that the interest of savings account holders will not be jeopardized;
2. whether or not the association has applied for federal insurance, its membership may be extended by the Fund Director for up to one year past June 1, 1985, if it is owned or controlled by an institution insured by FSLIC or FDIC that guarantees the savings accounts of the major association or has agreed to acquire or merge with that association;
3. if an association becomes a "major" association after joining the Fund, its membership may be continued for a maximum of one year after its becoming a major association, as determined by the Fund Director;
$15 million to $40 million are not eligible for membership on or after July 1, 1987, and those with assets of less than $15 million cannot be a member on or after July 1, 1989. If an involuntary action for conservatorship or receivership has been instituted against a smaller association, however, the association may remain a Fund member until the proceeding’s conclusion.

Finally, new title 10 provides punitive measures. It is a misdemeanor knowingly to submit false information to the Fund. A person who does so may be fined not more than $5,000, or imprisoned for not more than five years, or both.

The remaining sections of chapter six are uncodified. Section four merges MSSIC into SMDIFC without need for any confirmatory or other articles or instruments. This provision allows SMDIFC to avoid potential federal tax liabilities in the transfer. Section five allows all members of MSSIC at the time of enactment automatically to become members of SMDIFC. Section eight requires the Governor to appoint a special committee to study the Act’s effects on smaller associations and make appropriate recommendations. Chapter nine is a corrective bill that adds to two

4. if proceedings have been instituted against the association for the appointment of a conservator or receiver, membership will continue until the completion of those proceedings;
5. if the association was insured by MSSIC on May 16, 1985, and is a subsidiary of a corporation that owns another association in another state, it may continue to be insured by the Fund until July 1, 1987.

References:
82. Id.
83. Id. (codified at MD. FIN. INST. CODE ANN. § 10-119).
84. Id.
85. 1985 Md. Laws at 4127.
86. SPECIAL SESSION REVIEW, supra note 5, at 11 (potential tax liabilities total $19 million).
88. 1985 Md. Laws at 4128. The eligibility provisions leave unresolved questions about the future of the “ethnics,” very small, neighborhood-oriented savings and loan associations that could never qualify for federal insurance. Most of the small associations experienced none of the managerial problems that plagued Old Court and Merritt and have been running smoothly during the crisis. It seems highly unfair to enact federal insurance requirements that will force innocent savings and loan associations out of business. The provision that a special committee examine the effects of the new Act on smaller associations and make appropriate recommendations indicates that the General Assembly and the Governor may carve out an exception for the “ethnics.” See Balt. Sun, May 17, 1985, at A14, col. 1.
sections of the new title 10\textsuperscript{90} and corrects an erroneous cross-reference in chapter six.\textsuperscript{91}

In sum, chapters six and nine establish a State fund to replace the collapsing MSSIC. But the State of Maryland clearly does not intend to stay in the deposit insurance business for long; SMDIFC is only a stop-gap measure, insuring depositor accounts for a maximum of four years while Maryland savings and loan associations either obtain federal insurance or go out of business.\textsuperscript{92} The authorization in chapter four of a $100 million State debt, to be used in part for SMDIFC,\textsuperscript{93} provides the monies necessary to ease public fears and stabilize the Maryland savings and loan system.

\textit{(g) State Administrative Costs.}—Chapter seven\textsuperscript{94} makes an emergency appropriation of $1 million to the Board of Public Works for the payment of administrative costs incurred in providing assistance to privately insured State savings and loan associations. The funds are appropriated from the General Fund Surplus Account for Fiscal Year 1985.\textsuperscript{95} Any funds remaining at the end of Fiscal Year 1985 will not revert to the Treasury, but will be available for expenditure during Fiscal Year 1986.\textsuperscript{96}

\textit{(h) Compelled Testimony.}—Chapter ten\textsuperscript{97} adds a new section to the Code\textsuperscript{98} authorizing compelled testimony in proceedings to investigate or prosecute criminal violations by savings and loan association officers. The bill states that a person who lawfully refuses to provide information in such proceedings,\textsuperscript{99} based upon the fifth

\textsuperscript{91.} The new title 10 referred to "an association that is open for business pursuant to Section 9-901(b) of this Article." \textit{Id.} at 4126. The proposed Section 9-901(b) was not enacted.
\textsuperscript{92.} The Speaker of the House of Delegates, Benjamin Cardin, told House members that savings and loan associations eventually would have to be covered by FSLIC or go out of business because the State could not remain in the insurance business. Balt. Sun, May 17, 1985, at 3A, col. 6. Apparently, members of SMDIFC that do not obtain federal insurance by their eligibility deadline will be sold and liquidated. The depositors would then be paid from the proceeds, up to $100,000 per account. \textit{See} Balt. Sun, May 15, 1985, at 10A, col. 6.
\textsuperscript{93.} Act of May 18, 1985, ch. 4, 1985 Md. Laws 4112.
\textsuperscript{94.} Act of May 18, 1985, ch. 7, 1985 Md. Laws 4129.
\textsuperscript{95.} \textit{Id.}
\textsuperscript{96.} \textit{Id.}
\textsuperscript{99.} Note that the testimony must be compelled for this provision to apply, i.e., the
amendment privilege against self-incrimination, may be compelled to testify through the grant of transactional immunity, if witnesses are immune from prosecution based on their testimony, they cannot claim the privilege against self-incrimination. The immediate purpose of this bill is to facilitate the criminal investigation of Old Court’s and Merritt’s affairs.

(i) Office of Special Counsel.—In a preamble to chapter eleven, the General Assembly notes that the appointment of an independent investigator would maximize public confidence in any investigation of the savings and loan crisis. Accordingly, chapter eleven establishes an Office of Special Counsel as an independent unit in the Executive Department, effective from June 1, 1985, to March 1, 1986. The Special Counsel’s primary duty has been to investigate all aspects of the events related to the emergency declared by the Governor on May 14, 1985. The bill details the special counsel’s term of appointment, the qualifications necessary for the job, and the position’s specific duties, powers, and responsibilities.

(j) Emergency Funding—Office of Special Counsel.—Chapter twelve makes an emergency appropriation of $500,000 for the payment of costs incurred in organizing and operating the Office of Special Counsel. The funds are appropriated from the General Fund Surplus Account for Fiscal Year 1985, with unused funds person must first refuse to answer the question. If witnesses volunteer information, they will not receive immunity. Id. Transactional immunity is an exemption “from prosecution, trial, and punishment for any and all crimes and offenses about which the person was compelled to testify.” 1985 Md. Laws at 4146 (codified at Md. Fin. Inst. Code Ann. § 9-910(b)).

101. Id. at 4149, 4152 (codified at Md. State Gov’t Code Ann. § 9-1201(b)).
102. Id. at 4150 (codified at Md. State Gov’t Code Ann. § 9-1204(b)).
103. Id. at 4150-52 (codified at Md. State Gov’t Code Ann. § 9-1202(a)).
104. The Special Counsel was to be appointed by June 15, 1985, and was to take office by July 1, 1985. 1985 Md. Laws at 4149 (codified at Md. State Gov’t Code Ann. § 9-1201(b)).
105. The Special Counsel must be a member of the Maryland bar for five years, must agree not to be a candidate for any other State or local office during the term of office and for three years thereafter, and may not be a State employee or State public official before appointment. 1985 Md. Laws at 4149-50 (codified at Md. State Gov’t Code Ann. § 9-1201(b)).
available for expenditure during Fiscal Year 1986.\textsuperscript{109}

\textit{(k) Conclusion.} On the afternoon of May 14, 1985, the savings and loan industry in Maryland was on the verge of total collapse. Depositor withdrawals on the previous two banking days exceeded $200 million.\textsuperscript{110} All privately insured associations were caught up in a wave of public panic triggered by the problems at Old Court and Merritt. The Governor’s $1,000 withdrawal limit\textsuperscript{111} was an effective\textsuperscript{112} first step towards resolving the crisis; the General Assembly’s legislation moved closer to a long-term solution. The key provisions of the Extraordinary Session laws were the grant of broad emergency powers to the Governor and the creation of a State-backed fund to replace MSSIC while Maryland savings and loan associations obtain federal insurance. As a whole, the twelve bills expanded governmental power to regulate and investigate savings and loan associations with an aim toward restoring public confidence in those institutions.

2. Savings and Loan Division—Cease and Desist Orders.—Chapter 291 of the Laws of 1985\textsuperscript{113} added section 8-402.1 to the Financial Institutions Article, authorizing the Savings and Loan Division of the Department of Licensing and Regulation to issue cease and desist orders to savings and loan associations\textsuperscript{114} to stop an unsound business practice, a practice that is injurious to the public interest, or a violation of law or regulation.\textsuperscript{115} The Division Director may include in the order a requirement that savings and loan association officials act affirmatively to correct any faulty practices.\textsuperscript{116} The order can also restrict withdrawals by named persons.\textsuperscript{117} This new section also provides for an administrative hearing either before a cease and desist order takes effect or immediately thereafter.\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{109} Id. at 4152-53.
  \item \textsuperscript{110} See Balt. Sun, May 15, 1985, at 10A, col. 4 ($116 million on May 13); N.Y. Times, May 21, 1985, at D4, col. 4 ($119 million on May 14).
  \item \textsuperscript{111} Proclamation, 12 Md. Admin. Reg. 1122-23 (June 7, 1985).
  \item \textsuperscript{112} See supra note 8 and accompanying text.
  \item \textsuperscript{114} House Bill 11, introduced during the Extraordinary Session of the General Assembly in May of 1985, would have moved the effective date of the cease and desist powers from July 1, 1985, to the date of passage of that bill. That bill, however, did not pass. Special Session Review, supra note 5, at 13.
  \item \textsuperscript{115} 1985 Md. Laws at 2123-24 (codified at Md. Fin. Inst. Code Ann. § 8-402.1(a)).
  \item \textsuperscript{116} Id. at 2124 (codified at Md. Fin. Inst. Code Ann. § 8-402.1(c)).
  \item \textsuperscript{117} Id. (codified at Md. Fin. Inst. Code Ann. § 8-402.1(b)).
  \item \textsuperscript{118} Id. Section 8-402.1(d)(2) provides that the hearing will be held in accordance with the Maryland Administrative Procedure Act, codified at Md. State Gov't Code
\end{itemize}
3. Savings and Loan Associations—Statement of Financial Condition.—Chapter 292119 expanded existing disclosure requirements of savings and loan associations to give the general public greater access to important financial information. Associations are now required to send or provide an annual statement of financial condition to any person upon request.120 Formerly, savings and loan associations only had to send such information to members.121

4. Regional Banking.—The Maryland General Assembly passed two banking acts during the 1985 legislative session that allow out-of-state bank holding companies to acquire in-state banks.122 The first enables out-of-state bank holding companies from specific states to acquire in-state banks.123 The second permits, under very limited circumstances, bank holding companies from any state to acquire in-state banks, but restricts their access to full scale banking operations.124

The Regional Act sets forth the conditions under which out-of-state bank holding companies may acquire a Maryland bank, a Maryland bank holding company, or an out-of-state bank holding company owning a Maryland subsidiary.125 An "out-of-state bank holding company" is defined as one whose principal place of business is within a state of the region;126 that has eighty percent of total

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120. Id.
125. Regional Act at 1558 (codified at MD. FIN. INST. CODE ANN. § 5-1002(a) (Supp. 1985)) [hereinafter all codification parentheticals for the Regional Act cite to the Financial Institutions Article].
126. Regional Act at 1558 (codified at § 5-1001(o)). Section 5-1001(o) provides that: "Region" means:
(1) From July 1, 1985 through June 30, 1987, the states of Maryland, Delaware, Virginia, West Virginia, and the District of Columbia; and
(2) On or after July 1, 1987 the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia.
deposits, excluding in-state deposits, within the region; and is not controlled by a nonregional or foreign bank or bank holding company.\textsuperscript{127} A "Maryland bank" is a bank organized under either Maryland or federal law with only in-state offices.\textsuperscript{128} A "Maryland bank holding company" is one whose principal place of business is Maryland, whose subsidiary banks have eighty percent of their total deposits in Maryland, and that is not controlled by an out-of-state bank holding company.\textsuperscript{129}

Under the Regional Act, an out-of-state bank holding company must be from the specified region before it can acquire a Maryland bank.\textsuperscript{130} It must comply with Maryland banking laws and submit an application and a filing fee to the Bank Commissioner.\textsuperscript{131} Before approving the acquisition, the Commissioner must find that 1) the laws of the state in which the out-of-state bank holding company has its principal place of business permit a Maryland bank to acquire a bank within that state;\textsuperscript{132} 2) the Maryland bank sought to be acquired could buy the out-of-state bank holding company under that state's law;\textsuperscript{133} and 3) the acquiring bank holding company seeks to buy either a de novo bank\textsuperscript{134} or a Maryland bank that has been in existence and continuously operated for four years.\textsuperscript{135} The Bank Commissioner must consider the out-of-state bank holding company's resources, financial history, and loan and general business policies.\textsuperscript{136} The Commissioner must also consider the future pros-

\begin{enumerate}
  \item Regional Act at 1556-57 (codified at § 5-1001(1)).
  \item Id. at 1556 (codified at § 5-1001(j)).
  \item Id. (codified at § 5-1001(k)).
  \item See supra note 126 and accompanying text.
  \item Regional Act at 1558-59 (codified at § 5-1003(a)(1)).
  \item Id. at 1559 (codified at § 5-1003(a)(2)(i)).
  \item Id. (codified at § 5-1003(a)(2)(ii)).
  \item Id. at 1559-60 (codified at § 5-1003(a)(2)(iii)(1)). Section 5-1001(h) defines a de novo bank as "a newly organized Maryland bank that has not been issued a certificate of authority to do business under this article by the [Bank] Commissioner or its equivalent by the Comptroller of the Currency." Id. at 1555. Section 5-1003(a)(2)(iii)(1) stipulates that if it is a de novo bank that is sought to be acquired, (1) it must have $10,000,000 in minimum capital stock and paid-in surplus on the date it is to commence business, increasing to $25,000,000 within one year; (2) it must have or will have 100 employees within one year; (3) the state in which the out-of-state bank holding company is organized must permit a Maryland bank to acquire a de novo bank in that state; and (4) the de novo bank may not be chartered before July 1, 1989. Id. at 1559-60.
  \item Id. at 1559-60 (codified at § 5-1003(a)(2)(iii)(2), (3), & (4)).
  \item Id. at 1560-61 (codified at § 5-1003(a)(4),(5)). The requirement that the Commissioner inspect the out-of-state bank holding company's loan and general business policies indicates the local nature of banking. Section 5-1003(a)(5) emphasizes that: when considering loan policy and the general plan of business under paragraph (4)(v) of this subsection, the Commissioner shall:
pects of the Maryland bank and the effect of the acquisition on concentration of resources and in-state competition. The acquisition is also subject to any conditions or restrictions applicable to a Maryland bank holding company attempting to acquire a bank in the jurisdiction in which the out-of-state bank holding company has its principal place of business.

The Regional Act's provisions apply both to first-time in-state acquisitions and to acquisitions by out-of-state bank holding companies that already own a Maryland bank subsidiary. These bank holding companies may acquire additional Maryland banks, as long as the in-state banks fall within the listed conditions. Furthermore, an out-of-state bank holding company may acquire the "shares of a bank organized solely to facilitate the acquisition of a bank that has been in existence and continuously operated as a bank for more than four years." Finally, a de novo bank may not be acquired before July 1, 1989.

To protect against abuses, the out-of-state bank holding company is subject to Maryland banking law. Furthermore, the Act requires the Bank Commissioner to monitor the progress of regional banking and make periodic reports to the General Assembly. Finally, an out-of-state bank holding company will be required to divest itself of its Maryland bank subsidiaries if it fails to

(i) Consider specific steps that will be taken to meet the credit needs of small businesses and individuals in the community to be served, including low and moderate income residents, consistent with safe and sound operation of the institution; and

(ii) Assess the record, if any, of the applicant in meeting the credit needs of the communities served in the past, including small businesses in the community served and low and moderate income residents, consistent with safe and sound operation of the institution.

137. Id. at 1560 (codified at § 5-1003(a)(4)).
138. Id. (codified at § 5-1003(a)(2)(iv)).
139. Id. at 1561 (codified at § 5-1003(b)).
140. Id. at 1561-62 (codified at § 5-1003(b)(2)). The categories are the same as in § 5-1003(a)(2)(iii). See supra notes 134 and 135 and accompanying text.
141. Regional Act at 1562 (codified at § 5-1003(c)).
142. Id. (codified at § 5-1003(d)).
143. Id. at 1564 (codified at § 5-1005(a)). Section 5-1005(a) provides that:
An out-of-state bank holding company that controls a Maryland bank, a Maryland bank holding company, or an out-of-state bank holding company having a Maryland bank subsidiary shall be subject to those laws of this state and to the rules of its units relating to the acquisition, ownership, and operation of Maryland banks and Maryland bank holding companies.
144. Id. at 1565-66 (codified at § 5-1007(d)(1)). The report must include the current operating policies, rates, future plans, and financial status of the out-of-state bank holding company and its Maryland subsidiary and the impact of the overall Act on Maryland financial institutions, among other things. Id. (codified at § 5-1007(d)(2)).
continue to meet the definitions of either a Maryland or out-of-state bank holding company. These safeguards are necessary since, as the Supreme Court recently reiterated, banking is of extreme local interest.

Before the passage of this Act, Maryland, in general, barred the acquisition of in-state banks by those of other states, and in no case could an out-of-state bank holding company conduct full scale operations in Maryland. The power to enact this legislation ostensibly comes from the Douglas Amendment to the Bank Holding Company Act of 1956, which granted the power to regulate in-state acquisitions by out-of-state bank holding companies to the states. Unsure of the extent of its power, the General Assembly provided that if any provision of the Regional Act were found to be invalid and its deletion would impair the purpose of the Act, the entire Act was to be nullified.

Since the passage of the Regional Act, the Supreme Court in Northeast Bancorp v. Board of Governors of the Federal Reserve System has upheld several reciprocal, regional banking acts as being within the intent of the Douglas Amendment to the Bank Holding Company Act of 1956. Since Congress authorized states to

145. Id. at 1562-63 (codified at § 5-1004(b)). Section 5-1004(b) requires divestiture, but lists several exceptions to this requirement. See id. (codified at § 5-1004(b)(2)).


147. MD. FIN. INST. CODE ANN. § 12-204 (1980). Section 12-204 provided that "[a] foreign bank or affiliated corporation may not become a bank holding company." The Regional Act amends § 12-204 to allow such acquisitions. Regional Act at 1566 (codified at § 12-204).


149. 12 U.S.C. § 1842(d) (1982). Section 1842(d) provides, in pertinent part, that the Federal Reserve Board is prohibited from authorizing the acquisition of an in-state bank by an out-of-state bank holding company, "unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

150. Regional Act at 1565 (codified at § 5-1007(b)). However, § 5-1007(c) provides that "[a]ny transaction that has been lawfully approved under this subtitle prior to a determination of invalidity under subsection (b) of this section shall be unaffected by a determination of invalidity." Id. (codified at § 5-1007(c)).


152. Id. at 2553. Petitioners had argued that the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d), only permitted a state to choose
regulate bank acquisitions by out-of-state bank holding companies, the state legislation did not violate the commerce clause. The Massachusetts and Connecticut statutes upheld in *Northeast Bancorp* are similar to Maryland's Regional Act. They both specify a region in which the out-of-state bank holding company must have its principal place of business, and they both have reciprocity requirements. Given the similarity in effect and legislative intent between those statutes and Maryland's Regional Act, it is unlikely that the Maryland act will be overturned after the Supreme Court's *Northeast Bancorp* decision.

The Regional Act's major effect will be increased in-state competition, which should provide consumers with better rates and services. By requiring reciprocity, the Regional Act also creates the opportunity for Maryland banks to acquire out-of-state banks. Reciprocity will further allow banks located on the State's borders to expand into natural markets.

The Act has several protectionist features as well. In addition to its reciprocity requirements, it requires strict compliance with its provisions. It allows new Maryland banks to grow for four years before an out-of-state bank holding company may acquire them. It also prohibits the acquisition of de novo banks before 1989, which, in effect, forces an out-of-state bank holding company to acquire established banks. Finally, it excludes New York and California megabanks and thus does not permit banks with assets out of all proportion to the assets of the largest Maryland banks to acquire them. The overriding danger in the Regional Act is that new management may become ambivalent toward the local communities' needs and concerns.

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153. *Id.* at 2553-54. The Court pointed out that, without the delegation of power, the commerce clause would prohibit such state legislation. The Court also rejected challenges to the statutes under the compact and equal protection clauses. *Id.* at 2554-56.

154. The two statutes considered by the Supreme Court in *Northeast Bancorp* were MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1984); CONN. GEN. STAT. ANN. §§ 36-552 to -563 (West Supp. 1986).

155. Regional Act at 1559-60 (codified at § 5-1003(a)(2)(iii)).

156. *Id.* at 1560 (codified at § 5-1003(a)(2)(iii)(D)); *id.* at 1562 (codified at § 5-1003(c)).

157. The exclusion of these large banks is accomplished by the Act's regional requirement. See *id.* at 1558 (codified at § 5-1001(o)).

158. Section 5-1007(d)(1) requires the Bank Commissioner to monitor regional banking and report the results to the General Assembly, including the bank's efforts to meet the credit needs of the community. *Id.* at 1565-66 (codified at § 5-1007(d)(2)(ii)). How-
The second act related to interstate banking passed by the General Assembly in 1985 amends certain sections of the Financial Institutions Article. Section 5-903 generally prohibits out-of-state bank holding companies from acquiring the stock of in-state banks. Prior to 1985, the only exceptions to this rule were newly formed, single office Maryland banks that had large amounts of capital and great numbers of employees and that would not compete with in-state banks. Under this exception, the acquired bank could never operate more than one office in the State. The 1985 amendments permit out-of-state bank holding companies to acquire Maryland banks and operate more than single offices in the state, if the bank to be acquired will be adequately financed and will provide significant employment. The out-of-state bank holding company must still meet the other section 5-903(b) requirements. In addition, it must execute an agreement promising to employ a specific number of people, build a facility in an enterprise zone, limit the number of branches it will open, establish a local Maryland Citizens Advisory Board, and not acquire any other Maryland

ever, an area of concern may be the bank's relationship with the community at large. Local banks are traditionally sponsors and contributors to local organizations. If out-of-state management becomes divorced from the needs of the community, the effects could be disturbing.


160. Md. Fin. Inst. Code Ann. § 5-903(a) (1980 & Supp. 1985). For the purposes of subtitle 9, § 5-901 defines an out-of-state bank holding company as "a bank holding company, as defined in the federal Bank Holding Company Act of 1956, as amended, that has banking subsidiaries whose operations are principally conducted in a state other than Maryland." Id. § 5-901(b)(1).

161. Id. § 5-903(b).

162. Id. § 5-903(b)(1).


164. Id. at 1569 (codified at § 5-903(c)(1)).

165. Id. at 1569-70 (codified at § 5-903(c)(1)(ii), (iii)). Section 5-903(c)(1)(ii) requires that an out-of-state bank holding company employ at least 500 people, excluding those working for it at the time the exemption is granted, within 1-1/2 years of the granting of the exemption. Subsection (c)(1)(iii) requires that at least 1000 people be employed within 2-1/2 years of the granting of the exemption.

166. Id. at 1570 (codified at § 5-903(c)(1)(iv)). Subsection (c)(1)(iv) requires the out-of-state bank holding company to "invest at least $25,000,000 for the purchase, installation, construction, or rehabilitation of capital facilities located within an enterprise zone" within 2-1/2 years of the granting of the exemption. The Bank Commissioner can waive this requirement if the bank holding company agrees to employ at least 750 people at its new facility. Id. at 1571 (codified at § 5-903(c)(4)).

167. Id. (codified at § 5-903(c)(1)(vi)).

168. Id. (codified at § 5-903(c)(1)(vii)).
Following the commencement of business under section 5-903(b), the bank holding company must wait six months to apply for the section 5-903(c) exemption. The Bank Commissioner may, after finding that the out-of-state bank holding company has signed the agreement and that it has employed at least 250 people, or is training 250 people if the “construction of the facility is significantly advanced” at their newly constructed enterprise zone facility, exempt the bank holding company from the single office and noncompetition restrictions contained in section 5-903(b)(1) and (b)(4). No exemptions may be granted until July 1, 1986. After an exemption is granted, the out-of-state bank holding company may open ten offices in the year following the Commissioner’s finding and another ten offices in the succeeding year. Thereafter, the out-of-state bank holding company may practice full service banking in the state.

Under Section 5-907, the Bank Commissioner has increased powers to enforce the provisions of section 5-903(c) and may, upon a finding of noncompliance, order the bank holding company to cease doing business in the state. Section 5-908 makes section 5-903(b) and (c) null and void if any part, which if deleted would destroy the purpose of the act, is found to be invalid.

Chapter 114 is an attempt by the State to increase the capital and employment in the State. To achieve these goals, however, the State is only willing to permit limited participation by out-of-state bank holding companies in the State’s banking community at a very high cost.

5. Garnishments.—The Maryland Annotated Code protects banks from liability when, under a court order, they impound deposits, money, or property. In McHugh & Associates v. Commercial Law...
In December 1982, Commercial & Farmers seized the money in an account belonging to the plaintiff, a partnership, under a writ of attachment against Kevin McHugh, an individual partner. After McHugh notified the bank of its mistake, Commercial & Farmers filed a confession of assets, listing the account under a different name. Eventually, the bank corrected its error, but the plaintiff had already suffered damages. In determining that the section 5-306(b) immunity did not protect Commercial & Farmers, the court reexamined a line of cases and statutory amendments. In *Fairfax v. Savings Bank of Baltimore*, the Court of Appeals held, in 1938, that a creditor of one spouse has no right to attach a bank account jointly owned by a husband and wife. To hold otherwise, the court said, would nullify the other spouse's withdrawal rights. Subsequent to *Fairfax*, the Maryland General Assembly enacted article 11, section 103 of the Maryland Annotated Code, which permitted banks to impound accounts when the claim involved "a whole or part of such deposit." In 1980 the Court of Special Appeals held that this provi-

institutions, the banking institution may or, if required by the court, shall impound the deposit, money, or property, subject to further order of the court, without any liability on its part to anyone for doing so.

179. Id. at 527, 476 A.2d at 740.
180. Id. at 521, 476 A.2d at 737. McHugh & Associates informed the bank that it had issued three checks on the account and if they were not honored, the partnership would be damaged and would, therefore, sever its relationship with the bank. *Id.*
181. Id. at 522-25, 476 A.2d at 737-39.
182. 175 Md. 136, 199 A. 872 (1938).
183. Id. at 144, 199 A. at 876.
184. Id., 199 A. at 877. According to the court, if a creditor could attach the joint account of a husband and wife, "the established rights of the debtor and his wife, against whom there is no claim, will be swept aside without justification in principle or precedent." *Id.*, 199 A. at 876.
186. Id. Article 11, § 103 provided, in pertinent part, that:

if there is served upon such banking institution a restraining order, injunction, attachment, garnishment, order to show cause, or other order, or decree, . . ., to which the adverse claimant is a party, involving a claim to the whole or a part of such deposit, money, or property, then such institution may, or to the extent required thereby shall, impound and withhold all or any part of such deposit, money, or property, subject to further order of the court and without any liability on its part to anyone for so doing.
sion did not affect the Fairfax holding.\textsuperscript{187} Also in 1980, the General Assembly amended section 103 and recodified parts of it as section 5-306 of the Financial Institutions Article.\textsuperscript{188} This amendment deleted the language concerning "part of a deposit" found in former section 103.\textsuperscript{189} In McHugh, the court determined that the amendments to section 5-306 did not change the meaning of the statute as interpreted in its 1980 decision.\textsuperscript{190} Furthermore, section 9-502(b)(3) of the Corporations & Associations Article prohibits the attachment of partnership assets by a creditor of an individual partner.\textsuperscript{191} Since the bank knew of the true status of the account and could seize only legally attachable assets, the court concluded that it lost its section 5-306 immunity.\textsuperscript{192}

6. Discharged Checks.—In 1985 the Maryland General Assembly amended the Commercial Law Article to require the return of "discharged checks" in certain situations.\textsuperscript{193} Specifically, any acceptor, defined as any "seller, lender or credit grantor to whom a discharged check was originally issued,"\textsuperscript{194} who requires the return of the original cancelled check to verify payment, must return the check upon verification.\textsuperscript{195} Furthermore, the check must be returned directly to the issuer and not to the financial institution on which the check was drawn.\textsuperscript{196} Failure to comply with these provi-
sions will subject the "acceptor" to liability for the amount of the check and any charges made against the issuer's account by the bank that are a direct result of the acceptor's failure to comply. This provision prevents the acceptor from sending the cancelled check to the bank and the bank mistakenly "double dipping" the account.

B. Uniform Commercial Code

1. Notification of Sale of Collateral.—In First National Bank of Maryland v. DiDomenico, the Court of Appeals held that a notification of the right of redemption that limited the time for redemption below that required by law did not comply with the statutory requirement for reasonable notice of the time after which a private sale of consumer goods will occur. Furthermore, whether the notification understates certain rights is a matter of interpretation and "the legal effect of an understatement of rights on the 'reasonableness' of the notification is a question of law." After DiDomenico defaulted on his loan, the bank notified him that he had fifteen days in which to redeem the collateral, a mobile home, after which time the collateral would be sold. DiDomenico did not redeem the collateral, but the bank did not sell it until more than two months after notification. The sale resulted in a deficiency for which the bank sued. DiDomenico counterclaimed for damages under section 9-507(1) of the Commercial Law Article. The cir-

197. Id. at 3601 (codified at Md. Com. Law Code Ann. § 14-1312(c)).
198. The purpose of this act is to forestall the situation in which the drawer issues a check to satisfy an outstanding bill. Later, the acceptor requires return of the original instrument to verify payment. After verifying payment, the acceptor sends the check to the drawee bank, which pays it again. Under the Maryland Commercial Law Article, an instrument, even though previously paid, remains negotiable in the hands of a holder in due course. Md. Com. Law Code Ann. § 3-305 (1975 & Supp. 1985). A holder in due course takes an instrument without notice of any defenses against it, id. § 3-302(1)(c), including prior payment, id. § 3-304(1)(b). Prior payment normally is prominently displayed on the check in the form of a cancellation or paid mark. If this is the case, the holder has notice of a defense and cannot be a holder in due course. If such a holder presents the cancelled check to the bank, it also has notice of prior payment and would be liable to the drawer if it repaid the check. If for some reason the holder is actually a holder in due course, however, and if the bank has no notice of prior payment (for example, if the check was not canceled), the drawer may have been liable, but for the addition of § 14-1312. 199. 302 Md. 290, 487 A.2d 646 (1985).
200. Id. at 292, 487 A.2d at 647.
201. Id. at 296, 487 A.2d at 649.

If the disposition has occurred the debtor . . . has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this subtitle. If the collateral is consumer goods, the debtor has a right to recover
circuit court found as a matter of law that the notice was reasonable and that DiDomenico could not have redeemed the collateral.

The statute governing notice prior to the sale of collateral, section 9-504(3) of the Commercial Law Article, requires that a creditor give "reasonable notification of the time after which any private sale or other intended disposition is to be made." A debtor's redemption rights, under section 9-506, extend to the time the creditor actually sells the collateral. The Court of Appeals determined that the bank's notification confused the time after which a sale was to be made with the debtor's redemption rights. Therefore, DiDomenico's redemption rights were not limited to fifteen days, as stated in the notice, but extended until the date of sale. The court held that such an understatement of redemption rights was not reasonable notification of the date after which the private sale would be held, as required by section 9-504(3).

First National argued that whether the notification was reasonable was a question of fact, which the trial judge had decided in its favor. The Court of Appeals, however, held that "whether the writing involved here understates [DiDomenico's] rights is a question of interpretation of the instrument. And the legal effect of an understatement of rights on the 'reasonableness' of the notification is a question of law." In any event an amount not less than the credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus ten percent of the cash price.


204. MD. COM. LAW CODE ANN. § 9-504(3) (1975).

205. MD. COM. LAW CODE ANN. § 9-506 (1975) provides in pertinent part:

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 9-504 . . . the debtor . . . 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. . . .

206. 302 Md. at 294-95, 487 A.2d at 648.

207. Id. at 295, 487 A.2d at 648-49.

208. Id. at 296, 487 A.2d at 649. First National relied on Richardson Ford Sales, Inc. v. Johnson, 100 N.M. 779, 676 P.2d 1344 (N.M. Ct. App. 1984). In Richardson Ford Sales, the debtor received a notice from the plaintiff, which stated the amount needed to redeem the car. Subsequently, that amount was reduced by an insurance payout and rebate, but Johnson was never notified of the new amount due. The New Mexico court held that the reasonableness of a notification was a question of fact and must be determined in relation to the purpose of the notice. Id. at 785, 676 P.2d at 1350.

209. 302 Md. at 296, 487 A.2d at 649. The court distinguished Richardson Ford Sales
Finally, the bank contended that DiDomenico had not been injured because he was actually unable to redeem the vehicle; therefore, the bank should be entitled to a deficiency judgment. The court, relying on Maryland National Bank v. Wathen, pointed out that reasonable notification was a condition precedent to a deficiency judgment. Damage, or the lack thereof, has nothing to do with the right to obtain a deficiency judgment, but the failure to comply with the condition bars the judgement. The court determined that the question of damages was relevant to DiDomenico's section 9-507(1) counterclaim and remanded to the trial court for the determination of that issue.

In First National Bank, the court went beyond Wathen in holding that a section 9-504(3) notification may be unreasonable if it misstates the debtor's section 9-506 redemption rights or confuses those rights with the required UCC notification of sale of goods. Since section 9-504(3) does not require a creditor to notify a debtor of his redemption rights, First National Bank makes it unlikely that a creditor will attempt to notify a debtor of his redemption rights at all.

Because that case involved the amount required to redeem, not the correct interpretation of the notice. Id. at 127, 414 A.2d at 649.

210. Id. at 297, 487 A.2d at 649.

211. 288 Md. 119, 414 A.2d 1261 (1980). In Wathen, the bank failed to notify a cosignee of a security agreement of the pending sale of the collateral. The bank had contended that to allow the debtor to escape liability for a deficiency was arbitrary. The bank proposed that a fairer method would be to limit its recovery to the difference between the fair market value and the amount of the obligation. Id. at 121, 414 A.2d at 1262-63. Dismissing this contention, the court reasoned that the interrelationship of code provisions sought to protect the debtor's redemption rights and the basic form of protection is the requirement of notice. Id. at 122-23, 414 A.2d at 1263. The court opined that to condition a deficiency judgment on such a simple notice requirement did not do "violence to the spirit of commercial reasonableness." Id. at 124, 414 A.2d at 1264. Therefore, notification was a condition precedent to obtaining a deficiency judgment. The bank then argued that the debtor's sole remedy was a § 9-507 damages claim. Id. The court held that actual damages were irrelevant in determining reasonableness, since damages are a remedy while the reasonableness of notification is a defense to a deficiency suit. Id. The court then reasoned that this bar to a deficiency suit existed before the advent of the UCC. If the drafters had wished to deny it as a defense, they could have stated their intention. Id. at 125-26, 414 A.2d at 1265.

212. 302 Md. at 297, 487 A.2d at 649.

213. Id.

214. Id. at 298, 487 A.2d at 650. See supra note 202 and accompanying text.


216. First National Bank could have been read to hold that a § 9-504(3) notice is unreasonable if it does not include an explanation of the debtor's redemption rights. The court specifically denied holding that reasonable notice included an explanation of these rights, however. "[W]e do not read [the Court of Special Appeals'] opinion as holding, and we do not hold, that a notice under § 9-504(3) must include an explanation of the
2. The Retail Installment Sales Act.—In Ford Motor Credit Co. v. Edwards, the Court of Appeals held that the Retail Installment Sales Act (RISA) governed an agreement that granted the seller a security interest under the Uniform Commercial Code (UCC), but listed the debtor's rights in conformity with RISA. Furthermore, it determined that a restatement of UCC provisions in a security agreement did not mandate that the agreement be governed by the UCC, but instead could be considered a contractual modification of RISA.

Edwards, the debtor, defaulted on his car loan and surrendered the vehicle to Ford Motor Credit, the assignee of his installment contract. The security agreement between the parties stated that the buyer granted the creditor a security interest "under the Uniform Commercial Code." Clause 16 of the agreement specified that, in the event of repossession, the creditor would notify the buyer of the right of redemption and the amount needed to redeem. This provision does not comply with UCC notification requirements. The clause further provided that the debtor was entitled to redeem the car until it was sold.

Ford Motor Credit notified Edwards of his redemption rights in compliance with the requirements of clause 16, subsequently sold the vehicle, and sued Edwards for a deficiency. Edwards defended on the ground that the notification did not comply with the Uniform Commercial Code, which requires that, in the event of repossession, a creditor must notify the debtor of the date, time, and place of any public sale. The trial court agreed and refused to enter a defi-
ciency judgment for Ford Motor Credit.\textsuperscript{227}

The Court of Appeals reversed. First, the vehicle constituted goods under section 12-601(j) of RISA.\textsuperscript{228} The court then decided that clause 16 paraphrased two sections of RISA: 12-624(d), which only requires notice of the buyer’s redemption right, the location of the repossessed goods, and the place where payment is to be made; and 12-625(a), which permits the debtor to redeem within fifteen days.\textsuperscript{231} The court determined that this paraphrasing indicated an intention to be governed by RISA rather than the UCC. Furthermore, section 9-203(4) of the Commercial Law Article resolved any conflict between the UCC and RISA in favor of RISA.\textsuperscript{232}

The court dismissed Edwards’ argument that clause 16 conformed to the UCC by giving the debtor the right to redeem up to the date of sale rather than the RISA fifteen-day limit.\textsuperscript{233} This provision, it held, was only a contractual modification of the RISA requirement and did not place the agreement under the terms of the UCC.\textsuperscript{234}

3. Accommodation Party Liability.—In Home Center Supply of Maryland v. CertainTeed,\textsuperscript{235} the Court of Special Appeals held that an accommodation party is bound by its indorsement of a valid promissory note for an antecedent debt owed by the maker to a holder in due course.\textsuperscript{236} Furthermore, the court held that an antecedent debt was

\textsuperscript{227} The trial court held that Ford Motor Credit had to comply with the UCC’s provisions regarding “repossession, redemption and sale of the collateral.” Since the notice did not contain the time, date, and place of the auction, Ford Motor Credit could not obtain a deficiency judgment against Edwards. 302 Md. at 106, 485 A.2d at 1012.

\textsuperscript{228} Md. Com. Law Code Ann. § 12-601(j) (1983). Section 12-601(j) defined goods as tangible property with a value limitation, at the time of the transaction, of $12,500. The value limitation was raised to $25,000 in 1983. See id.

\textsuperscript{229} Id. § 12-624(d) (1975 & Supp. 1977) (in effect at the time of the transaction).

\textsuperscript{230} Id. § 12-625(a).

\textsuperscript{231} 302 Md. at 107-08, 485 A.2d at 1012-13. The court pointed out that § 12-626 entitles the debtor to a public auction if at least 50% of the cash price has been paid and the buyer requests such a sale “within the 15 day period provided for in § 12-625(a).” This is the only provision that gives the debtor a right to a public sale under RISA. Id. at 107, 485 A.2d at 1012.

\textsuperscript{232} Id. at 107-08, 485 A.2d at 1012-13. Md. Com. Law Code Ann. § 9-203(4) (1975) provides that “in the case of conflict between the provisions of this title [the UCC] and any such statutes [title 12, subtitles 2, 3, and 6], the provisions of such statute controls.”

\textsuperscript{233} 302 Md. at 108, 485 A.2d at 1013. The court stated that “[w]hether he has fifteen days, per the terms of RISA, or a longer time because of the particular contract terms, he still receives the notice provided for by § 12-624(d).” Id.

\textsuperscript{234} Id.


\textsuperscript{236} Id. at 506, 476 A.2d at 729.
sufficient consideration for a promissory note and that the surety's obligation was supported by consideration flowing to its principal.

Financially troubled Home Center owed CertainTeed for goods previously delivered. Home Center executed a note, indorsed by Home Center's president, DelPo, for part of the amount due. CertainTeed subsequently agreed to extend a $150,000 line of credit to Home Center. Upon Home Center's default, CertainTeed cancelled the line of credit and attempted to collect the full amount of Home Center's past due debt, first from Home Center, then from DelPo. DelPo defended by claiming that the consideration for his indorsement, the $150,000 line of credit, had not been extended, as promised.

The Court of Special Appeals first determined that the note was a valid negotiable instrument under section 3-104 of the Commercial Law Article. Then, it found that CertainTeed was a holder in due course since it took the note as security for an antecedent claim (i.e. for value), in good faith, and without notice that it was overdue, had been discharged, or that any claim or defense existed against it. Normally, no personal claim or defense, subject to certain exceptions, can be raised against a holder in due course, but a holder in due course is subject to the defenses of a party with whom it has dealt. Therefore, CertainTeed, even though a holder in due course, was subject to the indorser's defense of lack of consideration.

237. Id.
238. Id. at 507, 476 A.2d at 730.
239. Id. at 499-500, 476 A.2d at 726.
240. Id. at 502-04, 476 A.2d at 727-28. The primary negotiability issue was whether the note was an "unconditional promise or order to pay" as required by Md. Com. Law Code Ann. § 3-104(1)(b) (1975). The court reasoned that CertainTeed's promise to extend the line of credit was only a constructive condition under § 3-105 and did not make the note a conditional promise to pay. 59 Md. App. at 504, 476 A.2d at 728.
241. 59 Md. App. at 505, 476 A.2d at 729. The court determined that CertainTeed was a holder in due course under Md. Com. Law Code Ann. §§ 3-302(1), -302(2), and -303(b). Section 3-302(1) provides that "[a] holder in due course is a holder who takes the instrument (a) [f]or value; and (b) [i]n good faith; and (c) [w]ithout notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Section 3-302(2) provides that a payee may be a holder in due course. Section 3-303(b) provides that a holder takes for value "[w]hen he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due."
243. Under Md. Com. Law Code Ann. § 3-305(2), a holder in due course is only free from the defenses of a party with whom it has not dealt.
244. 59 Md. App. at 505, 476 A.2d at 729.
The court then addressed whether the antecedent debt was sufficient consideration to support DelPo's indorsement. DelPo argued that the consideration for signing the note was the line of credit and that CertainTeed's cancellation of the line discharged the indorser.245 The court disagreed and held that section 3-408 does not require consideration if the note is for an antecedent claim.246 The court also found adequate consideration in CertainTeed's agreement to forestall legal action and its willingness to continue doing business with Home Center.247

C. Consumer Protection

The 1985 Maryland General Assembly enacted several laws designed to protect consumer borrowers and lenders. By amending various provisions of the Commercial Law and Financial Institutions articles, the legislature increased regulation of lenders and retailers to correct perceived abuses.

1. Extension of Consumer Borrower Status.—The first consumer protection act extends consumer status to commercial borrowers whose loans are secured by residential real property.248 Previously, section 12-103(e) of the Commercial Law Article permitted a lender to charge any interest rate on loans made to corporations and on commercial loans in excess of $5000.249 Amended section 12-103 distinguishes between commercial loans that are secured by residential real property and those that are not.250 In the latter case, lenders may still charge unlimited interest if the loan exceeds $15,000.251 If the loan is secured by residential real property, however, the principal amount must exceed $75,000 before unlimited interest may be charged.252 Amended section 12-404(c)(3) permits

245. 59 Md. App. at 505-06, 476 A.2d at 729.
246. Id. at 506, 476 A.2d at 729. Md. COM. LAW CODE ANN. § 3-408 provides in pertinent part that "no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind."
248. Act of May 21, 1985, ch. 115, 1985 Md. Laws 1574-79 (codified at Md. COM. LAW CODE ANN. §§ 12-103(e), -401(i), -404(c), -405(a)(1), -407.1(b), -901(d), -1001(d), -1005(a) (Supp. 1985)).
249. Md. COM. LAW CODE ANN. § 12-103(e) (1983). Commercial loan is defined as "a loan which is made: (1) Solely to acquire or carry on a business or commercial enterprise; or (2) To any business or commercial organization." Id. § 12-101(c).
250. 1985 Md. Laws at 1575 (codified at Md. COM. LAW CODE ANN. § 12-103(e) (Supp. 1985)) [hereinafter all codification parentheticals for ch. 115 cite to the Commercial Law Article, unless otherwise indicated].
251. Id. (codified at § 12-103(e)(1)(ii)).
252. Id. (codified at § 12-103(e)(1)(iii)).
balloon payments for commercial loans of less than $75,000,253 and section 12-405 permits lenders to collect higher origination fees on these special consumer loans.254 Sections 12-901 and 12-1001 now include this type of commercial borrower within the definition of consumer borrower.255 The act also amends sections 12-301 and 12-302 of the Financial Institutions Article.256 Section 12-301(g) excludes commercial loans in excess of $75,000 from the definition of a secondary mortgage,257 while section 12-302 extends the list of certain lenders exempted from the licensing requirements for secondary mortgage lenders.258 These amendments provide increased protection for small business people who use their homes as collateral for commercial loans.

2. Credit Applicant Protection.—The General Assembly also passed a law designed to protect consumers applying for credit.259 The act requires that lenders260 notify unsuccessful credit applicants of their right to request an explanation for the denial.261 The

253. Id. at 1577 (codified at § 12-404(c)(3)). Amended § 12-404(c)(3) allows for balloon payments as long as the borrower may postpone the final payment one time. This new section parallels Md. Com. Law Code Ann. § 12-404(c)(2)(iii) (1983), which permits the same for any mortgage loan.

254. 1985 Md. Laws at 1577 (codified at § 12-405). Section 12-405 permits the lender to collect "the greater of $500 or 4 percent of the net proceeds of a commercial loan of $75,000 or less made under this subtitle" as an origination fee. Origination fees for any other loan made under the subtitle are limited to the greater of $250 or 2% of the net proceeds.

255. Id. at 1578 (codified at §§ 12-901, -1001). Both sections are identical. Amended 12-901 provides:

"Consumer borrower" means an individual receiving a loan or other extension of credit under this subtitle for personal, household, or family purposes or an individual receiving a commercial loan or other extension of credit for any commercial purpose not in excess of $75,000, secured by owner-occupied real property having a dwelling on it designated principally as a residence with accommodations for not more than 4 families.

256. Id. at 1579-80 (codified at Md. Fin. Inst. Code Ann. §§ 12-301, -302 (Supp. 1985)).

257. Id. at 1579 (codified at Md. Fin. Inst. Code Ann. § 12-301(g)(2)).


260. For the purposes of this subtitle, a lender is defined as: "(1) Any lender or credit grantor regulated under Title 12 of this article; or (2) A credit union making a loan under § 6-507 of the Financial Institutions Article." 1985 Md. Laws at 3101-02 (codified at § 14-1701(d) [hereinafter all codification parentheticals for ch. 669 cite to the Commercial Law Article, unless otherwise indicated].

261. Id. at 3102 (codified at §§ 14-1702, -1703). Section 14-1702 requires the lender to notify the applicant of its decision within 30 days of receipt of the application. Section 14-1703 requires the lender to notify unsuccessful applicants of their right to inquire.
lender must list the specific reasons for the denial if the applicant requests it. In the event of a written complaint, the act provides for administrative hearings and grants power to the Commissioner of Consumer Credit to order institutions to comply with the act. Such orders do not apply to most banking and savings institutions, however. The act ostensibly will reduce arbitrary decisions by lenders and denials of credit based on erroneous information.

3. Attorney's Fees Associated with Collections.—The General Assembly also enacted a statute permitting consumer lenders to collect limited attorney's fees for costs incurred in collecting delinquent loans. New section 12-307.1(a) allows the lender to collect up to fifteen percent of the amount due from the borrower as attorney's fees and court costs if it refers a defaulted loan for collection to an attorney not in the lender's employ and if the loan had an original principal balance of more than $2000. For loans with an original balance of less than $2000, the court sets the attorney's fee. In either case, the contract, note, or evidence of indebtedness must permit the collection of attorney's fees and court costs.

4. Late Delivery of Consumer Goods.—A fourth consumer protection act gives consumers a remedy for the late delivery of household goods. The act does not apply to the late delivery of permanent fixtures, to mail order goods, or to those goods taken by the consumer on the date ordered. In all other cases, when a consumer orders goods from a retailer, the dealer must give a written estimate of the delivery date and a statement of the consumer's rights if the

262. Id. at 3102 (codified at § 14-1704); see also id. (codified at § 14-1703) (specifying contents of statement required by § 14-702).
263. Id. at 3103 (codified at § 14-1706).
264. Id. (codified at § 14-1706(e)). Section 14-1706(e) provides that "[f]or the purposes of this section, the Commissioner's order may not apply to any: (1) Incorporated bank, savings institution, or trust company; (2) Savings and loan association; or (3) Federal or state credit union."
266. 1985 Md. Laws at 3006 (codified at Md. Com. Law Code Ann. § 12-307.1(a)) [hereinafter all codification parentheticals for ch. 644 cite to the Commercial Law Article, unless otherwise indicated].
267. Id. (codified at § 12-307.1(b)).
268. Id. (codified at § 12-307.1).
270. 1985 Md. Laws at 3202 (codified at Md. Com. Law Code Ann. § 14-1801(e)) [hereinafter all codification parentheticals for ch. 703 cite to the Commercial Law Article, unless otherwise indicated].
goods are not delivered within two weeks of the estimated date. The statement of rights must include the consumer's options if the goods are late. The act absolves the dealer of responsibility if the lateness is a result of the actions of the consumer, acts of God, or a manufacturer's delay. Failure to comply with this act will be considered an unfair and deceptive trade practice under title 13 of the Commercial Law Article and could result in a cease and desist order, an injunction, damages, fines or criminal penalties.

5. Mortgage Banker and Broker Licensing.—The Maryland General Assembly also amended the licensing requirements for mortgage bankers and mortgage brokers. The definitions of a mortgage banker and a mortgage broker remain the same as in section 12-501 of the Financial Institutions Article, as does the list of institutions excluded from the licensing requirements under section 12-502. The amended act requires all persons, subject to the section 12-502 exceptions, acting as mortgage bankers or brokers to

271. Id. at 3202-03 (codified at § 14-1802).
272. Id. at 3202 (codified as § 14-1803). New § 14-1803 (a) allows the consumer the following four options: "(1) Cancel the contract and receive a full refund; (2) Cancel the contract and receive a credit equal to the deposit; (3) Negotiate with the dealer a new delivery date; or (4) Modify the contract by selecting other household goods."
273. Id. at 3203-04 (codified at § 14-1803(c)(1)). Section 14-1803(c)(1) provides that the dealer is not liable for the late delivery if the dealer is unable to deliver and notifies the consumer of the attempted delivery.
274. Id. at 3204 (codified at § 14-1803(c)(2),(3)). Section 14-1803(c)(3) provides that, if a manufacturer's or supplier's failure to deliver causes the dealer's failure, the dealer is not liable if the dealer attempts to cancel the order, but still remains liable to the manufacturer or supplier and if the dealer's liability to the manufacturer or supplier is not caused by the "dealer's delay in canceling the order when requested by the consumer."
276. Id. § 13-1403.
277. Id. § 13-406.
278. Id. § 13-408.
279. Id. § 13-410.
280. Id. § 13-411.
282. Md. Fin. Inst. Code Ann. § 12-501 (1980). Section 12-501(c) defines a mortgage banker as "any person who in the regular course of business lends money that is secured by a mortgage or other lien on real property." Section 12-501(d) defines a mortgage broker as one who assists a person in getting a mortgage.
283. Id. § 12-502. Section 12-502 excludes the following from the licensing requirement: "(1) Any bank, trust company, or savings bank; (2) Any savings and loan association; (3) Any credit union; (4) Any insurance company; (5) Any licensee under the Maryland Consumer Loan Law; or (6) Any licensee under the Maryland Secondary Mortgage Loan Law."
apply for licenses from the Bank Commissioner. Furthermore, the applicant must pay an investigation fee of $100 and a licensing fee of $300 per year (or $150 per half-year), and post a surety bond of $50,000.

The act also outlines new Bank Commissioner powers, which include the right to examine the business at any time, to investigate any suspected violators and their books and records, and to assess a fee for the cost of investigation. The statutory examination authority includes the right to "subpoena witnesses; administer oaths; examine an individual under oath; and compel the production of records, books, papers, contracts or other documents."  

Finally, under amended section 12-512, a willful violation of the subtitle or any code of conduct adopted under it is a misdemeanor, punishable by increased penalties. This provision would apparently enable the Bank Commissioner to publish a code of regulatory conduct, punishable under the act.

The secondary mortgage industry has been the subject of much criticism, especially concerning the effective interest rates charged on second and third mortgage loans. This act is an attempt to provide stricter scrutiny of and control over this industry's workings.

6. Deceptive Trade Practices.—Section 13-301 of the Commercial Law Article of the Annotated Code of Maryland defines deceptive trade practices and lists several examples of prohibited conduct. The section is part of an overall scheme of private enforcement ac-

284. 1985 Md. Laws at 3067-68 (codified at Md. Fin. Inst. Code Ann. § 12-503 (Supp. 1985)) [hereinafter, all codification parentheticals for Ch. 665 refer to the Financial Institutions Article]. For purposes of this subtitle, person is defined as "an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity." Id. at 3067 (codified at § 12-501(e)).  
285. Id. at 3068-69 (codified at § 12-504(b),(c)). Section 12-504(d) exempts "any mortgage banker or mortgage broker whose corporate purpose as set forth in its articles of incorporation specifically excludes the making or arranging of loans secured by residential property of four or less units" from the § 12-504(c) surety bond requirement. Id. at 3069 (codified at § 12-504(d)).  
286. Id. at 3069 (codified at § 12-507.1(b)).  
287. Id. at 3070 (codified at § 12-507.1(e)).  
288. Id. at 3070 (codified at § 12-512). Amended § 12-512 provides that "[a]ny person who willfully violates any provision of this subtitle or any code of conduct adopted under it is guilty of a misdemeanor. . . ."  
In 1985 the Maryland General Assembly expanded this list to include single family housing sales contracts that contain clauses limiting a buyer's right to obtain consequential damages in the event of a seller's breach.

D. Corporations and Associations

1. Antitrust.—In State v. Jonathan Logan, Inc., the Court of Appeals held that the Maryland Antitrust Act did not allow the State to seek "restitution" in a civil antitrust action. The Maryland Attorney General's Office sued Jonathan Logan under section 11-209(a) for an alleged resale price maintenance conspiracy. The State contended that section 11-209(a) authorizes an equity court to order "restitution" to the State for the benefit of retail purchasers. Jonathan Logan claimed that Maryland law does not empower the State to recover monetary awards for consumers, and the trial court agreed.

Section 11-209(a) does not expressly confer power on the State to pursue monetary recovery. Thus, the court considered the fed-

294. MD. COM. LAW CODE ANN. §§ 11-201 to -213 (1983). Id. § 11-209(a) states:
   (1) The Attorney General shall institute proceedings in equity to prevent or restrain violations of § 11-204. . . . (2) In a proceeding under this section, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to: (i) remove the effects of any violation it finds, and (ii) prevent continuation or renewal of the violation in the future. (3) The court may exercise all equitable powers necessary for this purpose, including injunction, divestiture of property or business units, and suspension or termination of the right of a foreign corporation or association to do business in the State.
295. 301 Md. at 64, 482 A.2d at 1. The court also held that the State failed to state a claim for injunctive relief in this case. Id. at 78, 482 A.2d at 8.
296. Id. at 64, 482 A.2d at 1.
297. Id. The State sought the difference between the price consumers actually paid for Jonathan Logan's raincoats and the price that they would have paid in the absence of price-fixing. Id. The Attorney General relied on Porter v. Warner Holding Co., 328 U.S. 395 (1946), in which the Supreme Court held that an equity court had jurisdiction to order repayment of overcharges as well as to enjoin violations of the Emergency Price Control Act. Id. at 400. The Attorney General argued from Porter that a proper construction of a court's power to remove the effects of an antitrust violation pursuant to § 11-209(a) included power to award monetary damages. 301 Md. at 71, 482 A.2d at 5.
298. 301 Md. at 65, 482 A.2d at 2.
299. Id. at 66, 482 A.2d at 2.
eral courts’ interpretation of similar federal statutes, as mandated by section 11-202(a) of the Maryland Antitrust Act. The court found no cases in which a federal court had allowed recovery of damages in an equitable enforcement action under section 4 of the Sherman Act. In fact, in DeBeers Consolidated Mines v. United States, the Supreme Court noted that “under the Sherman Act . . . the District Court has no jurisdiction . . . to enter a money judgment.” Thus, the court concluded an equity court could not award monetary relief for an injunction action under section 11-209(a).

The court then considered whether the State could seek restitution under section 11-209(b), which authorizes treble damages actions. States have relied on two theories to support their standing to sue for monetary awards under the analogous federal statute, section 4 of the Clayton Act. The first rests on injury to the state’s economy by the antitrust violation, and the second looks to parens patriae principles.

Hawaii v. Standard Oil illustrates both theories. Hawaii sued under section 4 of the Clayton Act, alleging a conspiracy in the sale, marketing, and distribution of refined petroleum products in the State. The Supreme Court rejected Hawaii’s parens patriae claim because the State did not demonstrate an interest independent of its citizens. The Court also rejected Hawaii’s claim of injury to the State’s economy. Since the State claim actually reflected injuries sustained by consumers who could seek recovery in their own names, allowing the State to pursue a claim as well would result in duplicative recoveries. Furthermore, the Supreme Court noted that the federal antitrust laws did not provide remedies for economic injuries to a state’s sovereign interests.

302. 301 Md. at 71, 482 A.2d at 5.
303. 325 U.S. 212 (1945).
304. Id. at 219.
305. 301 Md. at 72, 482 A.2d at 5.
307. 301 Md. at 73, 482 A.2d at 6.
308. Parens patriae is a concept of standing used to protect quasi-sovereign interests such as health, comfort, and welfare of the people, interstate water rights, and the general economy of the state. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).
309. 405 U.S. 251 (1972).
310. Id. at 253.
311. See id. at 258-59 & n.12.
312. Id. at 264.
313. Id. at 265.
In 1976 Congress amended federal law to allow actions by states based on these theories. The Maryland General Assembly has not made similar changes in Maryland law, however. Without such an express grant of authority, the Court of Appeals concluded that the State could not pursue a private action for monetary damages on behalf of its citizens.

The Court of Appeals also reviewed Maryland antitrust law in *Natural Design, Inc. v. Rouse Company*. Natural Design, doing business as Baycraft, competed with The Store, Ltd., another tenant of the Village Square Shopping Center. Baycraft claimed that Rouse, the landlord, had violated the Maryland Antitrust Act by refusing to renew Baycraft’s lease because Baycraft directly competed with The Store, Ltd. and refused to adjust its prices to reduce this competition. The trial court granted summary judgment for the Rouse Company. The Court of Appeals held that summary judgment should not have been granted on the restraint of trade claim.

In considering Natural Design’s restraint of trade claim, the court first noted that the Maryland Antitrust Act “complement[s]...
the body of the federal law governing restraints of trade."322 Section 11-202(a) of the Commercial Law Article323 provides that "courts [are to] be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters."324 Because section 11-204(a)(1) of the Maryland Antitrust Act is essentially identical to section 1 of the Sherman Antitrust Act,325 the Court of Appeals reviewed federal antitrust decisions interpreting the Sherman Act.

Section 1 prohibits only unreasonable restraints of trade.326 Some practices, however, are deemed unreasonable per se.327 The Supreme Court has long included price-fixing in this category.328 Thus, the Court of Appeals concluded that the per se rule would apply if Natural Design demonstrated a price-fixing arrangement.329

In Monsanto Co. v. Spray-Rite Service Corp.,330 the United States Supreme Court noted that the plaintiff must present "evidence that tends to exclude the possibility that the manufacturers and nonterminated distributors were acting independently."331 Mere complaints of price-fixing do not negate an inference of independent action.332 The Court of Appeals determined that Natural Design had satisfied this burden333 and reversed the summary

322. Id.
324. 302 Md. at 53, 485 A.2d at 666.
326. See Standard Oil v. United States, 221 U.S. 1 (1911).
327. See Northern Pacific Ry. v. United States, 356 U.S. 1 (1958) (tying arrangement in which a party agrees to sell one product only on condition that the buyer also purchases the tied product is per se unreasonable under the Sherman Act).
328. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, reh'g denied, 310 U.S. 658 (1940) (combination formed for the purpose and with the effect of raising, depressing, fixing or pegging, or stabilizing the price of a commodity in trade or commerce is illegal per se under the Sherman Act).
329. 302 Md. at 59, 485 A.2d at 669.
330. 465 U.S. 752, reh'g denied, 466 U.S. 994 (1984). Monsanto involved the quantum of proof necessary to establish a price-fixing agreement between a manufacturer and distributor when the manufacturer cancelled the distributor's contract after receiving complaints that the distributor had been price-cutting. Id. at 764. In Natural Design, the Court of Appeals considered an analogous situation in which a tenant's lease was not renewed after the landlord allegedly received complaints of price-cutting from another tenant. See 302 Md. at 62-66, 485 A.2d at 671-72.
331. 465 U.S. at 764 (emphasis added).
332. 302 Md. at 61, 485 A.2d at 670.
333. Id. at 66, 485 A.2d at 672. The court noted complaints by The Store, Ltd. to Rouse, a Rouse memorandum noting the conflict between the tenants, a confrontational meeting between Rouse and Natural Design attended by a representative of The Store,
judgment on the restraint of trade count.\textsuperscript{334}

The court upheld summary judgment on the monopolization count, however.\textsuperscript{335} Natural Design argued that Village Square has a unique geographic market and that Rouse, as landlord, monopolized it.\textsuperscript{336} Therefore, Rouse's failure to renew Natural Design's lease violated section 11-204(a)(2)\textsuperscript{337} of the Maryland Antitrust Act.\textsuperscript{338} The court viewed Natural Design's claim as an invocation of the "essential facilities doctrine" of antitrust analysis,\textsuperscript{339} which holds a monopolist liable for depriving competitors of access to a facility essential to competition in a specified market.\textsuperscript{340} The court found this doctrine inapplicable because Rouse did not compete with Natural Design and the Village Square was not a facility "impractical or unreasonable to duplicate."\textsuperscript{341}

2. Trademark Infringement.—In \textit{N. Hess' Sons, Inc. v. Hess Apparel, Inc.},\textsuperscript{342} the United States Court of Appeals for the Fourth Circuit rendered a decision with potentially harmful implications for Maryland trademark holders. \textit{N. Hess' Sons, Inc.} (Hess) has operated numerous retail shoe stores in the Baltimore area for over 100 years. Hess Apparel, Inc. (Apparel) has operated several women's apparel stores, primarily on Maryland's Eastern Shore and in Delaware. In 1981 both firms began conducting business in the Hunt Valley Mall near Baltimore. Contrary to prior representations, Apparel advertised and sold twenty-one brands of shoes, which re-

\begin{itemize}
  \item \textsuperscript{334} \textit{Id.} at 66, 485 A.2d at 672. Since Rouse moved for summary judgment, the evidence examined by the Court was viewed in a light most favorable to Natural Design.
  \item \textsuperscript{335} \textit{Id.} at 67, 485 A.2d at 673.
  \item \textsuperscript{336} \textit{Id.} at 66, 485 A.2d at 673.
  \item \textsuperscript{337} MD. COM. LAW CODE ANN. § 11-204(a)(2) (1983).
  \item \textsuperscript{338} 302 Md. at 66, 485 A.2d at 673.
  \item \textsuperscript{339} \textit{Id.} at 67, 485 A.2d at 673.
  \item \textsuperscript{340} See MCI Communication v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir.), \textit{cert. denied}, 464 U.S. 891 (1983). The elements necessary to establish liability are: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility to a competitor; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." 302 Md. at 66, 485 A.2d at 673. \textit{See generally} Otter Tail Power Co. v. United States, 410 U.S. 366, \textit{reh'g denied}, 411 U.S. 910 (1973) (describing essential facilities doctrine); \textit{Note}, \textit{Refusals to Deal by Vertically Integrated Monopolists}, 87 HARV. L. REV. 1720 (1974).
  \item \textsuperscript{341} 302 Md. at 68, 485 A.2d at 673 (1984). An out-of-court settlement finally brought an end to this lengthy legal dispute. While the terms of the out-of-court settlement were not disclosed, none of the parties admitted any wrongdoing. \textit{See} Gunts, \textit{Settlement Ends Merchants' Suit against Rouse}, Balt. Sun, Nov. 27, 1985, at D1, col. 6.
  \item \textsuperscript{342} 738 F.2d 1412 (4th Cir. 1984).
\end{itemize}
resulted in significant confusion among Hess' customers. Hess sued to enjoin Apparel from using its name, “Hess,” in the Baltimore area.\textsuperscript{343}

The district court found that the similarly between the names “Hess” and “Hess Apparel” created a likelihood of confusion in the minds of ordinary consumers. Thus, Apparel had violated the Lanham Act\textsuperscript{344} and Maryland common law.\textsuperscript{345} The district court enjoined Apparel from selling shoes in the Baltimore area unless it stated prominently in its advertising for one year its nonaffiliation with N. Hess’ Sons and placed a similar message in its show area.\textsuperscript{346} On appeal, Hess contended that this injunctive relief was inadequate.\textsuperscript{347}

In a per curiam opinion, the Fourth Circuit deferred to the district court’s wide discretion and affirmed its decision.\textsuperscript{348} The court refused to consider whether the injunction provided an adequate remedy.\textsuperscript{349} In a lengthy dissent, Senior Judge Rosenn criticized the district court for fashioning an order that failed to remedy the violation.\textsuperscript{350} The dissent suggested that Apparel should have been given the choice of ceasing to sell shoes or substantially altering its trademark and using a \textit{permanent} disclaimer.\textsuperscript{351} The dissent also pointed out that the three “surname” cases cited by the district court to support its order actually indicate the need for a stronger remedy.\textsuperscript{352}

\begin{itemize}
\item \textsuperscript{343} Id. at 1413.
\item \textsuperscript{344} Lanham Trademark Act, § 43(a), 15 U.S.C. § 1125(a) (1982), provides that any person who uses, in connection with any goods, words tending to falsely represent the origin of such goods is liable in a civil action to a person doing business in the locality likely to be damaged by the use of such a false description.
\item \textsuperscript{345} 738 F.2d at 1413.
\item \textsuperscript{346} Id. at 1414.
\item \textsuperscript{347} Id.
\item \textsuperscript{348} Id. (citing United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 141 (3d Cir. 1981); Frostie Co. v. Dr. Pepper Co., 361 F.2d 124 (5th Cir. 1966)).
\item \textsuperscript{349} Id. at 1414.
\item \textsuperscript{350} Id. (Rosenn, J., dissenting).
\item \textsuperscript{351} Id. at 1418 (Rosenn, J., dissenting). For an example of what seems to be a more appropriate remedy, see L.E. Waterman Co. v. Modern Pen Co., 235 U.S. 88 (1914) (corporation selling fountain pens as “Waterman’s” was entitled to protection against the use of the name “Waterman” by a selling agent of A.A. Waterman & Co.; decree required use of the junior user’s full name “Arthur A. Waterman & Co.” and a permanent disclaimer).
\item \textsuperscript{352} 788 F.2d at 1417 (Rosenn, J., dissenting). The majority cited Taylor Wine Co. v. Bully Hill Vineyards, Inc., 569 F.2d 731 (2d Cir. 1978) (court refused to permit Walter S. Taylor to sell wine under the “Taylor” name unless it adopted a permanent disclaimer and used the full name “Walter S. Taylor”); International Election Systems Corp. v. Shoup, 452 F. Supp. 684 (E.D. Pa. 1978) (court permitted the junior user to operate under the name “Ransom F. Shoup and Co.” with a permanent disclaimer), aff’d, 595 F.2d 1212 (3d. Cir. 1979); Berghoff Restaurant Co. v. Lewis W. Berghoff, Inc.,
all three cases, the courts imposed on the junior user both a permanent advertising disclaimer and a requirement to alter its mark to reduce the likelihood of confusion.\textsuperscript{553}

The one year advertising disclaimer in this case appears wholly inadequate. Customer confusion will continue, and the junior user must alter its advertising for only a year. Unless the junior user’s mark is changed, Apparel will continue to impinge upon Hess’ goodwill.

3. Directors’ Meetings.—(a) Notice Requirements.—In Valerino v. Little,\textsuperscript{354} the Court of Special Appeals held that the notice of a directors’ meeting did not adequately inform directors that a stock issuance could occur.\textsuperscript{355} Frederick Valerino, a director of Electra Mechanical of America (EMA), challenged the adequacy of the notice after the board issued stock causing Valerino’s proportionate ownership of EMA to decrease from fifty percent to less than twenty-five percent.\textsuperscript{356} This decrease in Valerino’s share of EMA frustrated his attempt to dissolve EMA under Maryland’s involuntary dissolution statute.\textsuperscript{357}

The notice stated that the meeting’s purpose was “for the sale and purchase of the Capital stock of EMA, Inc.”\textsuperscript{358} If the meaning of the terms “for the sale and purchase” of stock encompassed the meaning of the term “issue,” notice would have been adequate.\textsuperscript{359} After defining the terms “issue” and “purchase,” the court’s inquiry centered on the meaning of “sale.”\textsuperscript{360} The circumstances surround-

\textsuperscript{357} F. Supp. 127 (N.D. Ill. 1973) (court permanently enjoined the user from calling his restaurant “Berghoff” unless he incorporated “Lewis” in the name and adopted a permanent disclaimer), aff’d, 499 F.2d 1183 (7th Cir. 1974).
\textsuperscript{353} 738 F.2d at 1417 (Rosen, J., dissenting).
\textsuperscript{355} Id. at 599, 490 A.2d at 761.
\textsuperscript{356} Id. at 592, 480 A.2d at 758.
\textsuperscript{357} MD. CORPS. & ASS’NS CODE ANN. § 3-413(a) (1985) states that
stockholders entitled to cast as least 25 percent of all the votes entitled to be cast in the election of directors of a corporation may petition a court of equity to dissolve the corporation on the grounds that: (1) The directors are so divided respecting the management of the corporation’s affairs that the votes required for action by the board cannot be obtained; or (2) The stockholders are so divided that directors cannot be elected.
Valerino’s suit to dissolve EMA stemmed from a stalemate between the two equal shareholding groups represented respectively by Valerino and Little. The dispute over operations resulted in a failure to elect a new board of directors for two consecutive years.
\textsuperscript{62} Md. App. at 592, 490 A.2d at 757.
\textsuperscript{358} 62 Md. App. at 592, 490 A.2d at 758.
\textsuperscript{359} Id. at 597, 490 A.2d at 760.
\textsuperscript{360} “Issue” means putting stock into circulation. 11 W. FLETCHER, CYCLOPEDIA OF
ing the notice indicated that "sale" referred to EMA's purchase of stock being sold by Valerino rather than to the issuance of new stock.\(^3\) Thus, the notice failed to provide adequate information about the meeting's purpose, which rendered the board's subsequent stock issuance invalid.\(^4\)

The court drew additional support for the notice's invalidity from its failure to inform Valerino of his shareholder preemptive rights.\(^5\) Little argued that Valerino possessed no preemptive rights since their exercise would have defeated the stock issuance's purpose.\(^6\) The court agreed that Valerino's exercise of preemptive rights would defeat the issuance's objective.\(^7\) It did not decide, however, whether the preemptive rights would defeat the issuance's validity since it had already determined that the insufficient notice invalidated the issuance.\(^8\)

(b) Quorum Requirements.—The 1985 Maryland General Assembly defined more clearly the quorum requirements for directors' meetings of corporations having three directors or less.\(^9\) The legislature amended section 2-408 of the Corporations and Associations Article\(^10\) to permit corporate bylaws to provide that less than a majority, but not less than one-third, of the board of directors may

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361. 62 Md. App. at 597-98, 490 A.2d at 760.


363. 62 Md. App. at 599, 490 A.2d at 761. Preemptive rights allow shareholders to take proportionately in the new issue. See Md. CORPS. & ASS'NS CODE ANN. § 2-205 (1985). Although § 2-205 does not expressly require notice, its absence lends weight to Valerino's argument that an issuance of stock was not contemplated when the notice was sent. 62 Md. App. at 599, 490 A.2d at 761.

364. 62 Md. App. at 599, 490 A.2d at 761. Md. CORPS. & ASS'NS CODE ANN. § 2-205(a)(8) (1985) provides that preemptive rights do not exist if their application is impracticable. In the only case interpreting this section, the Court of Appeals held preemptive rights impracticable because they would hamper the organization's operation. Poole v. Miller, 211 Md. 448, 462, 128 A.2d 607, 615 (1957). Little argued that Poole supported a finding that impracticability existed if the exercise of preemptive rights would defeat the purpose of the stock issuance. 62 Md. App. at 599, 490 A.2d at 761.


366. 62 Md. App. at 600, 490 A.2d at 762.

367. Act of May 21, 1985, ch. 362, 1985 Md. Laws 2264 (codified at Md. CORPS. & ASS'NS CODE ANN. § 2-402, -408 (1985)). A corporation may have less than three directors in two instances. First, when no stock is outstanding, the corporation may have just one director. Second, if stock is outstanding and the corporation has less than three stockholders, the corporation may have less than three directors but not less than the number of stockholders. Md. CORPS. & ASS'NS CODE ANN. § 2-402.

368. Md. CORPS. & ASS'NS CODE ANN. § 2-408(b)(2).
constitute a quorum except in two instances. First, if the board has two or three directors, not less than two will constitute a quorum. Second, if a board consists of one director, as permitted under section 2-402(a), a quorum will consist of the remaining director. This change in Maryland corporate law prevents a repetition of the problem in *Mountain Manor Realty v. Bucheri*, in which a sole remaining stockholder and board member could not transact business of the board without first filling vacancies on the board.

4. Partnership Dissolution.—The Court of Special Appeals considered credits against partnership profits owed to a departing partner after partnership dissolution in *Berkson v. Berryman*. In 1979 Berryman joined Berkson’s sole practice as an associate. In 1980 the parties created a partnership and agreed that the net profits and losses from the practice would be divided two-thirds to Berkson and one-third to Berryman. All open files and pending cases of both parties became partnership cases subject to the agreed-upon division of profits and losses.

Berkson dissolved the partnership in November 1980 when he denied Berryman access to their office and files. Berkson returned to sole practice and prevented Berryman from participating in the conclusion of the partnership’s cases. Berryman sought and successfully secured a judgment for her share of the partnership’s profits from cases pending at the time of dissolution.

On appeal, Berkson asserted three claims against the share of profits owed Berryman after dissolution. First, he asserted that

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370. Id. (codified at Md. Corps. & Ass’ns Code Ann. § 2-408(b)(2)(i)).
371. Id. (codified at Md. Corps. & Ass’ns Code Ann. § 2-408(b)(2)(ii)).
373. 55 Md. App. at 188, 461 A.2d at 48.
375. Id. at 82, 488 A.2d at 506.
376. Id.
377. Id. at 83, 488 A.2d at 506.
378. Id. Berryman’s husband’s claim against the partnership for a witness fee and Berryman’s request for an increased share of the partnership’s profits precipitated the dissolution. *Id.* at 83-84, 488 A.2d at 506-07.
379. Id. at 84, 488 A.2d at 507.
380. Id. The trial court entered a judgment of $115,756.38.
381. Id. at 85, 488 A.2d at 507. Berkson also alleged that the trial court abused its discretion in denying his motion for a continuance. *Id.* at 84, 488 A.2d at 507. The court found that “the motion [for continuance] bordered on the frivolous.” *Id.* at 87, 488 A.2d at 508. Thus, the trial court properly denied it. *Id.* at 85, 488 A.2d at 507.
equitable estoppel barred Berryman from any claim to the partnership profits because she had breached a fiduciary duty owed to the partnership. Second, Berkson claimed a credit against the profits owed Berryman for consulting costs and operating expenses incurred in winding up partnership cases. Finally, he claimed a credit for his services in concluding partnership affairs.\(^{382}\)

The court granted only Berkson’s claim for Berryman’s share of the consulting fee owed by the partnership. In denying the equitable estoppel claim, the court noted that the act alleged to be a breach of fiduciary duty occurred after dissolution.\(^{383}\) The court denied Berkson an allowance for overhead expenses because he failed to meet his burden of proof regarding expenses attributable to winding up the partnership’s cases.\(^{384}\) The court also denied Berkson’s claim for an allowance for his services in winding up partnership affairs.\(^{385}\) Citing Resnick v. Kaplan,\(^{386}\) which construed the Uniform Partnership Act to confer no right upon a remaining partner to compensation for services in winding up partnership cases when no contrary language exists in the partnership agreement, the court found that the parties were bound to the agreement’s profit distribution provision.\(^{387}\)

The court found, however, that Berkson was entitled to a credit for Berryman’s share of consulting costs\(^{388}\) under two sections of the Maryland Uniform Partnership Act.\(^{389}\) Under sections 9-604 and 9-606 a partner can bind the partnership by an act appropriate for concluding a partnership case.\(^{390}\) The court concluded that hiring the consultant was necessary to protect the partnership’s clients’ best interests and to represent those clients in a competent fashion.\(^{391}\) Berkson’s action was therefore legitimately related to the conclusion of a partnership case and in accord with Maryland law.\(^{392}\)

\(^{382}\) Id. at 87, 88, 93, 488 A.2d at 508, 509, 511.
\(^{383}\) Id. at 88, 488 A.2d at 509.
\(^{384}\) Id. at 92, 488 A.2d at 511.
\(^{385}\) Id. at 94, 488 A.2d at 512.
\(^{387}\) 62 Md. App. at 94, 488 A.2d at 511-12.
\(^{388}\) Id. at 91, 488 A.2d at 510.
\(^{390}\) Id. § 9-604 states, in relevant part, that “[e]xcept so far as may be necessary to wind up partnership affairs . . . dissolution terminates all authority of any partner to act for the partnership . . . .” Id. § 9-606(a)(1) states that “[a]fter dissolution, a partner can bind the partnership . . . [b]y any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution . . . .”
\(^{391}\) 62 Md. App. at 90, 488 A.2d at 510.
\(^{392}\) Id. Accordingly, the trial court’s award was reduced by over $20,000.
5. Legislative Developments.—(a) Appraisal Rights.—The 1985 Maryland General Assembly added to the restrictions placed on stockholders’ appraisal rights.\footnote{393} In general, Maryland law prevents stockholders from demanding fair stock value by binding them to the terms of the transaction in certain enumerated circumstances.\footnote{394} Chapter 363\footnote{395} adds to this list stock transactions involving open-end investment companies\footnote{396} registered with the Securities and Exchange Commission, when the value placed on the open-end investment company’s stock is its “net asset value.”\footnote{397}

The General Assembly also clarified the rights of dissenting stockholders in share exchanges by amending sections 3-201 and 3-202(a) of the Corporations & Associations Article\footnote{398} during the last legislative session.\footnote{399} The brief amendments designate the corporation acquired in the stock exchange transaction as the “successor.” Under Maryland law, dissenting stockholders assert their appraisal rights against the successor corporation. By resolving any ambiguity concerning against whom appraisal rights may be asserted, the amendment clarifies the stockholder’s right to demand payment of the fair value of “the stockholder’s stock from the successor [i.e., the acquired corporation] if . . . the stockholder’s stock is to be acquired in a share exchange.”\footnote{400}

(b) Consumer Cooperatives.—The 1985 Maryland General Assembly enacted comprehensive legislation dealing with consumer cooperatives.\footnote{401} The new statute contains detailed provisions for the

\footnote{394. See Md. Corps. & Ass’ns Code Ann. § 3-202(c).}
\footnote{395. 1985 Md. Laws at 2266 (codified at Md. Corps. & Ass’ns Code Ann. § 3-202(c)).}
\footnote{396. An “open-end investment company” is a mutual fund willing to sell and redeem shares of stock at any time. In contrast, a “closed-end investment company” does not continuously sell shares to the public. Shares are sold by a closed-end investment company in only a few limited situations. 19 W. Fletcher, Cyclopedia of the Law of Private Corporations § 9221 (perm. ed. 1975).}
\footnote{397. “Net asset value” means the total market value of all common stock shares owned by the open-end investment company divided by the number of shares in the fund owned by investors. See 13 W. Fletcher, Cyclopedia of the Law of Private Corporations § 5906.14 (rev. perm. ed. 1980).}
\footnote{400. Md. Corps. & Ass’ns Code Ann. § 3-202(a)(2) (1985). The amendment substitutes the term “stockholder” for “his” to clarify the position of the parties in relation to the share exchange.}
organization, maintenance, and dissolution of consumer cooperatives. Its expanded treatment of the consumer cooperative organizational structure under Maryland law increases the availability of this advantageous business structure to those persons or corporations desiring to use it for the supply, promotion, or provision of goods and services to the cooperative's members. The act affords cooperatives the benefits of exemption from various Maryland securities laws and removes the implication that the conduct of a cooperative is a conspiracy, combination in restraint of trade, an illegal monopoly, or an attempt to fix prices arbitrarily.

The statute first sets forth guidelines for consumer cooperative formation. Under the new provisions, five or more adults or two or more entities operating on a cooperative basis may incorporate to acquire, produce, manufacture, furnish, or distribute goods or services on a cooperative basis for the benefit of its members or patrons. Further, a cooperative, formed under the act, has the powers and benefits granted to ordinary business corporations under the general corporation laws of Maryland. The statute also establishes charter requirements and outlines the stock, formation, structural, operating, and other corporate requirements of a cooperative. Other new provisions cover corporate conversion to a cooperative.

Chapter 739 establishes operating procedures for the newly formed cooperative upon incorporation. Detailed treatment of board of directors and bylaw requirements are provided as well.


404. Id. at 3492 (codified at Md. Corps. & Ass'ns Code Ann. § 5-5A-27) [hereinafter all codification parentheticals for ch. 739 cite to the Corporations and Associations Article unless otherwise indicated].

405. Id. at 3481 (codified at §§ 5-5A-03, -04 (1985)).

406. Id. (codified at § 5-5A-06).

407. Id. at 3482 (codified at §§ 5-5A-07, -08).

408. Id. (codified at § 5-5A-08).

409. Id. at 3482-85 (codified at §§ 5-5A-08 to -18).

410. Id. at 3485-87 (codified at §§ 5-5A-19 to -21).
In addition, the act covers the apportionment of the cooperative's savings and assets. Finally, the act provides for two situations leading to the termination of the existing cooperative—dissolution and division. First, the right of dissolution is reserved to the membership, and the statute provides for the selection of trustees to liquidate the cooperative's assets upon dissolution. Second, a cooperative may be terminated by dividing into two or more cooperatives. The act calls for a written division plan setting out the terms and effects of the division.

(c) Franchising.—The General Assembly created the Equity Participation Program to help socially or economically disadvantaged persons begin and develop franchises. The benefits of franchises to the State's economy motivated the General Assembly to create the program. While drafting this legislation, the legislature made direct findings as to the special financial assistance required by disadvantaged persons.

The legislature vested administrative authority for this new program in the Maryland Small Business Development Financing Authority. The Authority is authorized to buy, hold, and sell qualified securities and distribute studies and reports. The act also provides for technical assistance to carry out the purpose of the program. The act limits the ability of the Maryland Small Business Development Financing Authority to provide program financing, however. First, to qualify for financing, the applicant must submit a business plan describing the franchise's management, product, and market. The applicant must also state the franchise's

411. Id. at 3487 (codified at § 5-5A-22).
412. Id. at 3489 (codified at § 5-5A-24).
413. Id.
414. Id.
415. Id. at 3490 (codified at § 5-5A-25).
417. The success of franchises as fast-growing and reliable forms of business expansion has contributed to Maryland's economy in two ways. First, franchises have served as a continuing source of tax revenues. Second, franchises continue to provide job opportunities. Id. at 3637 (codified at Md. Fin. Inst. Code Ann. § 12-236 (Supp. 1985)) [hereinafter all codification parentheticals for ch. 776 cite to the Financial Institutions Article unless otherwise indicated].
418. Id. at 3638.
419. Id. (codified at § 13-128).
420. Id. at 3639 (codified at § 13-239(2), (3)).
421. Id. at 3638 (codified at § 13-239).
amount and need for capital.\(^{422}\) Second, the law limits the Authority's security ownership to no more than forty-five percent of the voting stock of the franchise or forty-five percent of the franchise itself.\(^{423}\) Several monetary caps limit the amount of the Authority's equity participation financing as well.\(^{424}\) In addition, the act requires the Authority to recover its investment and operate at a profit.\(^{425}\)

The General Assembly also outlined operating procedures for the program.\(^{426}\) The funds made available for financing franchises come from the Small Business Development Guaranty Fund, state appropriations, federal funds, and private contributions.\(^{427}\) The fund operates as a nonlapsing revolving fund.\(^{428}\) After financing begins, the legislature expects the fund to become self-sustaining from franchise royalties.\(^{429}\) Finally, the statute prescribes guidelines for the use of funds to expand the capital resources of qualified franchises.\(^{430}\)

\(^{(d)}\) Organizations and Capitalization Fees.—The 1985 General Assembly restructured the fee system for incorporation and certain corporate reorganizations. Chapter 213 substitutes organization and capitalization fees for the bonus taxes previously imposed.\(^{431}\) These organization and capitalization fees apply in five circumstances.\(^{432}\) First, the statute charges a Maryland corporation that

\(^{422}\) Id. at 3639 (codified at § 13-240(a)(1), (2)).

\(^{423}\) Id. at 3640 (codified at § 13-240(b)(1)).

\(^{424}\) "The amount of the authority's equity participation financing for any franchise shall not exceed $100,000 and shall not exceed 45 percent of the total initial investment in the franchise. The total amount of equity participation financing shall not exceed $1,000,000 for any 12 month period." Id. at 3641 (codified at § 13-240(b)(2), (3)).

\(^{425}\) Id. (codified at § 13-240(b)(4)).

\(^{426}\) Id. at 3639-42 (codified at §§ 13-240, -241).

\(^{427}\) Id. at 3641 (codified at § 13-241(b)).

\(^{428}\) Id. (codified at § 13-241(c)). A "nonlapsing, revolving fund" refers to a fund that does not terminate and from which withdrawals are made either as loans or as disbursements with the obligation of repaying the fund to keep the fund intact. See BLACK'S LAW DICTIONARY 1188 (5th ed. 1979).

\(^{429}\) Id. (codified at § 13-241(c)).

\(^{430}\) Id. at 3642 (codified at § 13-241(e)).


\(^{432}\) 1985 Md. Laws at 1927 (codified at MD. CORPS. & ASS'NS CODE ANN. § 1-204 (1985)).
incorporates on the aggregate par value of its capital stock. Second, a Maryland corporation incurs a fee on an increase in the aggregate par value of its capital stock. Third, the statute imposes a fee on a successor Maryland corporation resulting from consolidation when the aggregate par value of its capital stock exceeds the aggregate par value of the stock of the consolidating corporations. Fourth, chapter 213 imposes a fee on a successor corporation resulting from a merger if its aggregate par value exceeds the aggregate par value of the capital stock of the merging corporations. Finally, the legislature imposes a fee on the incorporation of a Maryland corporation without capital stock, a savings and loan association, or a credit union. The legislature also provided a detailed fee schedule to guide the State and corporations in assessing the amount of the fees.

(e) Economic Stabilization.—In the preamble to the Economic Stabilization Act, the General Assembly acknowledged the adverse effects of unemployment on Maryland's citizens and the harm caused by business closings without adequate notice. The Economic Stabilization Act creates a quick response program in which businesses may work with State government to ease the burden of a "reduction in operations." The Secretary of Employment and Training will direct the quick response program and, in cooperation with the Governor's Employment and Training Council, develop voluntary guidelines for employers faced with reductions in operations. These guidelines will be distributed to all employers in the State every two years. The Department of Employment and Training

433. "Aggregate par value" means the sum total par value of all classes of stock. Id. at 1927 (codified at Md. Corps. & Ass'ns Code Ann. § 1-204(a)(2) (1985)).
434. Id. at 1927-28 (codified at Md. Corps. & Ass'ns Code Ann. § 1-204(c)(1) (1985)).
436. "Reduction in Operations" includes 1) the relocation of an employer's operation; and/or 2) reduction of at least 25% of the employees, or 15 employees, over a three-month period. This provision does not apply if the reduction results solely from labor disputes, occurs in an enterprise operated by the State, occurs at temporary workplaces, results from seasonal factors customary in the industry, or occurs when an employer files for bankruptcy. Id. at 1725 (codified at Md. Ann. Code art. 41, § 206F(c) (Supp. 1985)).
437. The guidelines must include 1) the appropriate length of time for advance notification to employees; 2) the continuation of appropriate fringe benefits; and 3) the specific procedure for invoking State assistance. Id. at 1732 (codified at Md. Ann. Code art. 41, § 206-I(b) (Supp. 1985)).
438. Id. at 1733 (codified at Md. Ann. Code art. 41, § 206-I(d)).
will be equipped to provide various employment and training services through the quick response program. The Department will also monitor layoff and employment patterns to identify employers likely to reduce their operations, and offer State assistance to such employers.

E. Debtors and Creditors

I. Fraudulent Conveyances.—In Pearce v. Micka, the Court of Special Appeals held that a judgment creditor could attach, as a fraudulent conveyance, mortgage principal payments made by an insolvent debtor on a tenancy by the entireties property. The court found, however, that payments of interest, taxes, and insurance, and checking account deposits for spousal support did not constitute fraudulent conveyances under Maryland law.

Pearce obtained a malpractice judgment against John Micka, then an attorney, but experienced difficulty in securing payment. Despite his insolvency, Micka managed to make mortgage and escrow payments against the principal, interest, taxes, and insurance premiums on his primary residence by checks drawn on his law firm checking account and from borrowed funds. During this period,

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439. The services will include on-site unemployment insurance bulk claims registration, registration for Federal Trade Readjustment Act services, the provision of labor market and retraining information, job placement services, job seeking and finding information, and referral to retraining opportunities. Id. at 1732-33 (codified at Md. Ann. Code art. 41, § 206-I(c)(2)-(5)).

440. Id. at 1733 (codified at Md. Ann. Code art. 41, § 206-I(e)-(f)).


442. Id. at 277, 489 A.2d at 54. Pearce challenged the reduction of the joint tenancy indebtedness under the Maryland Uniform Fraudulent Conveyances Act, Md. Com. Law Code Ann. §§ 15-201 to -214 (1983). Specifically, § 15-204 provides, in pertinent part, that “[e]very conveyance made and every obligation incurred by a person who is or will be rendered insolvent by it is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.” Fair consideration is given if “property is conveyed or an antecedent debt is satisfied.” Id. § 15-203. Further, when a creditor’s rights have matured and the debtor’s conveyance is “fraudulent,” the creditor may “as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of purchase . . . (1) [h]ave the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim; or (2) [d]isregard the conveyance and attach or levy execution on the property conveyed.” Id. § 15-209. Pearce’s claim also rested on Md. Ann. Code art. 45, § 1 (1982), repealed by Act of May 15, 1984, ch. 296, 1984 Md. Laws 1847, which provided in pertinent part that “no acquisition of property passing from one spouse to the other, shall be valid if the same has been made or granted in prejudice of the rights of subsisting creditors. . . .” A provision similar to article 45, § 1, is codified at Md. Fam. Law Code Ann. § 4-301(d)(2) (1984).

443. 62 Md. App. at 275, 277-78, 489 A.2d at 53, 54. Pearce’s challenge to Micka’s deposits into his wife’s checking account rested on the same provisions.
Micka also transferred funds to his wife's checking account. Pearce sued Micka and his wife, asserting that the mortgage payments and deposits to the wife's checking account were fraudulent conveyances.\textsuperscript{444}

The chancellor deemed fraudulent transfers those portions of the mortgage payments made by Micka with his own funds that reduced the mortgage principal.\textsuperscript{445} The chancellor reasoned that the rest of the payments went to other bona fide creditors, such as the county, the mortgagee, and the insurer.\textsuperscript{446} Mortgage payments made with borrowed money were held not to be fraudulent transfers by the chancellor because the money never belonged to Micka.\textsuperscript{447} As a result, Pearce received half of the amount by which the principal indebtedness was reduced. Finally, the chancellor held the deposits to Mrs. Micka's checking account were not fraudulent transfers because the funds were used to provide necessaries for the debtor's wife and children.\textsuperscript{448} By the time the judgment was rendered, Micka had filed for bankruptcy, and the bankruptcy judge directed that any money recovered by Pearce should be transferred to the trustee in bankruptcy.\textsuperscript{449} After the chancellor ordered that the judgment be paid to the trustee, Pearce appealed.\textsuperscript{450}

The Court of Special Appeals affirmed the chancellor's finding that "payments of interest, taxes and insurance premiums did not constitute fraudulent conveyances."\textsuperscript{451} These payments did not violate Maryland law since the satisfaction of antecedent debts was fair consideration for the payments.\textsuperscript{452} Pearce prevailed, however, in securing judgment against all of the payments Micka had made in reducing the mortgage principal.\textsuperscript{453} The court also affirmed the

\textsuperscript{444} Id. at 268-69, 489 A.2d at 50.
\textsuperscript{445} Id. at 270, 489 A.2d at 50.
\textsuperscript{446} Id.
\textsuperscript{447} Id.
\textsuperscript{448} Id.
\textsuperscript{449} Id. at 270-71, 489 A.2d at 51.
\textsuperscript{450} Id. at 271, 489 A.2d at 51.
\textsuperscript{451} Id. at 275, 489 A.2d at 53. The court distinguished Lutherville Supply & Equip. Co. v. Dimon, 232 Md. 195, 192 A.2d 496 (1963), and McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696 (1940), because neither of them involved the question raised by Pearce. Lutherville Supply merely inquired whether the creditor had stated a cause of action under both the Uniform Fraudulent Conveyances Act and Md. ANN. CODE art. 45, § 1 (1982). McCaslin, unlike Micka, did not involve monthly mortgage payments including interest and funds to be escrowed for payment of taxes and insurance. 62 Md. App. at 273-74, 489 A.2d at 53.
\textsuperscript{452} 62 Md. App. at 275, 489 A.2d at 53.
\textsuperscript{453} Id. at 277, 489 A.2d at 54. The court held that the principal payments, adding to owner's equity, were fraudulent and prejudicial to creditors to the extent by which the
chancellor’s finding that Micka’s deposits to his wife’s checking account were not fraudulent because the payment by the debtor to provide necessaries for his wife and children was “fair consideration” within the meaning of the Uniform Act. Nor did the court find the deposits to be interspousal transfers of property under Maryland law. The chancellor’s judgment was vacated, however, and the case remanded because the chancellor erred in granting relief for only one-half of the amount by which Micka had reduced the mortgage principal.

2. Legislative Development.—The Maryland General Assembly amended the Commercial Law Article to clarify the avoidance powers of assignees for the benefit of creditors and receivers of an insolvent’s assets in insolvency proceedings. The same avoidance powers are now available to the assignee or the receiver as have been available to a trustee in bankruptcy under federal bankruptcy laws. The General Assembly provided the necessary terms and definitions to include assignees and receivers within the scope of avoidance powers of a trustee in a bankruptcy proceeding. More specifically, an assignee or receiver may avoid any fraudulent conveyance, preference, payment, or transfer to the same extent that the act is barred as fraudulent, void, or voidable under federal

454. Id. at 278, 489 A.2d at 54.
455. Id.
456. Id. at 277, 489 A.2d at 54.
458. Id. at 2712 (codified at Md. Com. Law Code Ann. § 15-101(a)(10)). The rights given to a trustee under federal bankruptcy law put the trustee in the position of a judicial lienor who is governed by state codification of the Uniform Commercial Code. Specifically, the avoidance rights of trustees in bankruptcy include the power to avoid any transfer of property of the debtor or obligation incurred by the debtor in the capacity of a lien creditor or as a successor to certain creditors or purchasers. 11 U.S.C. § 544 (1982). Second, the trustee may avoid the fixing of a statutory lien on property of the debtor in certain circumstances. § 545. Third, the trustee may avoid any transfer of property of the insolvent debtor to satisfy antecedent debts that would enable such creditors to receive more than they would normally under certain specified conditions. § 547. Fourth, the trustee may avoid any fraudulent transfers and obligations. § 548. Finally, the trustee may avoid certain transfers that occur after the commencement of the bankruptcy action. § 549.
The act also grants certain rights to the assignee or receiver. First, the assignee or receiver assumes the right of a creditor extending credit to the insolvent who obtains a judicial lien, whether such a creditor exists. Second, the assignee or receiver assumes the rights of a creditor who, after extending credit to the insolvent, receives an unsatisfied execution judgment at the time of the assignment or receivership proceeding. Finally, chapter 545 places the assignee or receiver in the position of a bona fide purchaser of the insolvent's real property who has perfected a transfer at the commencement of the assignment or receivership proceeding. Again, the avoidance powers are not dependent upon whether such a purchaser really exists. The import of the provision lies in the ability of an assignee or receiver to avoid additional liabilities and to protect creditors and the insolvent's assets by avoiding improper transfers, and securing a lien to be held by the assignee or receiver.

**F. Contracts**

1. **Arbitration Clauses.**—In *Board of County Commissioners v. Cam Construction Co.*, the Court of Appeals held that a contractor can compel arbitration to settle a contract dispute for the benefit of a subcontractor. Frederick County and Cam Construction Co., the prime contractor, executed an agreement for the design and construction of a courthouse. The agreement contained an arbitration clause and a provision that only the general contractor could be a party to any arbitration. The contractor demanded arbitration to recover alleged losses that included ones suffered by its subcontractors. The county objected to the inclusion of the subcontractors’
claims and sought to enjoin the arbitration. The circuit court denied the injunction, and the county appealed.\textsuperscript{468}

The county first claimed that it had no obligation to enter arbitration with subcontractors with whom it had not agreed to do so. The court pointed out that only the prime contractor had requested arbitration.\textsuperscript{469} The court then addressed the county's contention that a "lack of privity is an absolute bar where it is admitted that the claim made in the name of the prime will inure to the sub."\textsuperscript{470} The court rejected this claim as well, citing precedent that a contractor can bring a claim for damages against an owner, even though the subcontractor is the real party in interest.\textsuperscript{471} The court reasoned that a party bound by a contract is liable whether or not it personally performed the work. Thus, that party should be able to claim the contract's benefit. Also, someone must be able to assert rights under a contract. Since a subcontractor lacks privity to bring a direct action, the prime contractor must possess the right to hold the owner accountable.\textsuperscript{472}

As another ground for the injunctive relief, the county for the first time on appeal argued that the \textit{Severin} doctrine should bar the contractor from seeking arbitration on behalf of subcontractors.\textsuperscript{473} This doctrine states that a prime contractor cannot obtain a judgment for damages sustained by a subcontractor when it is not liable to the subcontractor for the amount or if it has not already reimbursed the subcontractor.\textsuperscript{474} The Court of Appeals noted that this doctrine has been heavily criticized and effectively undermined with exceptions.\textsuperscript{475} Furthermore, the \textit{Severin} issue, if applicable, should

\begin{footnotes}
\item 468. \textit{Id.} at 646, 480 A.2d at 796.
\item 469. \textit{Id.} at 646-47, 480 A.2d at 796-97.
\item 470. \textit{Id.} at 649, 480 A.2d at 798.
\item 471. \textit{Id.} at 647-49, 480 A.2d at 797-98 (citing United States v. Blair, 321 U.S. 730 (dispute over the construction of a government building), \textit{reh'g denied}, 322 U.S. 768 (1944); Buckley & Co. v. State, 140 N.J. Super. 289, 319-320, 356 A.2d 56, 73 (1975) (prime contractor can sue on behalf of subcontractors)).
\item 472. 300 Md. at 647-48, 480 A.2d at 797.
\item 473. \textit{Id.} at 650, 480 A.2d at 798 (citing \textit{Severin} v. United States, 99 Ct. Cl. 435 (1943), \textit{cert. denied}, 322 U.S. 733 (1944)). In \textit{Cam}, the court referred to this doctrine as one which has "haunted government contract litigation." 300 Md. at 650, 480 A.2d at 798.
\item 474. 300 Md. at 650-51, 480 A.2d at 798-99.
\item 475. \textit{Id.} at 651, 480 A.2d at 798. The Court of Appeals has not previously commented on the applicability of the \textit{Severin} doctrine in Maryland. In \textit{Cam}, the court accepted the decline of the doctrine in the federal courts, joining the majority view. The federal courts have narrowed the scope of applicability of the doctrine by placing upon the government the burden of proving that the general contractor is not liable to the subcontractor for the amount in dispute. See Donovan Constr. Co. v. United States, 149 F. Supp. 898 (Ct. Cl.), \textit{cert. denied}, 355 U.S. 826 (1957). The courts have also held that
\end{footnotes}
be raised at the time of arbitration. *Severin* does not preclude a contractor from suing on behalf of a sub, but only precludes recovery of damages if the government can show that the prime contractor has no liability to the sub.\(^{476}\)

Finally, the county argued that the “Little Miller Act” provided sufficient protection to the subcontractor.\(^{477}\) Although this statute does provide a remedy, the court found that it was not intended as an exclusive remedy. Thus, the prime contractor could invoke the arbitration provisions for the benefit of the subcontractors.\(^{478}\)

In *District Moving & Storage Co. v. Gardiner & Gardiner, Inc.*\(^{479}\) the Court of Special Appeals, in a case of first impression, held that a binding arbitration clause applies to a construction contract’s third party beneficiary. The court reasoned that a party who claims the benefit of a contract takes the contract subject to the same restrictions as parties in privity.\(^{480}\)

A property owner contracted with an architect and a general contractor to design and build a warehouse. Each contract contained a binding arbitration clause.\(^{481}\) *District Moving & Storage,*
the appellant, intended to lease the warehouse that was the subject of the contracts, but was not a signatory to either contract. After construction began, the owner and the appellant filed a suit alleging negligence and breach of contract by the architect and the contractor. The architect and the contractor petitioned the court to compel the owner to arbitrate the dispute and demurred to the appellant’s claims on the grounds that District Moving & Storage lacked privity to the agreement and standing to bring a claim. District Moving & Storage subsequently amended its complaint and claimed third party beneficiary status. The circuit court determined that the lessee could claim third party beneficiary status because all of the parties, at the time of the execution of the contracts, were aware of its intended use of the building. The court reasoned, however, that a party who claims the benefit of a contract must abide by all the contract terms, including a binding arbitration clause.

District Moving & Storage appealed this decision to the Maryland Court of Special Appeals, which first noted that the appellant’s third party beneficiary status was not in dispute. The Restatement of Contracts defines a creditor beneficiary as someone who depends upon “an actual or supposed or asserted duty of the promisee...” In this case, the owner owed such a duty to the appellant.

The court then addressed the issue of whether a third party beneficiary is bound by a contract’s arbitration clause. Although the Uniform Arbitration Act, which Maryland has partially adopted, does not address this issue, the court held that a third party beneficiary is bound to the same extent as the promisee by the contract’s arbitration provisions. This conclusion represents a logical de-

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any other manner, any additional party not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by all the parties hereto. Any consent to arbitration involving an additional party or parties shall not constitute consent to arbitration of any dispute not described therein or with any party not named or described therein. This agreement to arbitrate and agreement to arbitrate with an additional party or parties duly consented to by the parties hereto shall be specifically enforceable under the prevailing arbitration law.

Id. at 98-99, 492 A.2d at 321. The agreement between the owner and the contractor contains essentially the same language. See id. at 99-100, 492 A.2d at 321.

482. 63 Md. App. at 100, 492 A.2d at 321.
483. Id. at 100-01, 492 A.2d at 321-22.
velopment in the law of third party beneficiaries. The Court of Appeals previously had held that "a third party beneficiary takes subject to the same defenses against the enforcement of the contract . . . as exist between the original promisor and promisee."\textsuperscript{487} This case extends that principle to arbitration provisions.

2. Public Contracts.—In \textit{Mayor of Baltimore v. Bio Gro Systems, Inc.},\textsuperscript{488} the Court of Appeals invalidated Baltimore City's negotiated extension of a competitively awarded municipal contract. While the court implied that a municipality can extend a contract pursuant to an option clause that continues the contract on identical terms and conditions, it clearly prohibited any extension involving negotiations for different conditions.\textsuperscript{489} Such renegotiation would violate the letter and spirit of the competitive bidding section of the Baltimore City Charter.\textsuperscript{490}

The city entered into a two-year sludge removal contract that provided for a two-year extension by mutual consent. After several months of negotiations, the contractor and the city agreed on a renewal contract that differed from the original accord in several provisions, including the price term. Following the formulation of this renewal agreement, the Board of Estimates held public hearings at which appellee Bio Gro Systems testified that it could have performed the work at a lower cost.\textsuperscript{491} The firm protested the private renegotiation of the contract, and the city filed a declaratory judgment action to determine the new contract's validity. The circuit court held that the contract violated the City Charter and declared it void.\textsuperscript{492}

The Court of Appeals noted that the City Charter clearly re-


\textsuperscript{488} 300 Md. 248, 477 A.2d 783 (1984).

\textsuperscript{489} \textit{Id.} at 255, 477 A.2d at 787.

\textsuperscript{490} \textit{BALTIMORE, MD., CITY CHARTER} art. VI, § 4 (1964) (pertaining to the process of competitive bidding).

\textsuperscript{491} 300 Md. at 250-51, 477 A.2d at 784-85. Enviro-Gro, the recipient of the original contract, agreed to remove the sludge for $34.75 per wet ton. The negotiated extension provided a price of $32.75 per wet ton. Appellee Bio Gro Systems, Inc. testified that it could have performed the work for $25 per ton. \textit{Id.}

\textsuperscript{492} \textit{Id.} at 251, 477 A.2d at 785. The court first issued a per curiam order affirming the decision of the circuit court. Several days later, the court produced this written opinion. \textit{Id.}
quires competitive bidding for any expenditure in excess of $5000 in order to protect public funds from corrupt practices. The court cited a long line of Maryland cases that have consistently reiterated this basic consideration of public policy and concluded that any private agreement that circumvents the competitive bidding process is void because it is contrary to public policy.

Although the court struck down the renegotiated extension of this contract, it added that not all extensions are invalid. Relying on case law from other jurisdictions, the court suggested that an option to extend the contract on identical terms would be permissible.

In *Maryland Port Administration v. John W. Brawner Contracting Co.*, the Court of Appeals reiterated that absent conditions of mutual mistake, fraud, or duress a court may not reform a competitively awarded public contract. The court noted that the relevant state regulation reinforces equitable principles and specifically precludes reformation for a price mistake.

This case involved two separate incidents in which a contractor discovered a price mistake in a bid after the award of a contract. In each case, the contractor chose to proceed under the contract and then sought to amend the price term. When the state agency

493. *Id.* at 251-52, 477 A.2d at 785.
495. 300 Md. at 252, 477 A.2d at 785-86 (citing Hanna v. Board of Educ., 200 Md. 49, 55, 87 A.2d 846, 849 (1952)).
496. *Id.* at 252, 477 A.2d at 786-87. See *Savage v. State*, 75 Wash. 2d 618, 453 P.2d 613 (1969). In *Bio Gro*, the court distinguished between an option to extend on the same terms and conditions and a negotiated extension. An option to extend merely continues the same contract. A negotiated extension in effect creates a new contract. This new contract would, if valid, circumvent the competitive bidding process. The court concluded that the city “cannot do indirectly what it is prohibited from doing directly.” 300 Md. at 255, 477 A.2d at 787 (citing Hanna v. Board of Educ., 200 Md. 49, 55, 87 A.2d 846, 849 (1952)).
499. 303 Md. at 45, 59-60, 492 A.2d at 281, 288-89.
500. In the first case, appellee John W. Brawner submitted a construction bid with a $10,000 error due to a subcontractor’s mistake. *Id.* at 49, 492 A.2d at 283. In the second case, appellee J. Roland Dashiel & Sons, Inc. made a $110,581 mistake by accidentally omitting materials from the bid. *Id.* at 52, 492 A.2d at 285.
501. *Id.* at 49, 52, 492 A.2d at 283, 285.
denied the change, the contractor appealed to the State Board of Contract Appeals. The Board pointed out that reformation did not conflict with the state procurement article's objectives of promoting fairness and public confidence in the procurement system. The Board also claimed that reformation was available as a remedy prior to the adoption of this article and that the regulation derived from the ABA Model Procurement Code, which permitted reformation for mutual mistake or unconscionability. The Board remanded both cases to the agency involved for factual findings. On appeal, the circuit court affirmed this decision: "[W]hile mere changes [in price] are forbidden, corrections required by conscience are not." The Court of Appeals held that the procurement regulations must be read literally. According to the court, the Board of Contract Appeals had misinterpreted the relevant law; rescission rather than reformation was the appropriate remedy when enforcement of a contract containing a unilateral price mistake would be unconscionable. Since the procurement regulations, which have the force of law, clearly state that "[c]hanges in price are not permitted. . . .", the court held that reformation would violate the rule of statutory construction that a court must construe a statute to ensure that no word is rendered "superfluous, meaningless, or

502. Md. ADMIN. CODE tit. 21, § 05.02.12D (1982) states in pertinent part: Mistakes Discovered After Award. Mistakes may not be corrected after award of the contract except when the procurement officer and the head of a procurement agency makes [sic] a determination that it would be unconscionable not to allow the mistake to be corrected. Changes in price are not permitted.

503. 303 Md. at 50, 492 A.2d at 284 (citing Flester v. Ohio Casualty Ins. Co., 269 Md. 544, 307 A.2d 663 (1973); Housing Equity Corp. v. Joyce, 265 Md. 570, 290 A.2d 769 (1972)). The Court of Appeals noted that these cases actually stand for the proposition that recission is the only remedy, absent mutual mistake, or unilateral mistake accompanied by duress, fraud, or inequitable conduct. 303 Md. at 58, 492 A.2d at 288.


505. 303 Md. at 52-55, 492 A.2d at 285-86. The trial court consolidated the two cases on appeal and determined that prior to the enactment of article 21, reformation was the only remedy available in such a situation and that the public policy behind article 21 supported reformation in the case of a mistake discovered after the award of a contract. See supra note 503.

506. 303 Md. at 45, 55, 492 A.2d at 281, 286.


509. Supra note 502.
The 1985 General Assembly also passed legislation dealing with procurement law and construction contract disputes. Chapter 678 has two key parts: The first contains new law concerning escrow accounts. Whether or not any claim exists, when the public procurement agency pays a semifinal estimate, it must place any retainage in an interest-bearing escrow account. Money is therefore available for later payment of disputed claims. The second part expands codified provisions of procurement law by establishing a procedure for the resolution of disputes relating to public sector construction contracts. Within thirty days of filing notice of a disputed claim, the contractor must submit to the procurement agency all pertinent data. The procurement agency head, or equivalent official, must review and resolve the claim within 180 days, unless extended by mutual agreement of the parties. Denial of a claim is a final action reviewable by the Board of Contract Appeals.

3. Employment Contracts.—In Staggs v. Blue Cross of Maryland, the Maryland Court of Special Appeals determined that an employer’s personnel policy can constitute an enforceable contract. The court thus adopted what it considered the majority view in a relatively new and unsettled area of contract law.

510. 303 Md. at 60, 492 A.2d at 289 (citing the general rule of Management Personnel Serv. v. Sandefur, 300 Md. 332, 341, 478 A.2d 310, 315 (1984)).
512. Retainage is the dollar amount remaining after the procurement agency has made the initial estimated payment. J. Lambert & L. White, Handbook of Modern Construction Law 7.7.3 (1988).
514. Id. at 3128 (codified at § 17-201(c)(6)). At the time of a final payment, the agency will release the retainage due to the contractor, plus any accrued interest.
515. Id. (codified at § 17-201).
516. Id. at 3127 (codified at § 17-201(c)(2)). Items to be submitted include the amount of the claim, the facts upon that the claim is based, and any other data that may substantiate the claim.
517. Id. at 3127 (codified at § 17-201(c)(4)).
518. Id. at 3128 (codified at § 17-201(e)). Failure to decide the claim within 180 days will be considered a denial for purposes of review. Id. at 3127-28 (codified at § 17-201(c)(5)).
520. Id. at 392, 486 A.2d at 805. Under traditional common law principles, an employment contract of indefinite duration is terminable at will by either party. See infra note 529 for cases relating to the evolution of these concepts.
Blue Cross accused three employees of falsifying sales reports and ordered these employees to resign or be fired. Two employees resigned; the third was discharged. All three brought suit, claiming that Blue Cross breached the terms of an employment agreement concerning termination policy and that their supervisors had maliciously and intentionally interfered with the employment agreement. The circuit court granted a summary judgment in favor of Blue Cross, from which the three employees appealed.\(^{521}\)

The Court of Special Appeals first determined that the employees who resigned had standing to bring suit. Generally, in Maryland, employees who voluntarily resign cannot later challenge the propriety of their terminations.\(^{522}\) Maryland does recognize, however, the concept of constructive discharge.\(^{523}\) If an employer coerces an employee to resign, the court may regard the separation as an effective discharge\(^{524}\) if the employer's words or actions "would logically lead a prudent man [or woman] to believe his [or her] tenure had been terminated."\(^{525}\)

The court then concluded that a Blue Cross personnel policy memorandum\(^{526}\) providing for pretermination review could be enforceable, even though the employment contract between the parties was indefinite in its terms. At common law, either party can terminate at will an employment contract of indefinite duration;\(^{527}\) however, the employer and employee can modify by contract an otherwise indefinite agreement.\(^{528}\) Provisions in employer policy statements and handbooks can constitute such modifications when,

\(^{521}\) 61 Md. App. at 385, 486 A.2d at 800.

\(^{522}\) Id. at 386, 486 A.2d at 800.

\(^{523}\) Id. at 386-87, 486 A.2d at 800 (citing Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 643, 477 A.2d 1197, 1203, cert. denied, 301 Md. 639, 484 A.2d 274 (1984)).

\(^{524}\) See Cumberland & Pa. R.R. v. Slack, 45 Md. 161 (1876) (employer coerced employee to resign by indicating that employment would be terminated).

\(^{525}\) 61 Md. App. at 387, 486 A.2d at 801 (quoting Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 335, 563 P.2d 54, 58-59 (1977) (employees are often asked to resign in lieu of being fired)).

\(^{526}\) The memorandum read in pertinent part:

IV. Employees terminating due to dismissal are subject to the following conditions:

A. Except in extreme cases . . . , employees will be given at least two formal counseling sessions by their supervisors . . .

E. An employee may be dismissed at any time for cause without liability to Blue Cross and Blue Shield of Maryland.


\(^{528}\) 61 Md. App. at 388, 486 A.2d at 801 (citing Hodge v. Evans Fin. Corp., 707 F.2d 1566, 1568 (D.C. Cir. 1983)).
“with knowledge of their existence, employees start or continue to work for the employer.” Thus, the Court of Special Appeals vacated the circuit court’s summary judgment, and remanded the case for trial.

In Tabs Associates v. Brohawn, the Court of Special Appeals held that Tabs had established a prima facie case of a protectable trade secret. The court also determined that the noncompetition covenant in Tabs’ employment contract with Brohawn could be enforced. Thus, the court reversed the trial court’s dismissal of Tabs’ action.

Tabs Associates presorts its customers’ mail to reduce their postage expenses. Brohawn, a former Tabs managerial employee, signed an employment agreement containing a covenant not to compete and a “trade secret” clause. Brohawn’s husband also worked for Tabs. The Brohawns resigned from the company in 1982 and started a competing business that allegedly utilized a unique process developed by Tabs. Tabs sued for injunctive relief, alleging violations of the written agreement and breach of fiduciary duty. After several preliminary actions, the circuit court


530. Id. at 393, 486 A.2d at 804.

531. Id. at 330, 475 A.2d 1203 (1984).

532. Id. at 348, 475 A.2d at 1213.

533. Id. at 340, 475 A.2d at 1208-09.

534. Id. at 350, 475 A.2d at 1214. Md. R.P. 535 (1977) governed motions to dismiss. It required a trial judge to make all reasonable inferences from the evidence presented “in the light most favorable to the plaintiff.” Washington Suburban Sanitary Comm’n v. TKU Assoc., 281 Md. 1, 21, 376 A.2d 505, 515 (1977); Moy v. Bell, 46 Md. App. 364, 368, 416 A.2d 289, 293 (1980). Md. R.P. 535 (1977) has been replaced by Md. R.P. 2-519(a) and is now referred to as a “Motion for Judgment.”

535. Id. at 335, 475 A.2d at 1206.

536. Id. Mr. Brohawn apparently did not sign an employment agreement.

537. Id. The Brohawns’ started a competing company known as PSM Associates (PSM).

538. Id. at 333, 475 A. 2d at 1205. The court first entered an ex parte order enjoining George and Mary Brohawn, and PSM, from doing business as PSM. Another judge then
dismissed the complaints for lack of a prima facie case that Tabs' process contained a protectable "trade secret."\textsuperscript{539}

Maryland law recognizes the validity of covenants not to compete when such covenants constitute reasonable efforts to protect the employer's business.\textsuperscript{540} In general, courts will enforce restrictions on the sale of goodwill and the use of customer lists, customer contact, and trade secrets.\textsuperscript{541} In this case, Tabs demonstrated at trial that Brohawn had access to customer lists, and testimony indicated that George Brohawn had contacted Tabs' clients. Thus, Tabs had established a prima facie breach of the noncompetition covenant.\textsuperscript{542}

The court also determined that Tabs had established a prima facie case for violation of its trade secrets.\textsuperscript{543} The court first examined the criteria for protectable trade secrets in Maryland. Relevant factors include 1) whether the process is known outside of the company, 2) whether the employees know the process, 3) whether measures were taken to safeguard the secret, 4) what value the secret had to the firm and its competitors, 5) what the secret cost to develop, and 6) whether competitors could easily acquire or duplicate the technology or the secret.\textsuperscript{544} Tabs had produced sufficient evidence at trial to satisfy all of these factors. Thus, the trial court erred in dismissing Tabs' action.\textsuperscript{545}

signed an interlocutory injunction enjoining Mary Brohawn from further contact or communication with PSM. \textit{Id.} \textsuperscript{539} \textit{Id.} at 339, 344, 475 A.2d at 1208, 1211. 

\textsuperscript{540} \textit{Id.} at 338, 475 A.2d at 1207. In each case, the court weighs the need to protect the employer against the hardship imposed on the employee. \textit{See, e.g., Tuttle v. Riggs-Warfield-Roloson, Inc., 251 Md. 45, 49-50, 246 A.2d 588, 590 (1968). The court also determines whether the contract includes adequate consideration ancillary to the employment contract and whether the geographical limits on competition are reasonably related to the employer's business. \textit{See, e.g., Becker v. Bailey, 268 Md. 93, 96, 299 A.2d 835, 837-38 (1973).}

In Tabs Assocs., the court noted that the employee's skills were managerial and easily transferable to any business. Thus, no hardship would result from enforcing the covenant not to compete. On the other hand, the employer's unique process provided the basis of the company's profitability. Thus, the potential loss to the company was great and outweighed the employee's interests. 59 Md. App. at 387, 475 A.2d at 1207. \textsuperscript{541} \textit{59 Md. App.} at 336-37, 475 A.2d at 1207 (citing Rosen & Loewy, Restrictive Covenants in Maryland Employment Agreements: A Guide for Drafting, 11 U. BALTIMORE L. REV. 377 (1982)). 

\textsuperscript{542} \textit{Id.} at 340, 475 A.2d at 1208-09. 

\textsuperscript{543} \textit{Id.} at 348, 475 A.2d at 1213. 

\textsuperscript{544} Space Aero Prod. Co. v. R.E. Darling Co., 238 Md. 93, 110, 208 A.2d 74, 82 (1965) (citing RESTATEMENT OF TORTS § 757 comment b (1939)). 

\textsuperscript{545} 59 Md. App. at 349-50, 475 A.2d at 1214.
4. Subcontractor Liability.—In USEMCO, Inc. v. Marbro Co., the Court of Special Appeals held a subcontractor liable for the liquidated damages suffered by the contractor as a result of the sub's delivery delay. Marbro, the prime contractor, sought to enter into an agreement with Anne Arundel County to build a sewage treatment plant. USEMCO, the supplier, "proposed to offer" to build and supply a pumping station, and sent this proposal to all contractors who had bid for the project. Marbro submitted an order to USEMCO, conditioned upon award of the contract. USEMCO, in turn, sent Marbro an "order acknowledgement" which contained "terms and conditions," including a broad exculpatory clause that absolved USEMCO from any potential liability. Marbro received the contract from the county and proceeded with the project, but suffered delays due to USEMCO's failure to make timely delivery of the pumping station. This delay prompted the county to assess liquidated damages against Marbro. Marbro then withheld final payment to USEMCO, and USEMCO brought an action in circuit court for payment due. Marbro counterclaimed for the amount of liquidated damages. The circuit court held USEMCO responsible for these damages and awarded USEMCO only the difference between the payment due and the liquidated damages. USEMCO appealed, claiming that the terms of its agreement with Marbro excused any liability on its part.

The Court of Special Appeals affirmed the circuit court's decision and clarified Maryland law concerning offer and acceptance. Because the Uniform Commercial Code (UCC) does not define "offer," the court examined common law principles of contract law to determine the status of each party. The court determined that USEMCO's proposal to Marbro did not constitute an offer. A contract requires mutual assent to a promise for consideration. This

547. Id. at 354, 493 A.2d at 90.
548. Id. at 354-55, 483 A.2d at 90.
549. Id.
550. Id. at 355-56, 483 A.2d at 90-91.
551. Id. at 358, 483 A.2d at 91.
552. Id. at 353, 483 A.2d at 88.
553. Id. at 355, 358, 483 A.2d at 89, 91.
554. Id. at 353-54, 358, 483 A.2d at 89, 91.
555. Id. at 358, 483 A.2d at 91-92.
556. Id., 483 A.2d at 92.
557. Id. at 360, 483 A.2d at 92 (citing UCC § 1-103 (1977)). See also Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 538-39, 369 A.2d 1017, 1023 (1977) (UCC does not define offer).
process begins with a proposal to make a promise in return for consideration or a proposal of consideration for a promise.\textsuperscript{558} A mere expression of intent is not an offer unless it definitively and with certainty expresses that the person making the proposal, upon acceptance by the other person, expects to be bound by the agreement.\textsuperscript{559} The definitiveness and certainty are to be ascertained from the language and circumstances of each transaction. Thus, USEMCO's initial proposal\textsuperscript{560} was not sufficiently definite to constitute an offer. The offer did not occur until Marbro ordered the pumping station.\textsuperscript{561} USEMCO's acknowledgement of the order constituted an acceptance. This acceptance included a reference to USEMCO's standard terms and conditions, which were set forth in a separate writing and which USEMCO claimed formed part of the agreement with Marbro.\textsuperscript{562}

The court first considered whether this separate writing was part of the contract. The court turned to section 2-207 of the Uniform Commercial Code, which provides that an acceptance is operable if it states different or additional terms, as long as these terms do not materially alter the agreement.\textsuperscript{563} In this case, the court found that the terms in the separate document would have materially altered the agreement. Thus, Marbro's failure to object to their inclu-

\begin{itemize}
  \item \textsuperscript{558} 279 Md. at 539, 369 A.2d at 1023.
  \item \textsuperscript{559} Peoples Drug Store v. Fenton, 191 Md. 489, 494, 62 A.2d 273, 276 (1948).
  \item \textsuperscript{560} This proposal stated that "USEMCO proposes to offer for sale the equipment . . . subject to the Standard Terms and Conditions of Sale contained in USEMCO's Order Acknowledgement Form." 60 Md. App. at 354-55, 483 A.2d at 90.
  \item \textsuperscript{561} Id. at 360-61, 483 A.2d at 92-93.
  \item \textsuperscript{562} The "Standard Terms and Conditions" limited USEMCO's liability for deviations from the specifications and from late delivery. It stated in pertinent part:
    \begin{enumerate}
      \item This proposal does not guarantee that the product described herein is in exact accord with the job plans.
      \item \textsuperscript{A}ll delivery schedules are estimates only. . . .
      \item USEMCO shall not be liable for any losses, damages, or delays due to or caused by transportation difficulties, fire, labor shortages, strike or other labor disputes, civil or military authority insurrection, riot, war, accident, shortage of labor or material . . . or any other cause or circumstance . . . beyond USEMCO's reasonable control . . . Acceptance of equipment on delivery shall constitute a waiver of any claims for losses or damages due to delay. . . . Further, under no circumstances shall USEMCO be liable for any liquidated, special or consequential damages or for any penalties, whether direct or indirect.
    \end{enumerate}
  \item \textsuperscript{563} Id. at 362-64, 483 A.2d at 93-94 (citing UCC § 2-207 (1977)). The court reasoned that the time of delivery and the specifications were vital to the buyer's purpose. Thus, it would be unfair to assume from Marbro's silence that it had assented to the inclusion of the exculpatory language contained in the standard terms and conditions. For this reason, the inclusion of these terms would materially alter the agreement. Id. at 363-65, 483 A.2d at 94-95.
\end{itemize}
sion did not make them part of the contract. Because the contract concerned specific machinery required by Marbro’s agreement with the county, it would be inconsistent with Marbro’s purpose to believe that it would accept terms absolving USEMCO from liability if the equipment did not meet the county’s specifications.564

After determining that USEMCO was liable under the terms of the contract, the court decided that USEMCO breached the contract by late delivery of the goods. The court cited the general rule that when a contract does not specify the time for performance, the court will infer a reasonable time from the facts and circumstances.565 In UMESCO, the trial court determined that USEMCO was aware of Marbro’s deadline and that this date was a reasonable deadline for USEMCO. The Court of Special Appeals agreed and held that the trial court’s decision was not clearly erroneous.566

Finally, the court found USEMCO liable for the liquidated damages. USEMCO argued that Marbro could not claim the liquidated damages as a set-off because these damages were not foreseeable. The court pointed out that USEMCO had received a copy of Marbro’s contract with the county, including the damage provisions; thus, USEMCO had actual knowledge.567 Therefore, USEMCO remained liable for the amount of assessed liquidated damages as a set-off against the claim for payment due.568

5. Statute of Frauds.—In Griffith v. One Investment Plaza Associates,569 the Court of Special Appeals found that the Statute of Frauds570 did not bar the enforcement of an oral agreement.571 A real estate broker sued for commissions due for lease renewals under an oral agreement. The present building owner sought a declaratory judgment that the Statute of Frauds barred enforcement of this contract because it had not been fully performed within one

564. Id. at 364, 483 A.2d at 95.
565. Id. at 365, 483 A.2d at 95 (citing Anne Arundel County v. Crofton Corp., 286 Md. 666, 410 A.2d 228 (1980); Evergreen Amusement Corp. v. Milstead, 206 Md. 610, 112 A.2d 901 (1955)).
566. Id. at 366, 483 A.2d at 96.
567. USEMCO received this copy of the contract when it initially set out to prepare the proposal that it submitted to the various contractors who were going to bid the project. Although the actual amount was not listed, the court said that USEMCO certainly could foresee that some damages would be assessed. Id. at 366-67, 483 A.2d at 96.
568. Id. at 367, 483 A.2d at 96.
571. 62 Md. App. at 8, 488 A.2d at 185.
year. The circuit court agreed and sustained the demurrers to the broker's suit.\textsuperscript{572} The Court of Special Appeals reversed. An action based on the lease would be barred because the lease, by its own terms, could not be performed within one year.\textsuperscript{578} The court explained, however, that the real issue in this case involved the oral listing agreement, an employment contract of indefinite duration. The Statute of Frauds does not bar the enforcement of a contract that \textit{possibly can be} completed within one year.\textsuperscript{574} The one-year rule only makes a contract unenforceable if the parties expressly agree that the contract will not be completely performed within one year.\textsuperscript{575}

\textbf{G. Insurance}

1. \textit{Automobile Insurance.}—(a) \textit{Household Exclusion.}—In Jennings \textit{v. Government Employees Insurance Co.}\textsuperscript{576} (GEICO), the Court of Appeals held the "so-called household exclusion" from compulsory automobile liability insurance invalid because it violated public policy.\textsuperscript{577} Jennings was injured while a passenger in an automobile owned by him and operated by his stepson.\textsuperscript{578} His insurer, GEICO, denied liability for Jennings' injuries because the insurance policy\textsuperscript{579} excluded coverage for bodily injury to the insured and family members residing with the insured. Jennings challenged the validity of this so-called household exclusion, but the trial court upheld it.\textsuperscript{580}
In earlier decisions, the Court of Appeals had also upheld the use of the household exclusion clause in some circumstances.\textsuperscript{581} In 1972, however, the General Assembly enacted a compulsory automobile insurance statute, which mandated the specific types and minimum dollar amounts of coverage that each Maryland vehicle must have.\textsuperscript{582} The same statute also authorized certain limited exclusions, but not the household exclusion for bodily injury involved in \textit{Jennings}.\textsuperscript{583}

Generally, the Court of Appeals has refused to approve exclusions from the required coverages other than those expressly set forth by the legislature.\textsuperscript{584} Since the statute provides for only four exclusions from the mandatory coverage, the court reasoned that acceptance of other exclusions would frustrate, to a significant extent, the remedial legislative purpose of the mandatory insurance law.\textsuperscript{585} The court also noted that specific evidence indicates that the General Assembly did not intend to permit the household exclusion from required liability coverage.\textsuperscript{586} The legislature did provide a household exclusion from the required uninsured motorist coverage; thus, its failure to provide such an exclusion in the required liability coverage indicated to the court a legislative intent not to allow this exclusion.\textsuperscript{587} Based on this review of the legislative his-

\begin{itemize}
\item \textsuperscript{581} Compare Parker v. State Farm Mut. Auto. Ins., 263 Md. 206, 209-211, 282 A.2d 503, 505-06 (1971) (insurance company had no obligation to defend named insured in suit by another family member); Kelsay v. State Farm Ins., 242 Md. 528, 530-33, 219 A.2d 830, 834-35 (1965) (statute that extended insurance coverage to any person using a motor vehicle with permission of the insured prevailed over policy indorsement limiting coverage to the named minor) with State Farm v. Briscoe, 245 Md. 147, 151-53, 225 A.2d 270, 273 (1967) ("household exclusion" clause did not relieve insurer from obligation to defend the additional insured because possibility of collusion with parents remote).
\item \textsuperscript{583} Md. Ann. Code art. 48A, § 545 (1979 & Supp. 1985). The four exclusions from the required coverages are (1) persons intentionally causing the accident, (2) persons injured while voluntarily riding in a vehicle known to be stolen, (3) person injured while in the commission of a felony, and (4) pedestrian injured in an accident outside of Maryland and who is not a Maryland resident. \textit{Id.}
\item \textsuperscript{584} 302 Md. at 358-59, 488 A.2d at 169.
\item \textsuperscript{585} \textit{Id.} at 359-60, 488 A.2d at 170.
\item \textsuperscript{586} \textit{Id.}
\item \textsuperscript{587} \textit{Id.} at 360, 488 A.2d at 170. Md. Ann. Code art. 48A, § 541(c)(2) (1979 & Supp. 1985) provides that the insurer may exclude from uninsured motorist benefits the named insured or members of his family residing in his household when occupying, or
\end{itemize}
tory, the court concluded that the so-called household exclusion from compulsory automobile liability insurance contravened the clear intent of the mandatory insurance law. 588

Although the court invalidated the household exclusion, it did not address whether the household exclusion is invalid for the entire policy amount or only invalid for amounts up to the statutory minimum coverages. One of the largest auto insurers in Maryland, State Farm Mutual Insurance Co., has chosen the latter alternative. 589 Like Allstate, State Farm had previously excluded coverage for claims of household members against each other. It recently amended its automobile liability insurance policy to provide coverage for claims against household members, but only up to the liability limits required by law.

The determination of this approach’s validity will undoubtedly require additional litigation. Arguably, State Farm’s policy provision also violates public policy by adding an exclusion to the policy not expressly authorized by statute. The insured decided to purchase liability coverage in excess of the statutory minimum and should thus be covered for bodily injury up to the policy limits, regardless of who the claim is against. On the other hand, the mandatory automobile insurance law is designed to provide at least minimum compensation to accident victims. As long as the policy provides coverage in the minimum amounts required by law, the insurance company should be able to negotiate any exclusions that it wishes with its policyholders.

(b) Uninsured Motorists.—In Rafferty v. Allstate 590 the Court of Appeals held that the statutory provision for uninsured motorist benefits prohibited the recovery of amounts greater than the statutory

struck as a pedestrian by, an uninsured motor vehicle that is owned by the named insured or a member of his family residing in his household.

588. 302 Md. at 362, 488 A.2d at 171. The court also noted that a majority of the jurisdictions considering the validity of the household exclusion after the enactment of compulsory automobile insurance laws had also found such exclusions invalid. Id. at 361, 488 A.2d at 170. See, e.g., Bishop v. Allstate Ins. Co., 623 S.W.2d 865 (Ky. 1981); Transamerica Ins. Co. v. Royle, 202 Mont. 173, 656 P.2d 820 (1983).

589. State Farm, in May 1985, presumably in response to Jennings, issued two policy amendments, effective at the insured’s next renewal: “6896S Amendment of Liability Coverage” and “6896U Amendment of Bodily Injury Liability Coverage.” The first of these amendments is applicable to State Farm’s “Car Policy” and the second applicable to State Farm’s “Automobile Policy.” In each of the amendments the effect is the same: to add coverage for claims of household members against each other where none existed before, but to limit this coverage to the statutory minimum.

minimum from a secondary insurer. Rafferty's decedent, his daughter, was killed while a passenger in a car struck by an uninsured motorist. The estate collected $33,333 from the insurer of the driver of the car in which the decedent was a passenger and then sought further recovery under the uninsured motorist coverage provision of Rafferty's insurance. Rafferty carried uninsured motorist coverage with Allstate on each of three cars in the statutory minimums of $20,000 per person and $40,000 per accident. The estate argued that the per person minimum applied to each car and should be added together, thereby giving the estate $60,000 of uninsured motorist coverage. The plaintiff's theory was that the $60,000 would be offset by the $33,333 recovery already received from the driver's insurer, resulting in a $26,667 recovery from Allstate. The court indicated that it understood the estate's theory of entitlement to the full $60,000, but did not reach this issue because the holding obviated any need to do so.

The court disallowed recovery from the secondary insurer, holding that article 48A, section 543(a) of the Maryland Annotated Code forbids "recovery of uninsured motorist benefits in excess of the statutory minimum [$20,000] from more than one insurer."
Its decision turned on the construction of the term "supplemental" in section 543(a). The term 'supplemental' is, we think, more encompassing, and refers to attempts to fill the deficiencies in the uninsured motorist coverage of the primary policy by claiming under a second policy. As recovery under the second policy here would be on a supplemental basis, the court concluded that it was prohibited by section 543(a). The construction of supplemental is paramount to the court's holding here because the recovery sought was never contended to be duplicative.

The court supported its conclusion, that recovery from a secondary insurer is prohibited when the statutory minimum is recovered from the primary insurer, by stating that to do so would allow victims of uninsured motorists greater insurance protection than would be available had they been injured by insured motorists having only the minimum required liability insurance. Such an allowance, the court said, would be an unwarranted judicial enactment of uninsured motorist coverage greater than the minimum statutory limits specified by the General Assembly. Finally, the court added that section 543(a) is not a per se prohibition against recovery under more than one policy, for if the primary insurer's coverage had been for less than the statutory minimum, the insured could then recover from the secondary insurer amounts up on what "supplemental" means. The Court of Special Appeals indicated that it meant "supplemental" to mean over and above legally cognizable damages, however:

By way of illustration, we point out that if the claimant is legally entitled to recover the sum of $100,000 from the uninsured motorist, and claimant so recovers, he may not successfully prosecute a claim against his own insurance carrier for an additional sum or 'supplement'. Such a recovery would amount to 'stacking or pyramiding'.

Id. at 430, 392 A.2d at 570 (citations omitted).

In Yarmuth, the Court of Appeals stated in a footnote that it disagreed "with a contrary construction placed upon § 543(a) in dicta by the Court of Special Appeals in Langston v. Allstate Ins. Co., 40 Md. App. 414, 392 A.2d 561 (1978), a case upon which appellants place major reliance." 286 Md. at 265 n.3, 407 A.2d at 319 n.3. In Rafferty, after noting the question raised in the petition for certiorari, the Court stated that it need not address the issue as it had already expressed its disagreement with Langston in Yarmuth. 303 Md. at 72, 492 A.2d at 295.

598. Md. Code Ann. art. 48A, § 543(a) (1979) states: Recovery where more than one policy. Notwithstanding any other provision of this subtitle, no person shall recover benefits under the coverages required in §§ 539 and 541 of this article from more than one motor vehicle liability policy or insurer on either a duplicative or supplemental basis.


600. Id. at 71, 492 A.2d at 294.

601. Id. at 70, 492 A.2d at 294.
to the $20,000 minimum.\(^{602}\)

In *Pope v. Sun Cab Co.*,\(^{603}\) the Court of Special Appeals held that taxicabs do not have to carry uninsured motorists insurance.\(^{604}\) The court viewed this conclusion as obvious.\(^{605}\) Article 48A, section 538, a definitional section applicable to the entire Motor Vehicle Insurance subtitle, expressly excludes taxicabs from the definition of motor vehicle.\(^{606}\) Section 541(c) requires every motor vehicle insurance policy to include uninsured motorist coverage.\(^{607}\) Since taxicabs are not motor vehicles under the statute, the provision regarding motor vehicle insurance does not apply to them.\(^{608}\)

The Maryland Automobile Insurance Fund (MAIF)\(^{609}\) argued that specific legislation was necessary to exclude taxicabs.\(^{610}\) The court rejected this argument because it would make the definition of motor vehicle in section 538(b) superfluous.\(^{611}\) The court also noted that their interpretation did not leave injured taxicab passengers without protection; the legislature intended them, however, to seek recovery from MAIF, rather than the cab company, when an uninsured motorist caused their injuries.\(^{612}\)

2. **Policy Interpretation.**—In *Pacific Indemnity Co. v. Interstate Fire & Casualty Co.*,\(^{614}\) the Court of Appeals stated that it could not determine from the record presented whether a brain-damaged infant's claim for personal injuries and his father's claim for consequential

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602. *Id.* at 71-72, 492 A.2d at 295.
604. 62 Md. App. at 229, 488 A.2d at 1015.
605. *Id.*
607. MD. ANN. CODE art. 48A, § 541(c)(2) (Supp. 1985).
609. MAIF intervened in Pope’s suit against Sun Cab after Sun Cab demurred to Pope’s uninsured motorist claim. The trial court rejected MAIF’s interpretation of § 541(c) and granted Pope’s petition to sue MAIF. MAIF filed a declaratory judgment action to determine the proper interpretation of § 541(c). *Id.* at 222-23, 488 A.2d at 1011.
610. *Id.* at 231, 488 A.2d at 1015. MD. ANN. CODE art. 48A, § 539 (1979 & Supp. 1985), the basic primary coverage requirements, does expressly exclude taxicabs. *Id.* § 539(b) (Supp. 1985).
611. 62 Md. App. at 231, 488 A.2d at 1015.
612. *Id.* at 229, 488 A.2d at 1015.
613. *Id.* MD. ANN. CODE art. 48A, § 243H (1979 & Supp. 1985) lists the circumstances under which claims can be made against MAIF.
The infant and his parents settled a negligence action against the insured obstetrician for $560,500: $350,000 for the infant's brain damage, $200,000 for the father's past and future consequential expenses and $10,500 for the mother's physical injuries. The obstetrician's primary insurer, Pacific, and excess insurance carrier, Interstate, disagreed about the proper allocation of responsibility for this settlement under the primary insurance policy. Pacific's policy limited liability to $200,000 for each claim and $600,000 in the aggregate. Pacific argued that "each claim" was not synonymous with each cause of action, but meant the damages flowing from each physical injury. Under this interpretation, the infant's claim included his father's derivative claim because it did not involve a separate physical injury. Thus, for purposes of the policy, one liability limit of $200,000 applied to the total amount awarded the infant and his father.

Interstate argued, however, that claim did mean cause of action. Thus, three separate $200,000 limits applied: one for the mother's claim, one for the father's, and one for the child's. The district court agreed and entered summary judgment for Interstate for $200,000. Pacific appealed, and the United States Court of Appeals for the Fourth Circuit certified the following question to the Maryland Court of Appeals:

Construing Pacific's policy under Maryland law, is Pacific liable to pay a separate $200,000 policy limit to Interstate for the claim of George M. Cross, Sr. for the financial injury sustained by him as a result of the insured alleged malpractice?

The Maryland Court of Appeals concluded that it was "unable categorically" to answer the certified question. Resolution of the issue hinged on the meaning of the term "injury" in Pacific's pol-

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615. Id. at 387, 488 A.2d at 487.
616. Id. at 386, 488 A.2d at 487.
617. Id. at 385-86, 488 A.2d at 487.
618. Id. at 387, 488 A.2d at 488.
619. Id.
620. Id.
621. Id.
622. Id. MD. CTS. & JUD. PROC. CODE ANN. § 12-601 (1984) gives the Court of Appeals the power to answer questions of law certified by a federal court or appellate state court when a question of Maryland law may be determinative in an action in the certifying court. Id. §§ 12-602 to -609 specify the procedures to be followed in certifying and responding to these questions.
623. 302 Md. at 406, 488 A.2d at 497.
The federal district court had concluded that the policy's use of this term was ambiguous; the Maryland Court of Appeals disagreed.

The court first reviewed the principles applicable to construction of insurance contracts. A court should construe the document as a whole to determine the intent of the parties. Words are accorded their ordinary meaning. If the language would suggest two meanings to a reasonably prudent person, extrinsic evidence may be admitted to resolve the ambiguity. Sources that may assist the court include trade usage of the ambiguous terms, the parties' construction of the contract prior to any dispute, and judicial construction of similar contracts.

Applying these principles to Pacific's policy, the court determined that the contract did not define clearly the term "injury." The court found both Pacific's narrow definition and Interstate's broad one to be consistent with the policy language. Prior judicial construction of similar policies did not provide any guidance; the decisions did not present "either the extent or degree of unanimity" which would lead the court to conclude that well-settled judicial interpretation had removed the term's ambiguity.

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624. See id. at 390-400, 488 A.2d at 490-94.
626. 302 Md. at 400, 488 A.2d at 494-95.
631. 302 Md. at 392-400, 488 A.2d at 490-95.
632. Id. at 400, 488 A.2d at 494.
633. Id. at 401-04, 488 A.2d at 95-97. Pacific relied on Chicago Ins. Co. v. Pacific Indem. Co., 566 F. Supp. 954 (E.D. Pa. 1982), aff'd, 720 F.2d 660 (3d Cir. 1983) (Chicago II), in which the court held that derivative claims do not constitute separate claims for purposes of applying policy limitations. The Court of Appeals discounted this decision because it failed to recognize that the policy covered both traditional medical malpractice claims and liability arising out of service on professional committees. Id. at 402, 488 A.2d at 496.

Although the court indicated that it found Pacific's factual showing of trade usage persuasive, it believed that review of the district court's summary judgment exceeded the scope of its responsibility under the Maryland Uniform Certification of Questions of Law Act. Thus, the court concluded that it could not answer the certified question.

3. Assignment of Benefits.—In *Central Collection Unit v. Columbia Medical Plan*, the Court of Appeals decided that the language in a hospital registration form constituted a valid assignment of insurance benefits under Maryland law. Eva Parker, a Columbia Medical Plan (CMP) member, spent more than a month in the University of Maryland Hospital and incurred a bill in excess of $40,000; she died without paying the hospital. The State sued CMP to recover these costs.

When she entered the hospital, Parker signed a registration form which included the following provision:

> I hereby authorize payment direct to the University of Maryland Hospital of the benefits for hospital expense otherwise payable to me as determined by the Insurance Company, but not to exceed the hospital's regular charges for this period of hospitalization. I understand I am financially responsible to the hospital for charges not covered by this authorization.

The State argued that this language constituted an assignment of Parker's insurance benefits, making CMP liable to the State for the value because the policy did not include the definition of "each claim" and did not contain a partial definition of "injury" as the policy in *Pacific* did.

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634. *Id.* at 405, 488 A.2d at 497. The court indicated that it would adopt Pacific's interpretation of the policy if the case were on appeal from a Maryland circuit court. *Id.*

635. *Id.* at 406, 488 A.2d at 497.

636. *Id.* On remand from the Maryland Court of Appeals, the United States Court of Appeals for the Fourth Circuit vacated the decision of, and remanded to, the district court. The Fourth Circuit stated that, although the Maryland Court of Appeals was unable to answer the certified question, it implicitly provided the guidance that the Fourth Circuit sought. Thus, the Fourth Circuit found the Pacific insurance policy facially ambiguous requiring the trial court to admit extrinsic evidence to show the parties' intent and the trade usage, if any, of the term "each claim". *Interstate Fire & Casualty Co. v. Pacific Indem. Co.*, 774 F.2d 94, 95 (4th Cir. 1984).


638. *Id.* at 326, 478 A.2d at 307. See *supra* Civil Procedure notes 1-13 and accompanying text for a discussion of the procedural issue involved in *Columbia Medical Plan*.

639. 300 Md. at 320, 478 A.2d at 304.

640. *Id.* at 320-21, 478 A.2d at 304.

641. *Id.* at 320, 327 n.5, 478 A.2d at 304, 307 n.5.
costs of Parker's hospital stay.\textsuperscript{642} CMP contended, however, that the hospital was not an assignee of Parker's insurance benefits and thus, could not sue CMP directly.\textsuperscript{643}

The court relied on general principles of contract law to find that Parker had assigned her benefits to the hospital.\textsuperscript{644} Maryland law does not require specific language to establish a valid assignment;\textsuperscript{645} the intent of the parties, as determined from the words of the contract, controls.\textsuperscript{646} The court then determined that Parker clearly intended to transfer to the hospital her rights to hospital benefits from CMP.\textsuperscript{647}

4. Insurer's Duty to Defend.—In Fireman's Fund Insurance Co. v. Rairigh,\textsuperscript{648} the Court of Special Appeals reversed the trial court's summary judgment for Rairigh because a genuine dispute existed about whether the excess insurer, Fireman's Fund, had breached its duty to defend.\textsuperscript{649} Rairigh and four other men died in a plane crash. Although Erlbeck, one of the victims and a qualified pilot, was found in a pilot's seat, the person in control of the plane when it crashed could not be determined. Southeastern Aviation Underwriters (SEAU) insured Phoenix Aviation, the plane's owner, under a policy which covered this accident. Erlbeck also had a personal excess liability policy from Fireman's Fund, which possibly covered the accident.\textsuperscript{650}

In phase I of this litigation, the survivors of three of the men sued the Erlbeck estate. SEAU settled this claim prior to trial by

\textsuperscript{642} Id. at 327, 478 A.2d at 307. The State relied primarily on Greater Kansas City Baptist & Community Hosp. Ass'n v. Businessmen's Assurance Co., 585 S.W.2d 118 (Mo. Ct. App. 1979), in which the Missouri court interpreted virtually identical language as a valid assignment of benefits. 300 Md. at 327, 478 A.2d at 307-08.


\textsuperscript{644} 300 Md. at 330-32, 478 A.2d at 309-10. The court found Businessmen's Assurance Co. more persuasive than the Texas and Alabama cases cited by CMP, apparently because the Missouri court also relied on general contract principles. See id. at 327, 331, 478 A.2d at 308, 309.

\textsuperscript{645} Id. at 330, 478 A.2d at 309.

\textsuperscript{646} Id. at 331, 478 A.2d at 309. See, e.g., Maryland Cooperative Milk Producers v. Bell, 206 Md. 168, 175, 110 A.2d 661, 664 (1955).

\textsuperscript{647} 302 Md. at 331-32, 478 A.2d at 310.


\textsuperscript{649} Id. at 313, 475 A.2d at 513.

\textsuperscript{650} Id. at 308-10, 475 A.2d at 511.
paying $100,000 to each of the five estates of the men killed in the crash. As part of the settlement the three plaintiffs obtained a consent judgment against Erlbeck's estate and the assignment of any tort or contract rights that the estate had against the excess insurer, Fireman's Fund. Plaintiffs also agreed not to attempt to collect judgments from the defendant's estate. When the settlement agreement was signed, counsel for the Erlbeck estate advised Fireman's Fund that consent judgments would be entered in four days, unless Fireman's Fund disapproved of the settlement and entered an appearance on behalf of Erlbeck's estate. The excess insurer did not appear.\footnote{Id. at 309-11, 475 A.2d at 511-12.}

In phase II of this litigation, the three plaintiffs sued Fireman's Fund for the proceeds of Erlbeck's personal policy. The trial court granted plaintiffs' motion for partial summary judgment in the amount of $1,000,000, the policy limit. The trial court ruled that Fireman's Fund was required to defend the Erlbeck estate despite the representation provided by SEAU and that Fireman's Fund's breach of this duty estopped it from litigating the coverage issue.\footnote{Id. at 311, 475 A.2d at 512.}

The Court of Special Appeals reversed. First, it found that the issue of whether the Erlbeck estate sought a defense from Fireman's Fund in phase I presented a genuine dispute as to a material fact, which precluded the entry of a summary judgment.\footnote{Id. at 313, 475 A.2d at 513.} SEAU's first contact with Fireman's Fund occurred approximately two years before the settlement agreement; Fireman's Fund refused to assume control of the case or participate in settlement negotiations.\footnote{Id. at 314, 475 A.2d at 513-14.} Four days before the entry of the consent judgments, SEAU informed Fireman's Fund of the proposed settlements; Fireman's Fund again declined to enter an appearance.\footnote{Id.} The court noted that none of the parties to this phase I litigation wanted Fireman's Fund's involvement at this point because it would probably have scuttled the agreement.\footnote{Id. at 314-15, 475 A.2d at 514.} Thus, the court, applying Maryland Rule 610,\footnote{Md. R.P. 610 d (1977) (now Md. R.P. 2-501(e)) provided that summary judgment should be granted when "the pleadings, depositions, ... admissions ... [and] ... affidavits ... show that there is no genuine dispute as to any material fact."} concluded that a genuine factual dispute existed as to whether the Erlbeck estate had sought a defense from Fireman's Fund and re-
versed the partial summary judgment. Second, the court determined that, if Fireman's Fund had a duty to defend the estate, it should not be estopped from litigating the coverage issue in phase II. Estoppel does eliminate the delay and expense of multiple trials on the same issue; the doctrine assumes, however, that the interests of the parties in each trial are identical. In Rairigh, Fireman's Fund and the Erlbeck estate had antagonistic interests during phase I. The estate would want to demonstrate that the plane was chartered with crew and thus, ensure that any judgment would be covered by insurance. Fireman's Fund, on the other hand, would want to show that its insured was flying the plane, which would preclude coverage under Erlbeck's policy.

Finally, the court objected to the trial court's conclusion that Fireman's Fund's duty to defend attached because the claims asserted exceeded the policy limits of the primary insurer. The court noted that this rule would obligate the excess insurer to defend in every case, regardless of the amount of damages that the claimant could prove. Thus, Maryland follows the majority rule that requires the excess insurer to defend only after the primary policy limits are exhausted.

5. Liability for Litigation Expenses. — In Continental Casualty Co. v. Board of Education, the Court of Appeals determined the proper method of allocating litigation expenses between claims covered by

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658. 59 Md. App. at 315, 475 A.2d at 514.
659. Id. at 320, 475 A.2d at 516.
660. Id. at 315-16, 475 A.2d at 514-15. See, e.g., Glens Falls Ins. Co. v. American Oil Co., 254 Md. 120, 254 A.2d 658 (1969) (due process requirement that each party have "day in court"). The court rejected Rairigh's attempt to distinguish Glen Falls. Although it acknowledged that the insurance company denied coverage because it considered the insured's act intentional rather than negligent, the court saw no reason to limit Glen Falls to its particular facts. 59 Md. App. at 320, 475 A.2d at 516.
661. See 59 Md. App. at 319-22, 475 A.2d at 516-17.
662. Id. at 319-20, 475 A.2d at 517.
663. Id. at 322-23, 475 A.2d at 517-18.
664. Id. at 323, 475 A.2d at 518.
665. Id.
an insurance policy and those not covered. Continental Casualty Co. (CNA) insured the Charles County Board of Education under a directors' and officers' (D & O) liability policy, which expressly excluded coverage for losses resulting from breach of construction contracts. Iorio Construction Co. sued the Board, alleging both contract and tort claims. The Board asked CNA to acknowledge coverage; CNA refused. The Board then filed suit in federal court to obtain a declaration that CNA had to pay its expenses in the Iorio suit and the declaratory judgment action.

After the federal court determined that two of Iorio's claims were covered by the CNA policy, the court certified a question to the Maryland Court of Appeals to determine whether Maryland law required apportionment of expenses and, if so, what standard should be applied. The Board argued that Brohawn v. Transamerica Insurance Co. required that CNA pay the total cost of defending Iorio's law suit. The court, however, distinguished between a policy that imposes a duty to defend on the insurer and a policy, such as CNA's, that required reimbursement of litigation expenses. The CNA policy did not give the insurer the duty to defend, the right to select counsel, or the right to control any litigation. Thus, CNA's refusal to accept liability for defense of the tort claims was not the equivalent of a breach of the duty to defend. As a result, damages should not be measured by the cost of defending the entire suit, but must be apportioned between covered and uncovered claims.

The court determined that damages should be measured by the Board's expectation interest. Thus, CNA should pay for all expenses reasonably related to the defense of the covered claims.

667. Id. at 531-32, 489 A.2d at 543-44.
668. Id. at 520, 522, 489 A.2d at 538, 539.
669. Id. at 523-24, 489 A.2d at 540.
672. 302 Md. at 528, 489 A.2d at 542. Brohawn involved a homeowner's policy that imposed a duty to defend on the insurer. The court held that this duty extended to claims against the insured that might be covered by the policy. 276 Md. at 408, 437 A.2d at 850.
673. 302 Md. at 530, 489 A.2d at 543.
674. Id. at 530-31, 489 A.2d at 543.
675. Id. at 531, 489 A.2d at 543.
676. Id., 489 A.2d at 543-44.
677. Id.
678. Id. at 532, 489 A.2d at 544.
The Board, however, has the burden of establishing the proper allocation, if it cannot do so, it can collect only nominal damages.

The Court of Appeals also determined that CNA had to pay the Board's expenses incurred in the declaratory judgment action. Although generally all litigants must pay their own expenses other than court costs, Maryland has long recognized an exception when an insurer breaches its contract with the insured.

The Court of Special Appeals considered the effect of an insured's breach on an insurance company's obligation to pay a claim and litigation expenses in Washington v. Federal Kemper Insurance Co. Washington failed to notify Federal Kemper of a pending lawsuit against him, as required by his insurance policy. After Washington lost at trial, he did contact the insurer, but Federal Kemper refused to pay the judgment or assume responsibility for Washington's appeal. Washington then filed this declaratory judgment action to determine Federal Kemper's obligations under the insurance policy.

Under Maryland law, an insurer can deny coverage if the insured failed to give timely notice of the claim and the insurer suffered actual prejudice from the insured's failure. The court determined that entry of an adverse judgment prior to notice constituted actual prejudice. The court rejected dicta in Harleysville Insurance Co. v. Rosenbaum that defined actual prejudice as liability because of failure to notify. In the court's view, this standard would require the insurer to prove a negative, a virtually impossible burden.

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679. Id. at 536, 489 A.2d at 546.
680. Id. at 536-37, 489 A.2d at 546.
681. Id. at 537, 489 A.2d at 546-47.
685. Id. at 290-91, 482 A.2d at 504.
687. 60 Md. App. at 296, 482 A.2d at 506-07.
689. Id. at 84, 351 A.2d at 198.
690. 60 Md. App. at 295-96, 482 A.2d at 507. After discussing the appropriate stan-
6. Receivership.—The Maryland legislature established the Maryland Life & Health Insurance Guaranty Association (Association) to protect persons against losses from the financial failure of a life, health, or annuity insurer. The Association's responsibilities include the payment of claims under the failed insurer's policies. When American Centennial Life Insurance Company (ACLIC) went into receivership, the Association paid claims on ACLIC's policies as required by law. It also attempted to intervene as a party in the receivership proceedings in order to obtain the records pertaining to ACLIC insurance policies, the financial records for the receivership, and the audit reports filed for the receivership. The trial court treated the Association as an ordinary creditor, rejected the request to intervene, and denied disclosure of the records.

In *Maryland Life & Health Insurance Guaranty Association v. Perrott*, the Court of Appeals disagreed with the characterization of the Association as a mere creditor. Since the Association had a responsibility to guarantee the performance of ACLIC's policy obligations, the court concluded that it had greater rights than a creditor. The court then determined that the Association had a right to intervene. The statute creating the Association grants standing to the Association to appear "in all matters germane to the

dard for actual prejudice, the court concluded that the trial court's finding of actual prejudice was not clearly erroneous. *Id.* at 296, 482 A.2d at 507.

The Court of Special Appeals also refused to disturb the trial court's ruling that Federal Kemper had no obligation to pay Washington's expenses in this case. In the first lawsuit, the court's findings of fact limited the claims against Washington to ones not covered by his insurance policy. Since Federal Kemper received no notice of the lawsuit until its conclusion, it could base its decision not to defend on the facts as found by the court in that suit. Thus, Washington had no right to reimbursement for the litigation expenses to determine coverage. *Id.* at 297-98, 482 A.2d at 507-08.


693. On November 29, 1979, the Insurance Commissioner filed a complaint against ACLIC, pursuant to Md. Ann. CODE art. 48, §§ 132 - 164A (1979 & Supp. 1985). The court appointed the Commissioner as rehabilitator under *id.* §§ 141 and 145. When a cursory financial review by the Maryland Insurance Division indicated ACLIC's deficit to be approximately $1,700,000, the court directed liquidation and appointed the Commissioner as receiver, as specified in *id.* § 145. Maryland Life & Health Ins. Guar. Ass'n v. Perrott, 301 Md. 78, 82, 482 A.2d 9, 10-11 (1984).

694. 301 Md. at 81, 482 A.2d at 10.


696. *Id.* at 85-86, 482 A.2d at 12-13.

697. *Id.* at 90-91, 482 A.2d at 15.
powers and duties of the Association." Thus, the court concluded that the trial court erred in denying the Association's intervention petition.

The court then considered the Association's requests for financial information regarding ACLIC and the receivership audit reports. It noted that the trial court did not decide these issues and remanded them for a hearing. The court indicated, however, that its review of the "uninformative" record failed to reveal how ACLIC would be prejudiced by the requested disclosures.

7. Legislative Development.—The 1985 General Assembly increased the authority of the Workers' Compensation Commission to regulate the Uninsured Employers' Fund, which protects employees from the negligence of their employers in obtaining workers' compensation insurance. The legislature transferred from the Director of the Uninsured Employers' Fund to the Workers' Compensation Commission the power to assess uninsured employers for workers' compensation claims. In addition, the new law grants the Commission the authority to impose increased assessments against insurers that repeatedly fail to comply with insurance certification requirements. Following an insurer's fifth failure to comply, the Commission may also request that the insurer show cause

699. 301 Md. at 90-91, 482 A.2d at 15.
700. Id. at 91-93, 482 A.2d at 15-16.
701. Id. at 93, 482 A.2d at 16.
704. 1985 Md. Laws at 1141-42 (codified at Md. Ann. Code art. 101, § 91(d)) gave the Commission the following powers held by the Fund's Director:
1. impose an assessment of $150 against an uninsured employer when the Commission renders a decision on a claim for compensation;
2. direct payment of the assessment into the Fund if the compensable injury occurred on or after January 1, 1968;
3. assess an additional 15 percent of the award made in such claim, up to a maximum of $1,500, and order the assessment payable to the Fund;
4. when a meritorious claim against an insurer or self-insured employer is not awarded or is abated due to death or lack of eligible claimant, impose an assessment of ten percent of the likely award to the Fund, such assessment not to exceed $4,500.
705. Id. at 1141 (codified at Md. Ann. Code art. 101 § 91(d)(2)).
why its authority to write workers' compensation insurance should not be suspended or revoked.\textsuperscript{706}

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\textsuperscript{706} \textit{Id.}
IV. CONSTITUTIONAL LAW

A. Maryland Constitutional Law

In *Widgeon v. Eastern Shore Hospital Center*, the Court of Appeals held that an individual may bring a common law cause of action for damages for a violation of articles 24 and 26 of the Maryland Declaration of Rights. This remedy was available despite the lack of statutory authorization and the availability of other remedies that would adequately protect the plaintiff's rights.

The question, one of first impression in Maryland, was certified to the court from the United States District Court for the District of Maryland. In the case before the district court, the plaintiff alleged that he was wrongfully admitted to and detained in a state hospital based on his wife's testimony at an *ex parte* hearing that he was exhibiting abnormal and violent behavior. According to the plaintiff's complaint, his wife wanted him confined so that she could move to Florida with another man. The plaintiff alleged that he was released as soon as his wife arrived in Florida.

2. Md. Const. Decl. of Rts. art. 24 provides:
   That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Article 26 provides:
   That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.
3. 300 Md. at 535, 479 A.2d at 928-29. An action for violation of these state constitutional provisions can be brought in the alternative; no election of remedies is required prior to final judgment. The other remedies available are damages in tort and damages as provided under 42 U.S.C. § 1983. *Id.* In addition to the action brought for violations of the Maryland Declaration of Rights, articles 24 and 26, the plaintiff claimed damages for negligence, false imprisonment, false arrest, defamation, intentional infliction of emotional distress, conspiracy, and violation of federal constitutional rights under 42 U.S.C. § 1983. *Id.* at 538, 479 A.2d at 930.
4. *Id.* at 525, 479 A.2d at 923. The certified question before the court was: "Does the law of Maryland provide an action for damages for violation of enumerated Articles of the Declaration of Rights of the Constitution of Maryland, *viz*, Articles 24 and 26?" *Id.* at 511 n.1, 479 A.2d at 922 n.1.
5. *Id.* at 523, 479 A.2d at 922.
6. *Id.* at 524, 479 A.2d at 923.
The defendants contended that the availability of adequate relief under state common law and federal statutory law eliminated the need to imply a new cause of action under the state constitution. According to the defendants, invoking a constitutional remedy is an extraordinary step, and if the case could be fairly decided on non-constitutional grounds, an implied action based on constitutional law should not be allowed.7

The Court of Appeals rejected these arguments. It found no need to imply a new cause of action because one has existed under Maryland law since 1776.8 Under article 5 of the Maryland Declaration of Rights, the inhabitants of Maryland are entitled to the benefits of the law of England as it existed on July 4, 1776.9 Relying on several eighteenth century English cases,10 the court found that in England an individual could bring a traditional action for damages when an individual right guaranteed by a fundamental document (such as the Magna Carta) was violated. The English right to bring such an action was also recognized in other Maryland cases involving actions for violations of other provisions of the Maryland Constitution.11 Furthermore, before the application of the exclusionary rule to the states,12 Maryland courts had recognized that a civil action for damages would be available to an individual on trial in a criminal case when evidence seized in violation of the Maryland Constitution was introduced at the criminal trial.13

Unlike Maryland law, a federal statute expressly provides for

7. Id. at 534-35, 479 A.2d at 929.
9. Md. Const. Decl. of Rts. art. 5 provides:
   "Inhabitants of Maryland are entitled to the Common Law of England . . . and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy six. . . ."
11. Id. at 529, 479 A.2d at 925-26. See, e.g., Western Md. R.R. v. Owings, 15 Md. 199 (1860) (allowing an action for compensation under what is now Md. Const. art. III, § 40 when the court found that the defendant had taken the plaintiff's private property for public use).
13. See Meisinger v. State, 155 Md. 195, 207, 142 A. 190, 193 (1928) (Parke, J., dissenting). Although this position was later rejected, this case recognized that, rather than exclude the illegally seized evidence from the criminal trial, the defendant's constitutional rights could be vindicated if the defendant were allowed to pursue a civil cause of
such an action.\textsuperscript{14} The defendants argued that the state legislature's failure to authorize an action of this type indicated the legislative intent that no cause of action should lie. The court found, however, that for more than a century, from 1861 to 1973, a statute existed that referred specifically to "all actions for . . . violation of the twenty-first, twenty-third, twenty-eighth, and twenty-ninth articles of the Declaration of Rights."\textsuperscript{15} Although the statute has been repealed,\textsuperscript{16} the court found it significant that the legislature had acknowledged the existence of those claims. The court also noted that it has construed articles 24 and 26 of the Maryland Declaration of Rights to be in pari materia with the fourth, fifth, and fourteenth amendments of the United States Constitution.\textsuperscript{17} Since federal law allows actions for violation of these federal constitutional provisions,\textsuperscript{18} the court reasoned that an action should lie for violation of the state constitution as well.

The Court of Appeals concluded that a cause of action for violation of articles 24 and 26 exists.\textsuperscript{19} In a footnote, however, the court declined to discuss what damages could be collected under the constitutional action that were not already available to the plaintiff under the more traditional tort claims.\textsuperscript{20} In other cases, when more conventional claims are not available, the courts will have to address what damages, if any, can be recovered for the constitutional violation.

\textbf{B. Commerce Clause}

1. \textit{Public Utility Holding Companies}.—In \textit{Baltimore Gas & Electric Company v. Heintz},\textsuperscript{21} the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of a Maryland law prohibiting certain transfers of public utility stock.\textsuperscript{22} The decision overturned the federal district court's finding that the law imposed action under article 26 of the Maryland Declaration of Rights. The present rule is that evidence seized in violation of the defendant's constitutional rights is not admissible.

\begin{itemize}
\item \textsuperscript{14} 42 U.S.C. § 1983 (1982).
\item \textsuperscript{15} Acts of 1861, ch. 73, 1861 Md. Laws art. 57, § 1 (repealed 1973). The statute did not enable the plaintiff to bring such actions; it merely set the statutory period for which they could be brought. 300 Md. at 532 n.13, 479 A.2d at 927 n.13.
\item \textsuperscript{16} The statute was replaced with a general statute setting the limitations period for all actions and listing exceptions. 300 Md. at 532 n.13, 479 A.2d at 927 n.13.
\item \textsuperscript{17} 300 Md. at 552, 479 A.2d at 927.
\item \textsuperscript{18} 42 U.S.C. § 1983 (1982).
\item \textsuperscript{19} 300 Md. at 537-38, 479 A.2d at 930.
\item \textsuperscript{20} Id. at 538 n.17, 479 A.2d at 930 n.17.
\item \textsuperscript{21} 760 F.2d 1408 (4th Cir. 1985).
\item \textsuperscript{22} Id. at 1427.
\end{itemize}
unconstitutionally excessive burdens on interstate commerce.\textsuperscript{23}

The dispute arose when the Baltimore Gas and Electric Company (BG&E), in an effort to diversify its activities and to segregate its utility and nonutility activities, applied to the Maryland Public Service Commission (PSC) for authorization to transfer all of its stock to a holding company, BGE CORP.\textsuperscript{24} The PSC denied the application pursuant to article 78, section 24(e) of the Maryland Annotated Code, which prohibits a 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.\textsuperscript{25}

The district court, applying a balancing test, held that section 24(e) imposed excessive burdens on interstate commerce that were not justified by the State's interest in preventing the abuses historically associated with the holding company structure.\textsuperscript{26} According to the lower court, the State's interest could be served with a less restrictive alternative; thus, the absolute ban on the holding company structure for public utilities was unconstitutional.\textsuperscript{27}

The Fourth Circuit reversed the district court because it did not agree that a legislature must choose the least restrictive alternative when regulating a public utility.\textsuperscript{28} Instead, the court applied the test developed by the Supreme Court in \textit{Pike v. Bruce Church, Inc.}\textsuperscript{29} If the statute "'regulates even-handedly to effectuate a legitimate local in-

\textsuperscript{24} 760 F.2d at 1412.
\textsuperscript{25} \textit{Id.} 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 by the Commission. No stock corporation of any description (except, with the authorization of the Commission, a company of the same class) shall take, hold or acquire more than ten percent of the total capital stock of any public service company organized or existing 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.
\textsuperscript{26} 582 F. Supp at 682. The district court found that the state's interest was not rationally served by the outright ban imposed by § 24(e). The court held that the exception which allows holding companies for corporations that already own public utilities weakened the state's interest. \textit{Id.} at 679.
\textsuperscript{27} The lower court would have required the state to allow public utility holding companies upon approval by the PSC. \textit{Id.} at 682.
\textsuperscript{28} 760 F.2d at 1427.
\textsuperscript{29} 397 U.S. 137 (1970).
interest and its effects on interstate commerce are only incidental, [the statute] will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'

Traditionally, when a statute is challenged under the commerce clause, the courts will determine first whether the burden imposed is direct or indirect. Direct burdens are per se invalid, while indirect burdens are subjected to a balancing test that weighs the public interest against the burden imposed. Unless the indirect burden imposed is "clearly excessive" in relation to the local interest, the statute will be upheld.

Recent Supreme Court decisions have not uniformly followed this direct/indirect approach, however. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, for example, the Court rejected the application of a bright line test. Rather, it characterized the modern trend in commerce clause jurisprudence as a determination, in each case, of "the nature of the state regulation involved, the objective of the state, and the effect of the regulation on interstate commerce." In *Baltimore Gas & Electric*, the Fourth Circuit refused to hold that the direct/indirect approach had no constitutional validity, although it regarded the test as "analytically unsound and result-oriented.

The court then proceeded to analyze the statute under the balancing test traditionally reserved for indirect burdens. First, the court determined that the statute was "evenhanded"; it did not favor local over out-of-state commerce. In fact, the statute prohibits only in-state holding companies; out-of-state corporations that supply utility services to Maryland are unaffected by the restrictions. Thus, the court found that the statute could not be classified as "economic protectionism" in either purpose or effect.

30. 760 F.2d at 1422 (quoting Pike v. Bruce Church, Inc., 397 U.S. at 142).
31. 760 F.2d at 1420.
32. Id.
33. Id. (citing Pike, 397 U.S. at 142).
35. Id. at 393.
36. Id. at 390 (quoting Illinois Gas Co. v. Public Serv. Co., 314 U.S. 498, 505 (1942)). The practical effect of this trend has been to give more latitude to state regulation. *Arkansas Pub. Serv. Comm'n*, 461 U.S. at 390.
37. 760 F.2d at 1421.
38. Id. at 1422.
39. Id.
40. Id. Apparently, the fact that more severe restrictions burden the Maryland corporations will not cause the statute to be considered unevenhanded. See id. at 1422-23.
The court then considered the public interest at stake in light of the burden imposed.41 Public utilities, because they are "legal" monopolies, are traditionally subject to extensive regulation under the state's police power.42 BG&E argued that other federal and state regulations adequately address the potential abuses of holding companies; thus, the absolute prohibition of section 24(e) was unnecessary. The court rejected this argument: The legislature could constitutionally use more than one means to accomplish its end and had no obligation to choose the least intrusive alternative.43 The court reasoned that limiting the legislature to one means of regulation would allow the utility company to choose the regulations that it preferred and challenge all others as unconstitutional. As a result, the court refused to examine the adequacy of other federal and state prohibitions on holding companies. Instead, the court held that so long as the burden imposed on commerce is not excessive in light of the local benefit conferred, the statute will be upheld.44

In this case, the State burdened interstate commerce by preventing BG&E from diversification, which affected BG&E's ability to secure financing, and by prohibiting the transfer of stock from the utility company to the holding company.45 The court viewed this burden as "minimal" in light of the consumer interest at stake.46 Because utility companies are the only "legal" monopolies and because holding companies "provide the occasion for deceptive financing practices," the court found that extensive regulation is justified.47

The district court, in finding section 24(e) unconstitutional, found that certain exceptions to the statute undermined its purpose.48 The statute does not prohibit a corporation that already operates as a public utility from acquiring more than ten percent of the shares of a public utility of the same class as that acquired as long as

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41. Id. at 1423-24.
42. Id. at 1424.
44. See 760 F.2d at 1425.
45. Id. The court of appeals agreed with the district court's view of the burden imposed.
46. Id. at 1425.
47. Id. at 1424-25.
48. Id. at 1426.
the PSC approves the acquisition. While the district court stated that it could not envision how the state interest with regard to holding companies that already own a public utility could be any different from the state interest with regard to companies that do not own such an interest, the Fourth Circuit did see the distinction. Because the acquiring corporation is already regulated as a utility, the Fourth Circuit found that the potential for abuse may be diminished and the state interest in regulation of potential abuses may be outweighed by the economies of scale or production. Also, by requiring prior PSC approval the acquiring company is still subject to some regulation.

With this decision, the Fourth Circuit indicated a reluctance to declare statutes invalid because the legislature has not chosen the least restrictive means of regulation. As long as the statute does not discriminate against interstate commerce the court will uphold it. While this decision has undoubtedly thwarted BG&E's plans to diversify under the holding company structure, it does not add much to commerce clause jurisprudence. The court sharply criticized the traditional direct/indirect analysis, but refused to abandon the test. Instead, the court chose what it considered to be a more prudent approach: It characterized the burden as indirect and proceeded with a balancing test. By using such an analysis, the court bypassed the direct/indirect portion of the traditional test. As a result, the court seemed willing to grant the legislature wider latitude to regulate legitimate state interest.

2. Challenge to "Flat Fees."—In American Trucking Associations v. Goldstein, the Court of Appeals held that a statute imposing an annual twenty-five dollar ($25.00) registration fee upon all motor carriers operating commercial vehicles in Maryland did not violate

49. Id.
50. 582 F. Supp. at 679.
51. 760 F.2d at 1425-26. BG&E also attacked the statute under the due process and equal protection clauses of the U.S. Constitution. BG&E claimed that the statute arbitrarily and irrationally discriminated against stock holding corporations that do not already control a public service company. The court dismissed these arguments, finding that the State did have a rational basis for its regulatory scheme. Id.
52. Id. at 1426-27.
53. Id. at 1427.
54. Id.
56. "Motor carrier" is defined as "any person who operates or causes to be operated any commercial motor vehicle on any highway in this State." Md. Ann. Code art. 81, § 412(c) (Supp. 1985).
the commerce clause of the United States Constitution. Although these types of "flat fees," which are imposed by states to cover the cost of maintaining public property used by certain businesses, have been held to be constitutional since 1935, the appellants contended that the United States Supreme Court had effectively overruled the "flat fee" cases in two recent decisions.

In these decisions, the Supreme Court required a tax to "be reasonably related to the extent of the [taxpayer's] contact" with the state in order to withstand a commerce clause challenge. The appellants in American Trucking argued that a flat tax can never be related to "the extent of the [taxpayer's] contact" with the state because it is imposed equally on all motor carriers regardless of how often they drive on Maryland highways. The Court of Appeals, however, found that the Supreme Court did not intend to overrule the "flat fee" cases. First, the Supreme Court had used two of the "flat fee" cases in formulating the requirements for constitutionality under the commerce clause. Second, the Court had considered the "user" fee cases irrelevant to inquiries under the general revenue statutes. The Court of Appeals found that the legislature intended to distribute the cost of highway maintenance evenly among all users and that the practical effect of the law was not discriminatory. Thus, the law did not violate the commerce clause.

57. "Commercial motor vehicles" include buses, road tractors, truck trailers, freight trailers, and other commercial vehicles. See id. § 412(b).
58. 301 Md. at 387, 483 A.2d at 55.
59. In Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935), the plaintiff contended that the flat twenty-five dollar fee imposed on all motor carriers operating in Georgia was an oppressive burden on interstate commerce because interstate carriers use the road less often than local carriers. The Supreme Court held that the amount of the fee was not unreasonable and that the interstate carriers were not wronged because it was their own decision to use the highway less often than the local carriers. Id. at 289.
60. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (holding that the commerce clause requires a tax on commerce to be fairly related to the service provided by the state); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (applying the Complete Auto test to a severance tax on coal mining).
62. 301 Md. at 384, 483 A.2d at 54.
63. Id. (citing Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Ingels v. Morf, 300 U.S. 290 (1937)).
64. Id. at 384-85, 483 A.2d at 54.
65. Id. at 386, 483 A.2d at 54. The Court of Appeals also rejected appellants' other constitutional arguments. First, the court found that the plaintiff corporations had no standing to raise privilege and immunities clause issues. Id. at 387, 483 A.2d at 55 (citing Western & Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 656 (1981)). Second, the court determined that the plaintiffs' equal protection argument was the same as their commerce clause argument and should be rejected for the same
C. First Amendment

1. Free Exercise of Religion.—In Baltimore Lutheran High School v. Employment Security Administration, the Court of Appeals held that Maryland’s Employment Security Administration had not violated either the free exercise or establishment clauses of the first amendment by requiring a Lutheran high school to pay unemployment taxes for its lay employees. The appellants had contended that the requirement to pay unemployment taxes placed an undue burden on the school’s free exercise of religion because the tax interfered with the school’s financial and personnel management. The court did not determine whether the taxes interfered with the free exercise of religion; instead, it held that the State’s compelling interest in maintaining insurance for the unemployed justified any alleged interference.

The court also rejected the appellant’s establishment clause ar-

reasons. Id. Finally, the court rejected plaintiffs’ supremacy clause argument that an Interstate Commerce Commission regulation, 49 C.F.R. § 1023.13 (1985), prohibited a state registration tax of over ten dollars per year. The court held that this regulation did not apply in Maryland. 301 Md. at 388, 483 A.2d 55-56.

66. 302 Md. 649, 490 A.2d 701 (1985) [hereinafter cited as Lutheran II].

67. Id. at 668, 490 A.2d at 711. Maryland law exempts certain types of employment from unemployment taxes. These include “[s]ervices by an individual in the employ of a church . . . or an organization which is operated primarily for religious purposes. . . .” Md. Ann. Code art. 95A, § 20(g)(7)(v)(B) (1985).

This case began in 1977 when the Maryland law was amended to conform with the Federal Unemployment Tax Act 26 U.S.C. §§ 3301-11 (1982). The Employment Security Administration’s Board of Appeals, whose decision was affirmed by the circuit court, had found that Lutheran was not entitled to an exemption because the school was not operated primarily for religious purposes. The Court of Appeals vacated the Board’s decision because the Board failed to consider whether Lutheran’s courses were taught in “an ‘atmosphere of intellectual freedom’ . . . ‘without religious pressures’ and according to the principles of academic freedom.” Employment Sec. Admin. v. Baltimore Lutheran High School, 291 Md. 750, 766, 436 A.2d 481, 489 (1981) [hereinafter cited as Lutheran I] (quoting Roemer v. Board of Pub. Works, 436 U.S. 736, 756 (1976)). On remand, the Board found that Lutheran failed to produce sufficient evidence to show that it was “operated primarily for religious purposes.” Lutheran II, 302 Md. at 660, 490 A.2d at 707. In reviewing this decision, the Court of Appeals limited its inquiry to “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” Id. at 662, 490 A.2d at 708. After finding that the agency’s decision was reasonable, the court then considered Lutheran’s constitutional claims, which had not been raised in Lutheran I.

68. Lutheran II, 302 Md. at 667, 490 A.2d at 711.

69. Id. at 668, 490 A.2d at 711. The court found United States v. Lee, 455 U.S. 252 (1982), dispositive of this issue. In Lee the Supreme Court held that an Old Order Amish farmer could be required to pay social security taxes for his Amish farm workers even though the payment of these taxes conflicted with the tenets of the Amish faith. The Court held that “[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.” Id. at 257-58.
gument. According to the court, the financial and administrative burdens placed on the school did not differ "from a host of other secular regulatory requirements such as health inspections . . . , safety inspections . . . , and licensing [school bus] drivers."\(^\text{70}\)

2. Reporters' Privilege.—In *WBAL-TV Division, Hearst Corp. v. State*,\(^\text{71}\) the Court of Appeals declined to decide whether reporters have a qualified privilege not to supply evidence summoned by the court for possible use at a criminal trial. Instead, the court held that the State could overcome any such privilege in this case. Therefore, the court below had not abused its discretion in refusing to quash a summons issued to the television station.\(^\text{72}\)

A television reporter from WBAL-TV had conducted a videotaped interview with Anthony Grandison, who at the time of the interview was incarcerated for conspiracy and on trial for first degree murder.\(^\text{73}\) Portions of the interview were broadcast on the evening news. The court summoned the unbroadcast portions (outtakes) of the interview for possible use at the defendant's trial.\(^\text{74}\) The television station moved to quash the summons, claiming that the first amendment to the United States Constitution and article 40 of the Maryland Declaration of Rights\(^\text{75}\) gave the station a qualified privilege against being compelled to testify or produce information about news-gathering activities. To defeat this privilege, the State had to show that (1) the information sought was relevant and material to the trial and admissible in evidence, (2) the information was essential to a determination of guilt or innocence, and (3) the information was not otherwise available from alternative sources.\(^\text{76}\)

The court assumed, without deciding, that the privilege existed and applied the test proposed by appellants to determine whether the State had overcome the privilege. It then held that the trial

\(^{70}\) *Lutheran II*, 302 Md. at 672, 490 A.2d at 713 (relying on Salem College & Academy v. Employment Div., 298 Or. 471, 695 P.2d 25 (1985)).

\(^{71}\) 300 Md. 233, 477 A.2d 776 (1984).

\(^{72}\) *Id.* at 247, 477 A.2d at 783.

\(^{73}\) *Id.* at 236, 477 A.2d at 777.

\(^{74}\) *Id.*

\(^{75}\) 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.


\(^{76}\) 300 Md. at 237, 477 A.2d at 778.
court had correctly applied the test. The appellants conceded that a substantial number of Grandison's statements were relevant to the trial under the first part of the test. The dispute centered on the proper application of the second and third parts.

The appellants argued that the State must show "that it [would] be significantly more difficult to convict the defendant without the evidence" in order to satisfy the second part of the test. The court refused to require such a strong showing. Instead, the court found that the test was one of relevance and probative value. In this case, the recorded statements "directly related" to the murder trial and, as admissions of the defendant, were "highly probative"; thus, the second prong was satisfied. The appellants also urged the court to require the prosecution to specify which elements in its case the evidence would strengthen. The court found this argument illogical: the prosecution had not seen the tapes, and thus, could not know which elements the statements would tend to prove.

The appellants then contended that the prosecution had to attempt to obtain the information contained on the tapes before seeking to compel production from the station. The court found that Grandison was unlikely to repeat his taped statements and that any witnesses present would be unlikely to recall Grandison's words verbatim. Furthermore, WBAL-TV was the "sole possessor" of the taped interview. Thus, the court upheld the trial court's determination that the evidence could not be obtained from any other source.

The argument that reporters have a qualified privilege not to testify in criminal proceedings originated with Branzburg v. Hayes. In Branzburg, the reporter was summoned by the grand jury to give information that he had gathered from a confidential source. The appellant argued that he should not be compelled to give the information unless the State could overcome the three-part qualified privilege. This privilege was necessary, the appellant argued, in order to protect the free flow of information. If reporters were compelled to reveal their confidential sources, future sources would be

77. Id. at 243-44, 477 A.2d at 781.
78. Id. at 244, 477 A.2d at 781.
79. Id. at 245, 477 A.2d at 782.
80. Id.
81. Id. at 246, 477 A.2d at 782-83.
82. Id. at 246-47, 477 A.2d at 783.
83. Id. at 244-45, 477 A.2d at 781-82.
84. 408 U.S. 665 (1972).
85. Id. at 680.
less willing to give information to reporters. The Supreme Court held that the public interest in investigating and prosecuting crimes through the grand jury outweighed the public interest in the availability of future sources of information. The Court carefully worded its holding, however, to apply only to cases when the information sought is for use by a grand jury.

Subsequent lower court cases have interpreted Branzburg to mean that reporters have a qualified privilege not to testify if the state’s interest in their testimony is less compelling. In these cases, the courts have used the three-part test to weigh the media’s interest against the interest of the party seeking the information. Often the trial court will conduct an in camera review to decide on the relevance, materiality, and probative value of the information. The lower courts that have adopted the privilege have taken widely varying views of it, and no uniform application has emerged.

Amicus curiae for WMAR argued that, unless a privilege was recognized, calling reporters to testify would become standard prac-

86. Id. at 679-80.
87. Id. at 690-91. The Court noted that the defendant has a fifth amendment guarantee which provides that “[n]o person shall be held to answer for a capital offense unless on . . . indictment of a Grand Jury.” Id. at 687.
88. Branzburg was a 5 - 4 decision. Justice Powell, whose vote was necessary to get a majority, wrote in a separate concurring opinion that
[i]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation . . . he will have access to the court on a motion to quash. . . . The asserted claim to a privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.
Id. at 710 (Powell, J., concurring).
89. See, e.g., United States v. Burke, 700 F.2d 70, 78 (2d Cir.) (information sought merely cumulative), cert. denied, 464 U.S. 816 (1983); Bruno S. Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 594-99 (1st Cir. 1980) (civil suit). In this case, amicus curiae for WMAR argued that the public interest in protecting the media was greater in WBAL-TV than in the grand jury cases because the tapes would be used in open court rather than in a grand jury investigation. Brief for Amicus Curiae of WMAR, Inc. at 11, WBAL-TV Div., Hearst Corp. v. State, 300 Md. 233, 477 A.2d 776 (1984).
90. See United States v. Burke, 700 F.2d 70, 78 n.9 (2d Cir.) (encouraging use of in camera review to inspect potentially sensitive documents); cert. denied, 464 U.S. 816 (1983); cf. United States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir. 1980) (trial court should not conduct an in camera review unless party requesting the information shows that the information is not available from a nonjournalistic source) cert. denied, 464 U.S. 816 (1983).
91. Courts have found the privilege in state constitutional law, e.g., State ex rel. Green Bay Newspapers Co. v. Circuit Court, 113 Wis. 2d 411, 335 N.W.2d 367 (1983); state common law, e.g., Senear v. Daily Journal-American, 97 Wash. 2d 148, 641 P.2d 1180 (1982); and federal common law, e.g., Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979).
tice, resulting in a chilling effect on news-gathering. The court dismissed these fears as groundless. In 1983 the Court of Appeals, in a similar case, held that reporters do not enjoy a qualified privilege not to testify before a grand jury. The fact that the court now refuses to rule on whether such a privilege exists may be an indication that under a different set of facts, the court would be willing to adopt the privilege in cases involving information sought to be used as evidence in a criminal trial.

D. Fifth Amendment

1. Due Process.—In Miller v. Maloney Concrete Company, the Court of Special Appeals held that a Montgomery County zoning ordinance, which prohibited public nuisances, was unconstitutionally vague because it failed to provide a fixed legal definition of the term "public nuisance." Because the ordinance failed to provide clear standards for determining when it had been violated, the enforcement procedures were overly subjective and possibly discriminatory.

The ordinance permitted a person who had a complaint against a landuser "by reason of the emission of dust, fumes, gas, smoke, odor, noise, vibration or other disturbance" to file a petition with the County Board of Appeals. The board would then conduct a hearing to decide whether the use was a public nuisance. If the board found that the use was a public nuisance, it could enjoin the use. Noncompliance could result in civil or criminal sanctions or both.

92. Amicus Brief, supra note 89, at 11.
93. 300 Md. at 247, 477 A.2d at 783.
97. 63 Md. App. at 54, 491 A.2d at 1226.
98. See id. at 48-49, 491 A.2d at 1223.
99. The statute provides:
Any use which is found by the board to be a public nuisance, by reason of the emission of dust, fumes, gas, smoke, odor, noise, vibration or other disturbance, is expressly prohibited. No such finding shall be made by the board except after a hearing upon reasonable notice, and any person, the commission or the district council may file a petition with the board for such hearing.

100. Section 59-A-5.7 is part of the county zoning law. MONTGOMERY COUNTY, MD. CODE § 59-A-1.3(a) (1977) provides that "violations of this chapter may be punishable as provided in § 2-120 of Article 66D of the Annotated Code of Maryland." Article 66D was moved without change to Article 28 of the Maryland Annotated Code by Act of July 1, ch. 57, 1983 Md. Laws 213. Article 28, § 2-120 provides that the offender "shall be
In the case before the court, the County Board of Appeals had found that the appellee’s cement batching plant was a public nuisance because of the dust and noise resulting from the operation. Although the plant had been operating on the premises for some forty-five years, the surrounding neighborhood had changed to such an extent that in 1977 the area was rezoned from industrial to commercial. Because the cement plant was lawfully in existence before the area was rezoned, the operation became a lawful, nonconforming use under the Montgomery County Code.\(^\text{101}\) A nuisance complaint was filed against the appellee in 1982 when the plant’s lease on an adjacent property expired and the appellee was forced to consolidate its operation. Allegedly, the consolidation caused more noise and dust in the area.\(^\text{102}\)

The County Board of Appeals conducted a hearing in 1983 and concluded that the cement operation was a nuisance that could be alleviated if the appellee changed its operations. The board did not make any findings about the feasibility of these changes. On appeal, the circuit court found that the ordinance was unconstitutionally vague and therefore violated the defendant’s due process rights.\(^\text{103}\)

The Court of Appeals upheld the circuit court. The court emphasized the need for the legislature to define “public nuisance,” particularly if criminal sanctions are possible.\(^\text{104}\) In earlier cases, the Maryland courts had recognized the legislature’s authority to deem certain activities to be nuisances even if they were not nuisances under common law.\(^\text{105}\) The legislature cannot use its authority as a

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101. 63 Md. App. at 41, 491 A.2d at 1219.
102. Id. at 42, 491 A.2d at 1219.
103. Id. at 44-46, 491 A.2d at 1221.
104. Id. at 48, 491 A.2d at 1223. The standard used in Maryland for testing criminal statutes under the void for vagueness doctrine is whether the statute is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Id. See Bowers v. State, 283 Md. 115, 120, 389 A.2d 341, 345 (1978) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). The court in this case found zoning statute § 59-A-5.7 particularly repugnant because the appellee had complied with all the other provisions of the zoning laws. The plant operation was a lawful nonconforming use under MONTGOMERY COUNTY CODE § 59-G-4.1, and the company had applied for a special exemption from the noise control requirements. 63 Md. App. at 41, 54, 491 A.2d at 1219, 1225.
105. Under the common law as applied in Maryland, a public nuisance has generally not been declared unless it causes physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits and diminishes the value of the property. Bishop Processing Co. v. Davis, 213 Md. 465, 132 A.2d 445, 449 (1957); Gorman v. Sabo, 210 Md. 155, 159, 122 A.2d 475, 476 (1956).
"cloak for confiscation," however, nor can it "declare arbitrarily and capriciously any or every act a nuisance." The court pointed to the Montgomery County air quality control ordinance as an example of a nuisance statute that would not be void for vagueness. In the air quality control ordinance, the key terms are defined and relatively precise standards for what is abatable are established. These types of specific standards were not enunciated in section 59-A-5.7, which left the County Board of Appeals with unconstitutionally broad discretion to determine what constitutes a nuisance.

The legislature may have difficulty defining the term "nuisance" in a way that will satisfy the court's constitutional requirements. Many courts recognize that the word "nuisance" is "incapable of precise definition so as to fit all cases." It has been called "little more than a pejorative term, a weasel word used as a substitute for reasoning." Most of the decisions concerning nuisances revolve around the reasonableness of the use and the degree to which the activity affects the use and enjoyment of the plaintiff's property. It is unclear whether a statute that defines nuisance as "an unreasonable use which substantially interferes with the use of enjoyment of the surrounding land" could be considered constitutionally valid. In the absence of quantifiable factors, the determination that something is a nuisance is necessarily vague and turns on the facts in each case.

2. Takings Clause.—In Howard County v. JJM, Inc., the Court of Appeals held that a county zoning ordinance that required

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107. MONTGOMERY COUNTY, MD., CODE § 3-2 (1977). For example, unlike the zoning ordinance before the court, the air quality control ordinance states that substances in the air must be present "in such quantities and of such duration as are ... injurious to human, plant or animal life, or property, or which unreasonably interferes with the comfortable enjoyment of life or property or with the conduct of business." Id. See also MONTGOMERY COUNTY, MD., CODE § 31B-2 (1977) (noise control law).
110. See generally W. KEETON, supra note 109, § 88 (discussing reasonable and substantial interference in nuisance law).
112. HOWARD COUNTY, MD., CODE § 16.113(b)(2) (1977 & Supp. 1980). The ordinance provides:

The owner shall reserve within a proposed subdivision such part(s) of the right-
developers to reserve a right-of-way in a subdivision for a proposed state road was an unconstitutional taking without compensation. The court determined that the county must be able to demonstrate a reasonable nexus between the exaction of the right-of-way and the proposed subdivision before it can require a developer to set aside land for highway purposes.  

Under section 16113(b)(2) of the Howard County Code, owners who wish to subdivide their property must reserve "such part(s) of the right-of-way for a new state road designated in the state's twenty-year highway needs inventory . . . ." In the case before the court, the Howard County Office of Planning and Zoning refused to approve the appellant's subdivision because the plans did not reserve a right-of-way for the proposed relocation of Maryland Route 216. The proposed plan was included in the state's twenty-year general plan of highways, but not in the state's six-year construction plan. The Howard County Board of Appeals affirmed the Office of Planning and Zoning's finding that the owner, JJM, Inc., had not complied with the county's requirements for subdivision. The circuit court overturned the Board of Appeals because it found the county requirements unconstitutional as applied to the appellant's case. The circuit court held that the zoning ordinance deprived the owner of the right to make "any effective use of the property placed in reservation" for an indefinite period of time. By placing such an "onerous burden" on the development of the owner's property, the county had overstepped the limits of its police power.

The Court of Appeals affirmed. It recognized the general rule that a government, in a valid exercise of its police power, can regulate land use if the regulation is reasonably related to the public

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113. 301 Md. at 282, 482 A.2d at 921.
114. Id. at 260, 482 A.2d at 909-10. According to the Director of the Office of Planning and Zoning, the proposed relocation of Rt. 216 was put into the state's general plan in 1971 and from 1971 to 1981 (JJM, Inc. submitted its plans in 1981) no further action had been taken on the relocation. Id.
115. Id.
116. Id.
117. Id. The circuit court, like the Court of Appeals, looked at the scope and duration of the burden placed on the appellant's land, but did not examine the relationship between the burden and the needs of the subdivision. See id.
118. Id.
health, safety, morals, or welfare. But if the regulation goes "too far" it will be recognized as a taking. In determining whether the regulation does go "too far," the courts look to the severity and duration of the restriction as well as to the relationship between the restriction and the public interest at stake.

In the leading Maryland case concerning street reservations, *Kreiger v. Planning Commission*, the court did not require that the State show a relationship between the traffic needs of the subdivision and the proposed road. Rather, the court required only a showing that the area reserved for future streets was "reasonably related to the traffic and other needs of the community at large."

In *Kreiger*, as in *JJM*, the county made no assurance that the street would ever be built, but also did not indicate that it would not fully compensate the owner if the road were built. *JJM* differed from *Kreiger*, however, in two respects that the Court of Appeals considered vital. First, the landowner in *Kreiger* could put his land to any permissible use that he chose, while in *JJM* the landowner was totally restricted from using the reserved land. Second, in *Kreiger*, the reserved area was subject to setback provisions that would have prevented the owner from developing the land without the ordinance, while in *JJM* the owner could have developed its land if development had not been prohibited by the right-of-way restriction. These differences led the court to conclude that the reservation placed on the plaintiff's land in *JJM* was more severe than that imposed in *Kreiger*; thus, a more stringent test of constitutionality was justified.

119. *Id.* at 281, 482 A.2d at 920 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).
120. See generally W. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 167-72 (1977).
122. *Id.* at 325, 167 A.2d at 888. See generally W. STOEBUCK, *supra* note 120, at 183-85 (discussing various state court decisions concerning areas reserved on master plans).
123. 224 Md. at 324, 167 A.2d at 887. See *JJM*, 301 Md. at 364-65, 482 A.2d at 912.
124. 301 Md. at 266-67, 482 A.2d at 913. The court stated, "The difference between this case and *Kreiger* is the definition of reservation contained in the Howard County Code § 16.108 (54), which requires a developer to assign the land for a specified use, to be held by him ... for that use and no other use to a future time." *Id.* at 266, 482 A.2d at 913 (quoting HOWARD COUNTY, MD. CODE § 16.108(54)(1977)).

In *Kreiger*, the county did not require a reservation of land; it merely prohibited development in a certain area to allow space for a proposed widening of an existing road. 224 Md. at 323, 167 A.2d at 886.
125. 224 Md. at 324, 167 A.2d at 887.
126. *See* 301 Md. at 266-67, 482 A.2d at 913.
127. *See*, 301 Md. at 281-82, 482 A.2d at 920-21.
The court then relied on *Maryland-National Capital Park & Planning Commission v. Chadwick*¹²⁸ to find the reservation in *JJM* unreasonable. In *Chadwick*, a regulation required the landowners to reserve part of their property for a three-year period for a proposed park expansion. The court held that the restriction was unreasonable because it deprived the owners of any reasonable use of the property for three years.¹²⁹ Since the reservation required in *JJM* deprived the owner of any use for an indefinite period of time, it too was unreasonable.¹³⁰

In *JJM*, the court expanded the *Chadwick* rationale to apply to street as well as park reservations. Unlike its reasoning in *Kreiger*, which required a relationship between the reservation and the needs of the community at large, the court in *JJM* required a nexus between the reservation and the subdivision.¹³¹ Whether the court will apply this more restrictive test in every case remains an open question.¹³²

**E. 42 U.S.C. Section 1983**

In *Calvert v. Sharp*,¹³³ the United States Court of Appeals for the

¹²⁹. *Id.* at 18, 405 A.2d at 250. In *Chadwick*, the court did not require that the municipality show a relationship between the needs of the subdivision and the reservation. It merely required that the reservation be "reasonably necessary to achieve the public goal without being unduly oppressive upon individuals." *Id.* at 9, 405 A.2d at 245. The court also distinguished park reservations from street reservations and stated that the opinion was limited to its facts. *Id.* at 18, 405 A.2d at 250.
¹³⁰. *See* 301 Md. at 281, 482 A.2d at 920-21.
¹³¹. 301 Md. at 282, 482 A.2d at 921. In other jurisdictions that have required the county to show a nexus between the subdivision and the reservation, the courts have used various standards when applying the test. *See generally Nichols' The Law of Eminent Domain* § 1.42[2]. (J. Sackman rev. 3d ed. 1985) (citing cases from other states that require a nexus between the needs of the subdivision and the land reservation). In New Jersey the court requires that the nexus be "substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement." 181 Inc. v. Salem County Planning Bd., 133 N.J. Super 350, 359, 336 A.2d 501, 506 (1975), *aff'd*, 140 N.J. Super. 247, 356 A.2d 34 (1976). Other jurisdictions require only a "reasonable relationship." *See* Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 127 N.W.2d 442 (1965). It appears that Maryland, by using the "reasonable nexus" language, will require only a reasonable relationship and not the "clear and present" need that some jurisdictions require.
¹³². For example, if the owner were allowed to farm the property, the court might not apply the *JJM* test.
¹³³. 748 F.2d 861 (4th Cir. 1984).
Fourth Circuit dismissed an inmate's 42 U.S.C. section 1983 claim against a private physician for lack of subject matter jurisdiction. The inmate alleged that the physician's failure to treat him violated the eighth amendment. The court found that the physician was privately employed, had no state custodial or supervisory duties, and had no obligation to the state. Thus, he was not acting under "the color of state law," and the district court should have dismissed the action.

The Fourth Circuit relied on Polk County v. Dodson, in which the Supreme Court held that a public defender did not act under the color of state law in refusing to represent a client in an appeal that the attorney thought was frivolous. Comparing the required independence of an attorney to that of a doctor, the Fourth Circuit recognized that physicians must make their own medical decisions and cannot be responsible to administrative superiors for those decisions. In this case, the only obligation of the physician was to treat orthopedic problems. Because the physician owed his loyalty to the patient, he was in a potentially adverse position with the State. The physician was performing a private function, and hence not acting under the color of state law.

The court considered two other factors in concluding that the physician was not subject to suit under section 1983: the dependence on state funds and performance of public functions. Neither the physician nor his employer depended completely on the state for funding; the mere existence of a contract with the State did not make the physician a state actor. Similarly, the physician was not performing a "public function."

Maryland law requires that

135. 748 F.2d at 865.
136. Id. at 862. The inmate was referred to the physician, an orthopedic specialist, five times between July 1980 and December 1981. Although the physician examined him on each occasion, the inmate claimed that he did not treat him. Id.
137. Id. at 864. A private, nonprofit professional corporation, CPPA, employed the physician. CPPA had a contract with the State to provide medical services at the Maryland House of Corrections and the Maryland Penitentiary. CPPA also provides medical services to the general public; it is not completely dependent on the state for funds. Id. at 863.
139. Id. at 319.
140. 748 F.2d at 863.
141. Id.
142. Id.
143. Id. at 863-64.
144. Id. at 864. A private person who performs a function traditionally the exclusive
inmates or their families pay for medical care, if possible.\textsuperscript{145} Because medical services are not the exclusive prerogative of the State, they are not a public function for purposes of section 1983 suits.\textsuperscript{146} Therefore, the court concluded that the physician could not be sued under 42 U.S.C. section 1983.\textsuperscript{147}

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\textsuperscript{146} 748 F.2d at 864.
\textsuperscript{147} Id.
V. CRIMINAL LAW

A. Constitutional Issues

1. Dual Sovereignty.—In Evans v. State, the Court of Appeals held that the dual sovereignty doctrine — an exception to the general rule against double jeopardy — is part of the common law of Maryland. Dual sovereignty permits successive prosecutions for the same offense if the prosecutions are undertaken by separate sovereign governments.

Anthony Grandison, Vernon Evans, Jr.’s co-defendant, had allegedly hired Evans to murder two persons scheduled to testify against Grandison on federal narcotics charges. Evans was only partially successful. He killed one of the witnesses, but murdered a second person whom he mistakenly believed to be a witness. A two-count federal indictment was brought against Evans and Grandison followed by a four-count state indictment. After their

1. 301 Md. 45, 481 A.2d 1135 (1984) (per curiam). The court filed this opinion six months after the issuance of a per curiam order. In the per curiam order, the court affirmed two circuit court orders that denied each defendant’s motion to dismiss on double jeopardy grounds. The appeals came directly from the Circuit Court for Worcester County and the Circuit Court for Somerset County to which the defendants’ trials had been removed after severance. Under Md. CTS. & JUD. PROC. CODE ANN. § 12-301 (1984), a party may only take an appeal from a final judgment. A corollary to the general rule, however, allows an appeal from “a seemingly interlocutory order which denies an absolute constitutional right.” Stewart v. State, 282 Md. 557, 566, 386 A.2d 1206, 1211 (1978). The Court of Appeals has repeatedly held that the denial of a motion to dismiss on double jeopardy grounds is such an order. See Bowling v. State, 298 Md. 396, 401 n.4, 470 A.2d 797, 799 n.4 (1984) and cases cited therein.

After its decision in Evans, the Court of Appeals held that the collateral order doctrine applied to all interlocutory appeals. Parrott v. State, 301 Md. 411, 426, 483 A.2d 68, 75 (1984). Application of that doctrine would not change the result in double jeopardy cases, however. See id. at 425, 483 A.2d at 75; see also infra notes 754-67 and accompanying text (discussing Parrott).


4. 301 Md. at 48, 481 A.2d at 1136.

5. Id.

6. Id. The federal indictment filed in the United States District Court for the District of Maryland charged Evans and Grandison with conspiracy to violate the witnesses’ civil rights, 18 U.S.C. § 241 (1982), and witness tampering, 18 U.S.C. § 1512. The state indictment charged each defendant with use of a handgun in the commission of a felony or crime of violence, two counts of murder, and one count of conspiracy to commit murder. Evans and Grandison were tried together in federal court, but separately in state court. 301 Md. at 49, 481 A.2d at 1136-37.
conviction and sentencing in federal court, the defendants each moved to dismiss the state indictments on the grounds of double jeopardy. Upon the denial of these motions, both defendants took immediate appeals.

The defendants argued, and the court assumed *arguendo*, that the state and federal charges should be deemed the same for double jeopardy purposes. The defendants then maintained that either the double jeopardy clause of the fifth amendment to the United States Constitution or Maryland's common law prohibition against double jeopardy barred the successive state prosecution.

Rejection of the constitutional claim was inevitable; dual sovereignty is a time-honored feature of federal double jeopardy jurisprudence. The defendants relied on the Supreme Court case of *Benton v. Maryland*, which incorporated the federal prohibition against double jeopardy into the due process clause of the fourteenth amendment. They claimed that, under *Benton*, "the distinctions between the federal and state governments with regard to successive prosecutions for essentially the same crime have been

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7. Each defendant received a sentence of life plus ten years imprisonment. 301 Md. at 49, 481 A.2d at 1137.
8. *Id.*. The defendants also argued that the due process clause of the Maryland Constitution, *MD. CONST. DECL. OF RIGHTS* art. 24, barred the state prosecution. The court declined to address this claim separately, finding it "in substance no different from their double jeopardy argument." *Id.* n.1.
9. *Id.* at 49, 481 A.2d at 1137. *See supra* note 1.
10. 301 Md. at 49-50, 481 A.2d at 1137. The court indicated, however, that only the conspiracy counts of the respective indictments appeared to be substantively the same. *Id.* at 51 n.4, 481 A.2d at 1137-38 n.4.
11. *Id.* at 50, 481 A.2d at 1137.

    Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both . . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction to the other

14. *Id.* at 796.
erased."\(^{15}\) The court rejected the argument, citing Supreme Court and several circuit courts of appeals decisions that have upheld the dual sovereignty doctrine.\(^{16}\)

The defendants' second argument proved more formidable. Dual sovereignty, they contended, was not part of the received common law of Maryland;\(^{17}\) furthermore, the court had never changed the common law to include dual sovereignty.\(^{18}\) The defendants supported this proposition by citing two English cases\(^ {19}\) that predated the American Revolution and arguably rejected the dual sovereignty doctrine.\(^{20}\) Although the Court of Appeals accepted the cases as evidence that dual sovereignty was not part of Maryland's received common law,\(^ {21}\) the court rejected the balance of the defendants' argument. Asserting its power to change the common law,\(^ {22}\) the court found that *Worthington v. State*\(^ {23}\) and *State v. James*\(^ {24}\) demonstrated...
that Maryland had adopted the dual sovereignty doctrine. On the strength of these cases, the court upheld the doctrine of dual sovereignty and affirmed the lower courts' denials of the motions to dismiss.

Judge Eldridge, concurring in part and dissenting in part, took issue with the majority's use of Worthington and James. While Eldridge agreed that the doctrine of dual sovereignty had never been a part of Maryland's received common law, he disagreed with the majority's view that Maryland had since adopted the doctrine. Worthington and James, according to Eldridge, never addressed the concept of successive prosecutions for the same offense. Rather, these cases only hinted at the doctrine in dicta—dicta that Eldridge found to be completely unsupported by case law. Furthermore, Eldridge thought it unwise to abrogate the common law rule: "The purposes underlying the prohibition against successive prosecutions for the same offense are just as applicable regardless of whether those prosecutions are by the same or different sovereigns."

24. 203 Md. 113, 100 A.2d 12 (1953). In James, the Court of Appeals upheld a conviction for criminal nonsupport despite the defendant's prior conviction on a similar charge in Delaware. The offenses were clearly separate since each pertained to a different time period. In dicta, the court indicated, however, that it would have upheld the conviction if both crimes had been viewed as one. 203 Md. at 120, 100 A.2d at 15. The court relied on two Supreme Court cases endorsing dual sovereignty, Herbert v. Louisiana, 272 U.S. 312 (1926), and Jerome v. United States, 318 U.S. 191 (1943). But it referred as well to two earlier Maryland decisions, Bloomer v. State, 48 Md. 521 (1878), and Rossberg v. State, 111 Md. 394, 74 A. 581 (1909), 203 Md. at 120, 100 A.2d at 15, neither of which turned on the issue of dual sovereignty. In Bloomer, the court held that acts performed out-of-state could be used to prove a conspiracy conducted in Maryland. 48 Md. at 535. In Rossberg, the court examined the extent to which Baltimore City could legislate in areas in which the State had also enacted laws. See 111 Md. at 414-417, 74 A. at 584.

25. 301 Md. at 58, 481 A.2d at 1141.

26. Id.

27. Id. at 60, 481 A.2d at 1142-43 (Eldridge, J., concurring in part and dissenting in part). Judge Eldridge did agree with the majority's intimation that portions of the state indictment were "clearly distinct" from the federal offenses. Id. at 58-59 & n.1, 481 A.2d at 1141-42 & n.1. On that ground he would have concluded that the defendants' motions to dismiss were properly denied as to several of the charges. Id. at 58, 481 A.2d at 1141-42.

28. Id. at 60, 481 A.2d at 1143. Eldridge noted that the General Assembly has not adopted the doctrine either. Id.

29. Id. at 60-61, 481 A.2d at 1143. See supra notes 23-24.

30. Id. at 61, 481 A.2d at 1143. Eldridge apparently agrees with Justice Black that dual sovereignty should not apply to successive federal and state prosecution for the same offense. Eldridge twice quoted Black with approval in his relatively short concurrence and dissent. Id. at 60 n.2, 61, 481 A.2d at 1142 n.2, 1143.
2. **Double Jeopardy.**—In *Mason v. State*, the Court of Appeals examined double jeopardy in the context of plea bargains and common law conspiracy. The court held that the double jeopardy protection against successive prosecutions for the same offense barred the State from prosecuting a defendant on charges that it had previously nol prossed in connection with a plea agreement. The court also held that this same protection barred successive prosecutions of a defendant who distributed several controlled dangerous substances in accordance with a single unlawful agreement. The court found that the defendant had committed but one offense, common law conspiracy, regardless of the number or variety of controlled dangerous substances distributed.

In accordance with a plea agreement, Mason pleaded guilty to possession with intent to distribute cocaine. In exchange for the plea, the State agreed to enter a nolle prosequi on five other charges, including conspiracy to distribute cocaine. Several months later, however, Mason was charged with and convicted of remarkably similar offenses stemming from the same incident. When the trial court denied Mason's motion to dismiss this second indictment on double jeopardy grounds, he pleaded guilty to and was convicted of conspiracy with the intent to distribute heroin and conspiracy to distribute cocaine.

The Court of Special Appeals, in an unreported per curiam opinion, vacated the conviction for conspiracy to distribute cocaine on double jeopardy grounds. It allowed the other conviction to stand, however, because "[c]onspiracy to distribute heroin and conspiracy to distribute cocaine are different offenses since 'each re-

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32. Id. at 440, 488 A.2d at 958.
33. Id. at 445, 488 A.2d at 960.
34. Id.
35. Id. at 437, 488 A.2d at 956.
36. Id. In two criminal informations, Mason was charged with possession with intent to distribute a controlled dangerous substance (cocaine), possession of a controlled dangerous substance (cocaine), conspiracy to distribute a controlled dangerous substance (cocaine), unlawful distribution of a controlled dangerous substance (cocaine), and a handgun violation. As a result of the plea, Mason was sentenced to three years' imprisonment. Id. at 436-37, 488 A.2d at 956.
37. Id. at 437, 488 A.2d at 956. This subsequent indictment charged Mason with nine counts of conspiracy which included three heroin-related offenses, three marijuana offenses and three cocaine-related offenses. Id.
38. It is not clear why Mason did not immediately appeal the trial court's denial of the motion to dismiss. Interlocutory orders that deny motions to dismiss on double jeopardy grounds are immediately appealable. *See supra* note 1.
39. 302 Md. at 437, 488 A.2d at 956.
quires proof of a fact which the other does not."

The Court of Appeals first established that the plea agreement barred the State from recharging Mason with conspiracy to distribute cocaine, the offense it had originally nol prossed. In accordance with its own earlier pronouncements on the issue, the court distinguished between a nol pros entered on the State's own initiative and one entered as part of a binding plea agreement. When entered on the State's own initiative, the nol pros bars further prosecution only under the same charging document. It does not preclude a prosecution for the same offense under a different charging document or different count. When the nol pros is entered in connection with a binding plea agreement, however, it is "tanta-amount to a dismissal of that charge." Thus, "[o]nce the court accepts the defendant's guilty plea and the defendant complies with the terms of that agreement, the State is barred from any further prosecution on the charges so nol-prossed." Therefore, the State could not recharge Mason with conspiracy to distribute cocaine, one of the offenses that it had initially nol prosed.

The State maintained that conspiracy to distribute cocaine and conspiracy to distribute heroin are separate offenses. Therefore, both convictions should stand. To support this argument, the State used the test developed by the Supreme Court in Blockburger v. United States: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other

40. Id. at 437-38, 488 A.2d at 956-57.
41. Id. at 439, 488 A.2d at 957. A nolle prosequi is neither an acquittal nor a pardon. "'[N]ormally, the effect of a nol pros is as if the charge had never been brought in the first place.'" Id. at 439-40, 488 A.2d at 958 (quoting Curley v. State, 299 Md. 449, 460, 474 A.2d 502, 507 (1984)).
42. Id. at 439, 488 A.2d at 957. The State may have been operating under this assumption when it charged Mason four months later under a new indictment with some of the same offenses nol prosed as a result of the original agreement.
43. Id. at 440, 488 A.2d at 958.
44. Id.
45. Id. at 441, 488 A.2d at 958.
46. Id.
47. Id.
48. 284 U.S. 299 (1932). The Court of Appeals adopted this test in Thomas v. State, 277 Md. 257, 266-67, 353 A.2d 240, 246-47 (1976). Although the Mason opinion does not detail the State's exact use of Blockburger, the State must have argued that the two types of drugs, heroin and cocaine, were the additional and different fact to be proved in each offense.
The Supreme Court applied this test in *Albarnaz v. United States* and upheld the imposition of successive sentences for the violation of two federal drug statutes. The State argued that *Albernaz* was indistinguishable from the facts in *Mason*; therefore, Mason's successive convictions should stand. The court flatly disagreed. Unlike the defendants in *Albernaz*, Mason was not charged with "the violation of a statute, much less two statutes," but with common law conspiracy.

The court explained that the crucial element of common law conspiracy is an unlawful agreement:

The agreement is the crime, and the crime is complete without any overt act. . . . Ordinarily, a simple agreement to engage in criminal activity does not become several conspiracies because it has as its purpose the commission of several offenses. . . . A conspiracy remains one offense regardless of how many repeated violations of the law may have been the object of the conspiracy.

Because both common law conspiracy charges against Mason derived from a single unlawful agreement, an agreement to distribute controlled dangerous substances, the two charges constituted the same offense. Hence, the constitutional prohibition against double jeopardy barred Mason's second conviction.

In *Huffington v. State*, the Court of Appeals reiterated that the

49. 284 U.S. at 304 (emphasis added).
51. *Id.* at 339. The two defendants were charged with conspiracy to distribute marijuana, 21 U.S.C. § 846 (1982), and conspiracy to import marijuana, 21 U.S.C. § 963; both violations sprang from the same act. 450 U.S. at 335. The Court upheld the successive convictions because each involved proving a fact that the other did not. *Id.* at 339. The Court went beyond *Blockburger*, however, and found that Congress intended to punish two separate evils presented by drug trafficking: importation and distribution of marijuana. *Id.* at 343. This conclusion became the dispositive double jeopardy question for the *Albernaz* court—an intent to authorize separate punishments for two similar crimes. *Id.* at 344.
52. 302 Md. at 443, 488 A.2d at 960.
53. *Id.* at 444, 488 A.2d at 960.
54. *Id.* In Maryland, the definition of conspiracy is "the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means." *Id.*
55. *Id.* at 445, 488 A.2d at 960. Had the court held otherwise, "a defendant involved in a single conspiracy to distribute ten Schedule I narcotic drugs could be subject to ten separate prosecutions . . . without contravening the double jeopardy proscription against successive prosecutions." *Id.*, 488 A.2d at 961.
56. *Id.* at 447, 488 A.2d at 961.
57. *See id.*, 488 A.2d at 961.
58. 302 Md. 184, 486 A.2d 200 (1985) (per curiam).
double jeopardy clause does not bar the retrial of a defendant on the same charges when the conviction is reversed on appeal for any reason other than sufficiency of the evidence.\textsuperscript{59} Using a special verdict form, a jury found Huffington guilty of committing two felony murders, but specifically acquitted him of committing two premeditated murders.\textsuperscript{60} The Court of Appeals reversed the conviction and remanded the case for a new trial because certain evidence had been erroneously admitted.\textsuperscript{61} Just before retrial, Huffington moved to dismiss on double jeopardy grounds and took an immediate appeal from the trial court's denial of his motion.\textsuperscript{62} He argued that only one crime of murder exists. For purposes of double jeopardy, premeditated murder and felony murder should be considered the same crime because the elements that must be proved in both crimes are effectively identical. Therefore, Huffington contended that his acquittal on the premeditated murder charge necessarily barred any retrial on a felony murder charge.\textsuperscript{63}

The Court of Appeals rejected the defendant's argument.\textsuperscript{64} The second trial resulted from the defendant's appeal of his first conviction. On retrial, the defendant would only be tried on charges involved in that appeal—the felony murder charge. He would not be retried on charges that were not part of the appeal and on which he had been acquitted—the premeditated murder charge.\textsuperscript{65} As the

\textsuperscript{59} Id. at 189, 486 A.2d at 203.
\textsuperscript{60} Id. at 186, 486 A.2d at 201. Specifically, Huffington was found guilty of two murders, robbery, burglary, and violations of Md. Ann. Code art. 27, §§ 36B-36F (1982), the handgun statute. 302 Md. at 186, 486 A.2d at 201.
\textsuperscript{62} 302 Md. at 186-87, 486 A.2d at 201. See supra note 1.
\textsuperscript{63} 302 Md. at 187-88, 486 A.2d at 202-03. Premeditated murder is first degree murder and requires proof of a homicide, willfulness, deliberation and premeditation. Md. Ann. Code art. 27, § 407 (1982). Felony murder, on the other hand, is by statute first degree murder, but requires proof only that a homicide occurred during the commission of one of the enumerated felonies. Id. §§ 408-410. Proof of the underlying felony and proof of willfulness, deliberation, and premeditation are alternate elements of a single offense—first degree murder. Newton v. State, 280 Md. 260, 272, 373 A.2d 262, 268 (1977); 302 Md. at 188, 486 A.2d at 202. Therefore, in connection with a single homicide, it is possible for a defendant simultaneously to be convicted of a felony murder but acquitted of premeditated murder if the prosecution fails to prove that the defendant's acts were willful, deliberate, and premeditated. Indeed, this situation occurred in Huffington. 302 Md. at 187-88, 486 A.2d at 202.
\textsuperscript{64} 302 Md. at 188, 486 A.2d at 202.
\textsuperscript{65} The court rejected Huffington's argument that Green v. U.S., 355 U.S. 184 (1957), supported his position. Rather, the court held that Green allowed Huffington to be retried. 302 Md. at 190, 486 A.2d at 204. In Green, the defendant was found guilty of second degree murder and arson after the jury was instructed that he could alternatively be found guilty of either first or second degree murder. On appeal, the murder conviction was reversed, and Green was retried. In the retrial, Green was convicted of first
Supreme Court noted in *Forman v. United States*, 66 "a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal."67 Furthermore, Huffington's argument erroneously assumed that the elements of premeditated murder and felony murder are the same.68 Premeditated murder requires proof that a homicide occurred as a result of the defendant's willful, deliberate, premeditated actions.69 Felony murder requires proof that a homicide occurred during the commission of a felony.70 Felony murder does not require proof of willfulness, deliberateness and premeditation; nor is proof that the homicide occurred during the commission of a felony the functional equivalent of these three elements.71

The court made clear, however, that these two types of murder could constitute the same crime in some situations.72 For example, a defendant could not be tried for premeditated murder, then felony murder in successive trials. This situation did not occur in Huffington, however; the second trial was ordered as a direct result of Huffington's appeal of his first conviction.73

In *Donaldson v. State*, 74 the Court of Special Appeals held that an "extension" of probation following violation of the terms and conditions of the original probation is not an increase in sentence that violates the prohibition against double jeopardy.75 The court reiter-
ated that the phrase "extending probation" is merely a shorthand version of the procedure required by article 27, section 642 of the Maryland Annotated Code. When a judge extends probation under section 642, the judge revokes probation, strikes the suspended sentence, reinstates the original sentence, suspends the original sentence, and places the defendant on further probation. This procedure is constitutional because probation is not equivalent to a sentence. To make the distinction clear, the court quoted the 1983 Court of Appeals' opinion in Clipper v. State: "Probation is by definition conditional; therefore, the defendant is on notice that breaching those conditions may lead to the reinstatement of his original sentence. That original sentence is the only true punishment; the probation revocation is merely the withdrawal of favorable treatment previously accorded the defendant."

Should the sentencing court decide to "extend" probation when the terms and conditions of the original probation are vio-

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a sentencing judge to extend probation. 62 Md. App. at 653, 490 A.2d at 1320. See infra notes 931-37 and accompanying text. Donaldson goes further than Brown, however, in upholding the constitutionality of the procedure outlined by § 642.

76. 62 Md. App. at 651-52, 490 A.2d at 1320. Donaldson was convicted of theft and sentenced to one year of probation. After determining that Donaldson had violated the terms and conditions of his probation, the circuit court "extended" the probationary period for two years beyond the date of that proceeding. Id.

MD. ANN. CODE art. 27, § 642 (1982) provides:

Whenever any person is convicted of any offense in any of the courts of record of this State, having criminal jurisdiction, and the judge presiding does not impose sentence or suspends sentence generally or for a definite time places the offender upon probation, or makes another order and imposes other terms as she or he may deem proper, and that person at any time thereafter is brought before the court to be sentenced upon the original charge of his conviction, or for a violation of the terms and conditions of the order of probation in the case, the judge who then is presiding in that particular court, if he determines that the offender violated the terms and conditions of probation, may proceed to sentence the person to serve the period of imprisonment prescribed in the original sentence or any portion thereof, or if no sentence was imposed, any sentence provided for by law for the crime for which that person was originally convicted. The sentence may be suspended in whole or in part and the offender may be placed on further probation on the terms and conditions the judge deems proper but no term of probation may exceed the maximum prescribed by § 641A of this article.

77. 62 Md. App. at 78, 488 A.2d at 504.

78. 295 Md. 303, 455 A.2d 973 (1983).

79. 62 Md. App. at 653, 490 A.2d at 1320 (quoting Clipper, 295 Md. at 313, 455 A.2d at 978.) The court also found United States v. DiFrancesco, 449 U.S. 117 (1980), persuasive: "There is no constitutional protection against revocation of probation and the imposition of imprisonment." Id. at 157. This statement further emphasizes that probation is not the equivalent of a sentence. If it were, the constitutional protection of double jeopardy would attach.
lated, it is limited only by section 641A of article 27. Under section 641A, the term of probation may not exceed five years. Therefore, in Donaldson, the defendant’s sentence was not unconstitutionally extended. Rather, probation, which did not constitute sentencing at all, was revoked and reinstated in accordance with the statutory authority granted the sentencing court under section 642.

3. Right to Counsel.—In Leonard v. State, the Court of Appeals reiterated that a trial court has a duty to conduct a waiver of counsel inquiry before allowing defendants to assert their right to defend pro se. A trial court must make a reasonable effort to conduct a waiver inquiry whenever the defendant’s actions even slightly suggest the defendant’s desire to proceed pro se. The trial court’s duty to make this inquiry under Maryland Rule 4-215 will only be excused in the rare event that a defendant’s conduct is so disruptive that reasonable efforts by the court to comply with the rule are impossible.

To reach its conclusion, the court considered the interaction of two mutually exclusive constitutional rights—the right to have assistance of counsel and the right to self-representation. The court held that a valid assertion of the right to defend pro se is condi-

82. 302 Md. 111, 486 A.2d 163 (1985).
83. Id. at 124, 486 A.2d at 169. The duty to conduct a waiver of counsel inquiry is set forth in Md. R. P. 4-215 (formerly Md. R. P. 723c (Supp. 1983)). Leonard was decided under the former rule, which read as follows:
c. Waiver Inquiry.
   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, and fully comprehends:
   1. The nature of the charges against him, any lesser included offenses, and the range of allowable penalties, including mandatory and minimum penalties, if any;
   2. That counsel can render important assistance to him in determining whether there may be defenses to the charges or circumstances in mitigation thereof, and in preparing for and representing him at trial;
   3. That even if the defendant intends to plead guilty, counsel may be of substantial assistance in developing and presenting information which could affect the sentence or other disposition;
   4. That if the defendant is found to be financially unable to retain private counsel, the Public Defender or the court would, if the defendant wishes, provide counsel to represent him.
84. 302 Md. at 124, 486 A.2d at 169.
85. Id. at 127, 486 A.2d at 171.
86. Id. at 119, 486 A.2d at 166.
tioned on a valid waiver of the right to assistance of counsel. Thus, it is reversible error to allow defendants to represent themselves without conducting a waiver inquiry.\textsuperscript{87}

At trial, Leonard expressed dissatisfaction with his court-appointed lawyer and asked the court to appoint another lawyer;\textsuperscript{88} the court refused.\textsuperscript{89} A long argument ensued between the court and the defendant before the court allowed the defendant to represent himself during the trial.\textsuperscript{90} During the trial, the defendant made opening and closing statements, made objections, cross-examined witnesses, and called two of his own witnesses.\textsuperscript{91} A jury convicted Leonard of possession with intent to distribute a controlled dangerous substance and conspiracy.\textsuperscript{92}

On appeal, the defendant argued for reversal and a new trial\textsuperscript{93} because the trial court failed to conduct a waiver of counsel inquiry in accordance with Maryland Rule 4-215.\textsuperscript{94} In an unreported per curiam opinion, the Court of Special Appeals affirmed the defendant's conviction.\textsuperscript{95} Although Leonard "clearly wanted new counsel, . . . [u]nder the circumstances he was not entitled to new counsel."\textsuperscript{96} The Court of Appeals reversed.\textsuperscript{97}

The Court of Appeals relied on \textit{Snead v. State},\textsuperscript{98} which held that a defendant's assertion of the right to self-representation requires

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87. \textit{Id.} at 129, 486 A.2d at 172.
88. \textit{Id.} at 114, 486 A.2d at 164. The defendant requested a postponement of the trial in order to locate a witness, but the court denied his request. The defendant then asked the court, "can I get appointed another counsel?" The court denied this request too. It was the denial of this last request that set the stage for the issue at hand. \textit{Id.}
89. Note that former rule 723c, \textit{supra} note 83, did not require, and the court did not make, an inquiry as to the reasonableness of Leonard's request for another attorney. Rule 4-215(d) now requires such an inquiry. No other substantive differences exist between the new and old rules.
90. \textit{Id.} at 115-17, 486 A.2d at 165-66. The defendant discharged his lawyer. The court, however, made the lawyer sit at the trial table for the duration of the proceedings. The court intended to make the lawyer available to the defendant for consultation, but Leonard never used the service. \textit{Id.} at 117-18, 486 A.2d at 166.
91. \textit{Id.} at 118, 486 A.2d at 166.
92. \textit{Id.} The court sentenced Leonard to ten years' imprisonment. \textit{Id.}
93. \textit{Id.} at 119, 486 A.2d at 166.
94. \textit{Id.} at 122, 486 A.2d at 168.
95. \textit{Id.} at 118, 486 A.2d at 166.
96. \textit{Id.}
97. \textit{Id.} at 129, 486 A.2d at 172.
98. 302 Md. at 114, 406 A.2d at 98 (1979). In \textit{Snead}, the defendant told the trial judge on the day of trial that he wanted another attorney. The judge denied the request, and the defendant responded by saying, "I don't want no attorney then." \textit{Id.} at 126, 406 A.2d at 100. The Court of Appeals held that this statement was a sufficient assertion of the defendant's right to defend \textit{pro se}. Thus, the trial judge committed reversible error by
the trial judge to conduct a waiver of counsel inquiry.99 The court concluded that Leonard’s statement,100 although different in form than that in Snead,101 was sufficient to alert the trial court to conduct the inquiry.102

In dictum, the court hinted that circumstances may exist when a defendant’s behavior can become so disruptive in the courtroom that the trial court will be excused from conducting a waiver inquiry.103 The court, however, will not be relieved of the duty unless it has made a reasonable effort to conduct the inquiry.104 When the court applied this test in Leonard, it found that “the record is devoid of any reasonable effort by the trial court to engage in a Rule [4-215] waiver inquiry.”105 Therefore, the court was “unable to conclude that Leonard’s conduct prevented the [trial] court from complying with Rule [4-215].”106

In Thomas v. State,107 the Court of Appeals, in dicta,108 refused to find that the defendant’s sixth amendment right to counsel had been denied when defendant’s counsel unwittingly agreed that a psychiatrist hired by the prosecution could perform the defendant’s

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99. Id. at 127, 406 A.2d at 101.
100. COURT: I understand you want to conduct your own defense.
     MR. LEONARD: That’s the only choice I got.
     COURT: I take it your anwer is yes?
     MR. LEONARD: It’s got to be yes. It’s the only choice I have.
302 Md. at 125, 486 A.2d at 170 (emphasis in original).
101. See supra note 98.
102. 302 Md. at 125-26, 486 A.2d at 170. The court could find “no substantive difference between the two statements.” Id.
103. Id. at 128, 486 A.2d at 171. “The defendant’s disruptive and obstreperous conduct during these efforts must be of a magnitude such as effectively to thwart the court from complying with the Rule or to reduce the proceeding to a mockery.” Id.
104. Id.
105. Id.
106. Id.
107. 301 Md. 294, 483 A.2d 6 (1984). This death penalty appeal involved 16 allegations of error; the sixth amendment issue is the most noteworthy. See also infra Evidence, notes 1-28 and accompanying text for discussion of other aspects of Thomas.
108. The court avoided deciding the constitutional issue by finding that the issue had not been properly preserved for review. 301 Md. at 328, 483 A.2d at 23. Judge Eldridge sharply criticized this finding:
     I am aware of no principle of law requiring that a trial lawyer, in order to preserve an issue, must cite the specific Supreme Court case on point. Moreover, we have indicated that in death penalty cases, we shall consider issues “whether or not properly preserved for review.”
Id. at 351, 483 A.2d at 35 (footnote and citations omitted) (Eldridge, J., concurring in part and dissenting in part). See infra note 130 and accompanying text.
posttrial psychiatric examination. Rather, the court found that the defendant had effectively waived his right to counsel during the evaluation. The court upheld the waiver despite the fact that neither defense counsel nor the defendant realized that the psychiatrist was acting on behalf of the prosecution and not as a court-appointed expert.109

A jury convicted Thomas on two counts of first degree murder for the brutal slaying of a married couple in their home. The jury also convicted Thomas of the rape and robbery of a college student who boarded with the couple.110 Before the trial began, Thomas entered a plea of insanity and incompetency to stand trial.111 The trial judge ordered a full psychiatric examination of Thomas as a result of his plea.112 Dr. Spodak and three other staff psychiatrists from Clifton T. Perkins State Hospital examined Thomas on behalf of the Department of Health and Mental Hygiene.113 Based on their written report, the trial judge concluded that Thomas was competent to stand trial.114

Once convicted, the trial judge, pursuant to a petition115 filed by the State and consented to by defense counsel, ordered Thomas

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109. 301 Md. at 327-28, 483 A.2d at 24.
110. Id. at 301-03, 483 A.2d at 10-11. The murder victims, Donald and Sarah Spurling, were repeatedly stabbed. Noel Wilkins, the rape and robbery victim, was also forced to submit to various sexual acts. Later, Thomas returned and stole $20 from Ms. Wilkins. Ms. Wilkins eventually escaped and later identified Thomas as her assailant. Id.
111. Id. at 322, 483 A.2d at 20.
112. Id. Prior to filing his plea, Thomas participated in a “one on one” psychiatric evaluation with Dr. Spodak of the Clifton T. Perkins State Hospital. As a result of the evaluation, Dr. Spodak filed a “psychiatric case workup report.” Dr. Spodak apparently advised Thomas, prior to initiating the examination, that the State was seeking the death penalty and that anything Thomas might tell him would not be held in confidence. Thomas apparently understood that advisement and willingly participated in the examination. Id., 483 A.2d at 20-21.
113. Id. at 343, 483 A.2d at 31 (Eldridge, J., concurring in part and dissenting in part).
114. Id.
115. The prosecution filed the following petition:

PETITION FOR PRE-SENTENCE PSYCHIATRIC EVALUATION

Now comes the State of Maryland, by Sandra A. O’Connor, State’s Attorney for Baltimore County, and by Thomas S. Basham and Alfred L. Brennan, Jr., Assistant State’s Attorneys for Baltimore County, and says:

1. That the Defendant was evaluated at the Clifton T. Perkins Hospital Center following his entry of a plea of not guilty by reason of insanity;
2. That the findings of the Hospital Center are contained in a report to the Court dated February 4, 1982;
3. That it is desirable to supplement the original insanity evaluation with further interview(s) of the Defendant to develop material for presentation at sentencing;
4. That Dr. Michael Spodak, who participated in the insanity evaluation, can conduct such further interview with the Defendant at the Baltimore County
to participate in another psychiatric evaluation. This examination, also conducted by Dr. Spodak, was to "develop material for use at sentencing." For purposes of the examination, however, Dr. Spodak was employed by the State’s Attorney’s Office and was not acting in his capacity as a staff psychiatrist of Clifton T. Perkins State Hospital.

At the sentencing hearing, defense counsel objected to the admission of Dr. Spodak’s testimony and report into evidence. He insisted that had he known that Dr. Spodak was acting as an expert witness employed by the State’s Attorney’s Office, he would neither have consented to the State’s petition nor allowed Dr. Spodak to speak with Thomas. Defense counsel acknowledged that, under Johnson v. State, "Perkins' psychiatrists are deemed to be wholly impartial experts and not partisans of the prosecution, even though paid by the State." The defense argued, however, that Dr. Spodak was not acting in his capacity as a "Perkins' psychiatrist".

Detention Center and can do so within a few days of a court order authorizing such evaluation;
5. That counsel for the Defendant has no objection to such evaluation.
WHEREFORE, the State prays that this Honorable Court pass an order directing Dr. Michael Spodak to conduct a further evaluation of the Defendant at the Baltimore County Detention Center for the purpose of developing material for use at sentencing.
/s/ Sandra A. O'Connor
SANDRA A. O'CONNOR
State's Attorney for
Baltimore County

Id. at 343-44, 483 A.2d at 31-32 (Eldridge, J., concurring in part and dissenting in part).
116. Id. at 323, 483 A.2d at 21.
117. Id. Dr. Spodak told Thomas that the purpose of the evaluation was to "evaluate him on certain issues about the death penalty." He mentioned that he might be called as a witness at the trial. In addition, Dr. Spodak informed Thomas that he had been retained by the State’s Attorney’s Office. According to Dr. Spodak, Thomas apparently understood and willingly participated in the examination. Id.
118. Id.
119. Id. This allegation is supported by the fact that defense counsel objected to the admission of the report immediately after Dr. Spodak revealed on the stand that he was retained by the State’s Attorney’s office. Id. at 345, 483 A.2d at 32 (Eldridge, J., concurring in part and dissenting in part).
120. 292 Md. 405, 439 A.2d 542 (1982).
121. 301 Md. at 324, 482 A.2d at 21-22. Judge Eldridge elaborated on Johnson and developed a distinction not addressed by the Thomas majority:
[The Johnson court drew] a sharp distinction between doctors employed by the Department of Health and Mental Hygiene and expert witnesses hired by the prosecution[,] Judge Diggs stated for the [Johnson] court: "The doctors designated by the Department of Health and Mental Hygiene to examine Johnson are thus 'not partisans of the prosecution, though their fee is paid by the State, any more than is assigned counsel for the defense beholden to the prosecution merely because he is . . . compensated by the State.'"
but in his capacity as an independently retained expert witness for the prosecution. 2 This crucial fact was not disclosed in the prosecution's petition for presentence psychiatric evaluation. 2 The trial judge overruled the objection and admitted the evidence, finding that Dr. Spodak was a professional whose opinion would not change regardless of who paid him. 2

On appeal, Thomas argued that the United States Supreme Court case of Estelle v. Smith compelled reversal of his death sen-

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122. *Id.* at 342, 483 A.2d at 31 (Eldridge, J., concurring in part and dissenting in part) (quoting *Johnson*, 292 Md. at 414, 439 A.2d at 548 (emphasis added) (citations omitted)).

123. *Id.* at 344-45, 483 A.2d at 32-33 (Eldridge, J., concurring in part and dissenting in part).

124. *Id.*

Dr. Spodak's report and testimony . . . negated the existence of two possible mitigating circumstances . . . *i.e.*, that the murders . . . were not committed "while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance or intoxication;" and that it was not "unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." *Id.* at 324, 483 A.2d at 21 (quoting *MD. ANN. CODE* art. 27, § 413(g)(4), (7) (1982)).

The dissent pointed out that, "[i]n making both of these findings, the trial judge specifically relied on the testimony of Dr. Spodak at the sentencing hearing" and that was "the chief ground for the trial court's finding." This fact negated any possible argument that the State might advance that admitting the evidence was harmless error. *Id.* at 349, 483 A.2d at 34 (Eldridge, J., concurring in part and dissenting in part).

125. *Id.* at 324, 483 A.2d at 21. Judge Eldridge, in his dissent, suggested that the trial judge did not comprehend the thrust of the objection when he overruled it. Judge Eldridge saw Thomas' objection as going directly to the admissibility of the evidence, on the theory that the evidence was obtained through the use of "deception" by the State's Attorney. *Id.* at 346-47, 350, 483 A.2d at 33, 35 (Eldridge, J., concurring in part and dissenting in part).

126. The case was reviewed directly by the Court of Appeals without prior review by the Court of Special Appeals under the statutory authority of *MD. ANN. CODE* art. 27, § 414(a) (1982), which provides for automatic review of death sentences.

127. 451 U.S. 454 (1981). In *Estelle*, the trial judge on his own motion, and without advising defense counsel, ordered the defendant Estelle to submit to a pretrial psychiatric examination to determine Estelle's competency to stand trial. He was found competent and ultimately convicted. In an attempt to obtain the death penalty, the prosecution drew heavily on the contents of the pretrial examination. The examination, argued the prosecution, proved beyond a reasonable doubt that Estelle would be dangerous in the future. *Id.* at 456-61. The Supreme Court overturned the conviction because Estelle was denied his constitutional right against compelled self-incrimination and right to counsel. He should not have been ordered to submit to the pretrial examination without benefit of counsel and without being advised that his statements could be used against him in a postsentencing procedure. *Id.* at 466, 471.
tence. According to Thomas, both *Estelle* and his case raised the same constitutional issue—whether the admission of psychiatric testimony during the sentencing phase of a death penalty case violated the defendant’s sixth amendment right to assistance of counsel.\(^{128}\) In *Estelle*, the Supreme Court held that the trial judge’s actions did violate Estelle’s constitutional right to counsel: defense counsel had not been notified of the scope of the examination, did not consent to the examination, and did not have an opportunity to advise the defendant prior to submitting to the examination.\(^{129}\)

In *Thomas*, the court rejected the constitutional argument altogether and distinguished *Estelle*. Although the court held that Thomas did not preserve the issue for appeal,\(^{130}\) it found that no sixth amendment violation had occurred. The Court of Appeals reasoned that *Estelle* would not have compelled a reversal of the death sentence even if the defense counsel had made the proper objection at trial.\(^{131}\) Thomas made an effective waiver of his sixth amendment right to counsel:\(^{132}\) his counsel had an opportunity to consult with him prior to the presentencing psychiatric examina-

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128. 301 Md. at 324, 483 A.2d at 22. Both *Thomas* and *Estelle* also raised a fifth amendment issue. The Supreme Court, in *Estelle*, held that the trial judge’s action violated Estelle’s fifth amendment right against self-incrimination. The Court found that the prosecution had relied on “the unwarned statements” of Estelle to justify Estelle’s death sentence. 451 U.S. at 463. The Court of Appeals, however, held that Thomas suffered no violation of his fifth amendment rights. 301 Md. at 328, 483 A.2d at 23. Eldridge concurred with the court’s view that the fifth amendment aspect of *Estelle* did not apply to *Thomas*. Thomas and his defense counsel both knew that Dr. Spodak would conduct a psychiatric examination of Thomas. Dr. Spodak advised Thomas, with “Miranda-type” warnings, prior to examining him. Both of these factors were not present in *Estelle* and together were sufficient to defeat Thomas’ claim to a fifth amendment violation. Id. at 350, 352, 483 A.2d 34, 36 (Eldridge, J., concurring in part and dissenting in part).

129. 451 U.S. at 470-71.

130. 301 Md. at 327-328, 483 A.2d at 23. The court thought it was clear that Thomas’ objection did not rise to a constitutional level. Instead, the court thought that the defendant’s objection went to the weight, rather than the admissibility of Dr. Spodak’s testimony and report. Specifically, the court saw the argument as one based on the assumed bias that Dr. Spodak had towards the prosecution because they employed him. See supra note 108.

131. 301 Md. at 328-29, 483 A.2d at 23-24.

132. *Id.* The court seems to imply that the consent of Thomas and his defense counsel to the examination constituted a “voluntary, knowing and intelligent relinquishment or abandonment of the known sixth amendment right.” *See id.* at 327-29, 483 A.2d at 23-24. The majority completely ignored defense counsel’s argument that his consent and that of Thomas should be invalidated because it was obtained through deception. Eldridge agreed with the defense and argued that no valid waiver of a constitution right can occur if deception is involved. “[C]onsent induced by misrepresentation is not consent.” *Id.* at 350-51, 483 A.2d at 35 (Eldridge, J., concurring in part and dissenting in part).
tion; his counsel expressly consented to that examination, and Dr. Spodak administered “Miranda-type” warnings to Thomas prior to the examination. The court determined that these circumstances distinguished Thomas from Estelle; thus, the court upheld Thomas’ death sentence.

The Court of Appeals in *Lodowski v. State* and the Court of Special Appeals in *Elfadl v. State* came to functionally equivalent conclusions regarding an accused’s fifth amendment right against self-incrimination and sixth amendment right to counsel during police interrogations. In each case, the court held that the police must inform the defendant of the attorney’s presence and desire to speak with the defendant once counsel appears and requests a conference with a criminal defendant. If the police either intentionally or negligently fail to inform the defendant, then any statement obtained by the police after counsel appeared will not be admissible on a fifth or sixth amendment waiver theory.

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133. *Id.* at 328, 483 A.2d at 24.
134. See supra note 115.
135. See supra notes 112 and 117.
136. 301 Md. at 327-29, 483 A.2d at 23-24.

For a discussion of other issues in *Lodowski*, see infra notes 802-41 and accompanying text.

139. *Lodowski*, 302 Md. at 718, 490 A.2d at 1241; *Elfadl*, 61 Md. App. at 143, 485 A.2d at 280.
140. *Lodowski*, 302 Md. at 720-22, 490 A.2d at 1243-44. The holding in *Elfadl* was stated differently, but is equivalent to the *Lodowski* holding. In *Elfadl*, the court held that “an effective waiver of counsel terminates once a specific attorney appears on behalf of the accused.” 61 Md. App. at 142, 485 A.2d at 280. The court made clear that the police may not avoid the rule by obtaining a new waiver without informing the defendant that an attorney is available.

It is one thing to say a lawyer has no right to see a client; it is quite another to say that an accused knowingly and intelligently waived his right to counsel and his right against self-incrimination when he is purposely kept in the dark about the fact that his lawyer is in the next room.

*Id.* at 143, 485 A.2d at 280. See infra text accompanying notes 164 and 172.

The United States Supreme Court recently reached the opposite conclusion in *Moran v. Burbine*, 106 S. Ct. 1135 (1986). The police arrested Burbine on a burglary charge and then connected him with a murder that had occurred several months earlier. After his arrest, Burbine’s sister informed police that he had an attorney. Burbine, however, waived his right to counsel and confessed to the murder. The police never informed him that his sister had arranged for an attorney. *Id.* at 1138-39. The Court held that the police conduct did not affect the validity of Burbine’s waiver. *Id.* at 1141-42.
Lodowski and Elfadl were co-defendants who were separately tried and convicted by different juries on two counts of first degree murder and other related offenses. Lodowski was sentenced to death, and Elfadl received consecutive life sentences. Under Maryland law, Lodowski's death sentence was automatically reviewed by the Court of Appeals. Elfadl’s case, on the other hand, took the more usual appellate route and was decided by the Court of Special Appeals.

In Elfadl, the police initially detained and questioned the defendant for approximately twenty-four hours. The police obtained a statement from Elfadl prior to his release, but the trial judge found that the police failed to give Elfadl any warnings consistent with Miranda v. Arizona and thus excluded the statement. Two days later, Elfadl returned to the police station to retrieve his driver's license, which the police had kept after they detained

Thus, the fifth amendment did not require exclusion of Burbine's confessions. See supra note 137.

141. Elfadl and Lodowski were allegedly responsible for the ambush murders and robbery of an all-night Minimart’s manager and security guard. Elfadl allegedly killed the manager and Lodowski allegedly killed the security guard, an off-duty police officer. Robbery and conspiracy charges were also handed down against both defendants in separate nine-count indictments. Lodowski, 302 Md. at 698-99, 490 A.2d at 1231-32; Elfadl, 61 Md. App. at 133-35, 485 A.2d at 275-76.

142. 302 Md. at 698 n.1, 490 A.2d at 1232 n.1. Lodowski received the death sentence for the murder of the security guard. He also received three consecutive life sentences for the other murder and conspiracy to commit murder counts as well as two consecutive twenty-year terms of imprisonment on the robbery counts. Id. at 700 n.2, 490 A.2d at 1232 n.2.

143. 61 Md. App. at 134, 485 A.2d at 275-76. Elfadl received six consecutive life sentences for the murder and conspiracy counts and three consecutive twenty-year terms of imprisonment for the robbery counts. Id.

144. 302 Md. at 699, 490 A.2d at 1232; Md. Ann. Code art. 27, § 414(a) (1982); Md. R.P. 4-343.

145. 61 Md. App. at 134, 485 A.2d at 276.

146. Id. at 135-36, 485 A.2d at 276-77. Elfadl was questioned for four hours before he was given a one hour break to go home to pray and eat. Elfadl was accompanied by police and then returned to the police station for an additional 19 hours of questioning. Id.

147. The facts of the case do not clearly indicate the substance of this first statement. Id. at 135-36, 485 A.2d at 276.


149. 61 Md. App. at 136, 485 A.2d at 277. The police maintained that Elfadl was not then a suspect in the crimes and that he was free to leave if he had chosen to do so. Nonetheless, the trial judge suppressed the statements made during this first interrogation. The trial judge found that during this interrogation the defendant became a suspect in the murders. Therefore, the defendant was entitled to Miranda warnings, which he never received. Id.
him.\textsuperscript{150} On this occasion, the defendant was arrested and questioned after he was given \textit{Miranda} warnings.\textsuperscript{151} Elfadl executed a waiver of his \textit{Miranda} rights and, after twenty-three hours of questioning, gave a second statement to the police.\textsuperscript{152} The trial judge admitted this statement into evidence.\textsuperscript{153}

The police continued to question Elfadl for six hours after he gave the second statement. The police then prepared Elfadl's third written statement.\textsuperscript{154} Before the third statement was completed, the police prepared a charging document and took Elfadl before a District Court Commissioner.\textsuperscript{155} In the form prepared by the Commissioner, Elfadl indicated that he wished to have the services of an attorney.\textsuperscript{156}

By the time the third statement was being prepared, Elfadl's wife had retained counsel for her husband.\textsuperscript{157} The lawyer attempted to contact his client, but the police refused to let him speak to Elfadl or to inform Elfadl of his presence. For an hour and forty-five minutes, while Elfadl's typed statement was being prepared, his attorney insisted that he be allowed to see his client. The police refused.\textsuperscript{158} The trial judge admitted this third statement into evidence.\textsuperscript{159} On appeal, Elfadl challenged its admission.\textsuperscript{160}

The Court of Special Appeals framed the admissibility of the

\begin{itemize}
\item \textsuperscript{150} \textit{Id.} at 136, 485 A.2d at 277. Elfadl telephoned the police asking for the return of his license and was told to come to the police station. \textit{Id.}
\item \textsuperscript{151} \textit{Id.} Elfadl claimed that he told detective Hatfield that he had an appointment with his lawyer before Hatfield placed him under arrest. Hatfield denied that Elfadl ever told him about meeting a lawyer. Hatfield and two other detectives interrogated Elfadl for nearly twenty-three hours straight. At no time during the questioning was counsel present on behalf of Elfadl. \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 136-37, 485 A.2d at 277. Elfadl was given \textit{Miranda} warnings and then signed a waiver form each time that a different detective interrogated him. The second statement was typed and then signed by Elfadl at the end of his twenty-three hour interrogation with police. \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 138, 485 A.2d at 278. Defendant's second statement was exculpatory. In it, Elfadl explained how he had sold his shotgun to a stranger for $4,000 cash before the murder took place. The shotgun was later determined to be one of the murder weapons. \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 137-38, 485 A.2d at 277.
\item \textsuperscript{155} \textit{Id.} at 137, 485 A.2d at 277. Elfadl, however, had confessed orally to police well before the preparation of a charging document and the arrival of the District Court Commissioner. \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.} at 138, 485 A.2d at 278.
\item \textsuperscript{160} \textit{Id.} at 139, 485 A.2d at 278. The third statement was the most crucial to the State's case because it was a complete confession to crimes perpetrated by both Elfadl and Lodowski. \textit{Id.} at 138, 485 A.2d at 278.
\end{itemize}
third statement in terms of Elfadl’s sixth amendment right to counsel and his waiver of that right. The court said that “the right to counsel granted by the Sixth and Fourteenth amendments means at least that [Elfadl was] entitled to the help of a lawyer at or after the time that judicial proceedings had been initiated against him—whether by way of formal charge, preliminary hearing, indictment, information or arraignment.” Because Elfadl had been taken before a District Court Commissioner, the court concluded that his sixth amendment right to counsel had attached before the third statement was completed.

As the Court of Special Appeals saw it, the issue on appeal was whether the police must tell the defendant that a lawyer has been retained on the defendant’s behalf and is available for consultation before they may continue interrogation. The court held that “an effective waiver of counsel terminates once a specific attorney appears on behalf of the accused.” When police fail to allow counsel to contact a defendant or fail to inform the defendant of counsel’s presence, the police will be barred from using the defendant’s waiver of counsel in order to introduce the subsequent uncounseled statements at trial. At a minimum, this decision requires the police to inform a defendant, like Elfadl, of the presence of counsel. If the defendant does not indicate a desire to speak with that lawyer, the police may arguably rely on the defendant’s earlier waiver of the right to counsel.

In Lodowski, the defendant was also interrogated at great length and, like Elfadl, gave three statements to police. Lodowski attempted to suppress the three statements at trial based on a right to counsel argument, but the trial judge denied the motion. According to the trial judge, the right to counsel is a personal right and any request for counsel must be made by the defendant. The trial
judge then found as a matter of fact that Lodowski did not personally request a lawyer. Rather, Lodowski's mother, on her own initiative, retained counsel for her son. The police prevented Lodowski's lawyers from contacting him, however. While Lodowski was writing his third statement, his lawyers were attempting, without success, to make their presence known to him. Once Lodowski completed and signed the last statement, he was informed that his mother had retained counsel who were present and anxious to talk to him.

The Court of Appeals accepted the trial court's factual finding, but disagreed with its analysis of the issue. The court refused to consider Lodowski's claim on sixth amendment right to counsel grounds because adversarial judicial proceedings had not been initiated against Lodowski at the time he gave his third statement to the police. Rather, the Court of Appeals considered whether Lodowski had voluntarily waived his fifth amendment right against compelled self-incrimination. Although the court assumed that

a motion to suppress all three statements, but the trial court denied the motion. Id. at 710, 490 A.2d at 1237-38.

169. Id. at 712-13, 490 A.2d at 1239. Citing Md. R.P. 886, the Court of Appeals relied on all of the factual findings made by the trial court with respect to the interrogation. Id. at 711, 490 A.2d at 1238.

170. Id. at 714, 490 A.2d at 1239-40. Lodowski's lawyers went to great lengths in their unsuccessful attempts to contact Lodowski. The lawyers enlisted the aid of a public defender, the State's Attorney for Prince George's County, and a District Court judge and prepared a writ of habeas corpus. The police took the position that Lodowski had waived his right to counsel and had not asked for a lawyer; thus, they were not going to let a lawyer spend time with him. Id.

171. Id. at 715, 490 A.2d at 1240.

172. Id.

173. Id. at 716, 490 A.2d at 1240. In Elfadl, however, the Court of Special Appeals found that "[t]he right to counsel attached when interrogation focused on the [defendant] as an accused. It would exalt form over substance to defer the right to counsel until indictment." 61 Md. App. at 139 n.5, 485 A.2d at 278 n.5. Lodowski was arrested fourteen hours before he was taken before a District Court Commissioner. 302 Md. at 713, 490 A.2d at 1239. By holding that Lodowski's sixth amendment right did not attach until he was arraigned by the District Court Commissioner, the Court of Appeals arguably exalted "form over substance" contrary to the teaching of Escobedo v. Illinois, 378 U.S. 478 (1964). The focus of the interrogation was on Lodowski as an accused; if it were not, the police would not have arrested him. The police extracted an oral confession from Lodowski six full hours before he was arraigned. 302 Md. at 712, 490 A.2d at 1239. Surely Lodowski's right to counsel had attached by then because the police were fully aware of his involvement in a double murder. Query, however, whether a defendant's sixth amendment right to counsel attaches, within the meaning of Escobedo, at the time of the arrest.

174. 302 Md. at 716, 490 A.2d at 1241. The court stated that the Miranda warnings are procedural safeguards and that those safeguards may be waived by the defendant. "[U]ntil such warnings and waiver are demonstrated by the State at trial, no evidence obtained through custodial interrogation may be used against [the defendant]." Id.
Lodowski was given proper Miranda warnings before he made his third statement, the court found that Miranda made clear that a defendant's "failure to ask for a lawyer does not constitute a waiver." 175 When the right to counsel is constitutionally protected, "the right to be furnished counsel does not depend on a request." 176 The police did not inform Lodowski that lawyers retained by his mother were present until after he had signed the third statement. 177 Thus, the third statement was not voluntary. The police conduct frustrated the purpose of Miranda warnings and was inconsistent with the "concept of a knowing and intelligent waiver." 178 Despite the fact that "the police punctiliously adhered to the verbal formula of the Miranda decision in advising [Lodowski] of [his] rights, [the police] . . . adopted tactics which effectively prevented or forestalled the exercise of [his] rights." 179

Although the Court of Appeals premised its holding on the fifth amendment and not the sixth amendment as the Court of Special Appeals did in Elfadl, in effect, both courts adopted the same rule. 180 The police may not prevent counsel from contacting a criminal defendant in the midst of interrogation. Police must notify the defendant that counsel is available and ready to meet with the defendant whether the defendant requested the lawyer or whether a third party did so on his behalf. If police do not notify the defendant of this fact, they cannot argue that the defendant waived either fifth or sixth amendment rights. 181

In Elfadl and Lodowski, both courts held that the police violated the defendants' constitutional rights. Thus, the courts reversed the defendants' convictions and remanded each case for a new trial. 182

175. Id. at 718, 490 A.2d at 1241.
176. Id., 490 A.2d at 1242 (quoting Miranda v. Arizona, 384 U.S. 436, 471 (1966)).
177. Id. at 715, 490 A.2d at 1240.
178. Id. at 719, 490 A.2d at 1242.
179. Id. at 719, 490 A.2d at 1242 (quoting Commonwealth v. McKenna, 355 Mass. 913, 325, 244 N.E.2d 560, 567 (1969)).
180. See id. at 720-21, 490 A.2d at 1243; Elfadl, 61 Md. App. at 142-43, 485 A.2d at 280.
181. Lodowski, 302 Md. at 720-22, 490 A.2d at 1243-44; Elfadl, 61 Md. App. at 142-43, 485 A.2d at 280. The court in Lodowski, however, expressly refused to require that an affirmative waiver of the defendant's right to counsel be made while in the presence of an attorney. 302 Md. at 721, 490 A.2d at 1243.
182. Lodowski, 302 Md. at 725, 490 A.2d at 1245; Elfadl, 61 Md. App. at 144, 485 A.2d at 281. One reading of Lodowski suggests that its reasoning silently overrules the Court of Special Appeals decision in Elfadl. Lodowski narrowly interpreted the reach of sixth amendment and premised its holding instead on the fifth amendment. This reading is too simplistic. A closer reading suggests that the court could have, but chose not to,
4. **Miranda.**—Authorities must provide *Miranda*²⁺ warnings only in cases of custodial interrogation.¹⁸⁴ Therefore, when criminal defendants challenge the admissibility of self-incriminating statements on the ground that they should have been, but were not, given *Miranda* warnings, a court must inquire whether the defendants were in custody and whether they were subjected to an interrogation.¹⁸⁵ If, but only if, the court answers both of these questions affirmatively, it must suppress the self-incriminating statements.¹⁸⁶

In *Schmidt v. State*,¹⁸⁷ the Court of Special Appeals considered the admissibility of self-incriminating statements made at a bail hearing without *Miranda* warnings. Such statements, held the court, are admissible provided that the defendant makes them in response to questions relevant to bail.¹⁸⁸ Thus, the court extended *Vines v. State*,¹⁸⁹ in which the Court of Appeals found that administrative questioning¹⁹⁰ is not interrogation within the scope of *Miranda*.¹⁹¹

Schmidt was convicted of burglary, rape, and a second degree sexual offense.¹⁹² His defense of consent turned on the assertion that he and the victim were acquaintances.¹⁹³ At his bail hearing, however, the defendant had seriously undermined his position. When asked by the judge whether he knew the victim, Schmidt re-

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¹⁸⁴. *Id.* at 478-79. *Miranda* defines custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444. If a suspect does not receive a *Miranda* warning before being subjected to custodial interrogation, no statement, however incriminating, is admissible against the accused. Police must advise suspects that they have the right to remain silent, that any statements may be used as evidence against them, and that they have the right to the presence of an attorney either retained or appointed. *Id.* In addition, the State must show that the accused knowingly and intelligently waived these rights. *Id.* at 475.
¹⁸⁸. *Id.* at 101, 481 A.2d at 248-49. Md. R.P. 4-216(f) lists factors considered relevant to setting bail. A typical question relevant to bail might concern the defendant’s ties to the community through friends, work or family; such questions are asked to determine whether the defendant is likely to appear for trial. 60 Md. App. at 99, 481 A.2d at 247.
¹⁹⁰. Administrative questioning occurs during the booking and processing of the defendant. *Id.* at 376, 402 A.2d at 904.
¹⁹¹. *Id.*
¹⁹². 60 Md. App. at 90, 481 A.2d at 243.
¹⁹³. See *id.* at 93-94, 481 A.2d at 245.
plied, "At the time, no sir, I didn't. I was drunk. I didn't know who it was." At trial, the State introduced this statement into evidence over Schmidt's objection. On appeal, Schmidt maintained that the questioning at the bail hearing was a custodial interrogation, and therefore, he should have received Miranda warnings. The court conceded that Schmidt was in custody at the bail hearing, but it denied that the judge's inquiry constituted an interrogation.

The court observed that interrogation triggering the necessity of a Miranda warning is inherently coercive and prosecutorial. Administrative questioning, on the other hand, does not share these characteristics. The routine and general inquiries typical of administrative questioning are neither related to evidence gathering or prosecution nor specifically directed towards any criminal offense. Questions asked at a bail hearing—if "reasonably routine"—possess the characteristics of administrative questioning. Indeed, at a bail hearing the questions do not serve to elicit information for the benefit of the prosecution; rather, the questions are

194. Id. at 93, 481 A.2d at 244.
195. Id. at 94, 481 A.2d at 245. Schmidt filed a general pretrial motion to suppress all statements, oral and written. At the suppression hearing, however, he failed to contest specifically the admissibility of the bail hearing statement. Notwithstanding this omission, the court held that Schmidt had adequately preserved the issue for appeal. Not only had the State neglected to disclose its interest in the bail hearing statement at the suppression hearing, but the State had also failed to disclose to Schmidt its knowledge of the bail hearing statement. This failure to disclose its knowledge of the statement violated the discovery rule, Md. R.P. 4-263(a)(2)(A) (former Md. R.P. 741 a 2 (b) (Supp. 1983)). Thus, Schmidt's objection at trial was sufficient to preserve all grounds for objection on appeal. 60 Md. App. at 95-96, 481 A.2d at 246.
196. 60 Md. App. at 95, 481 A.2d at 245. Initially, Schmidt argued that inculpatory statements made at bail hearings should be excluded in all cases. Otherwise, the use of a bail hearing statement at trial would force the defendant to "choose between a meaningful determination of his eligibility for bail and the preservation of his right against self-incrimination." The court rejected such a per se exclusionary rule. Id.
197. Id. at 97, 481 A.2d at 246. The court noted that Schmidt "had been arrested and charged; the very purpose of the hearing was to determine whether or under what circumstances he might be released from custody." Id., 481 A.2d at 246-247. The court was careful to note, however, that a defendant need not be in the station house to be considered in custody for Miranda purposes. Custody begins whenever and wherever the defendant has been arrested and is no longer free to go where the defendant pleases. Id. at 97-98, 481 A.2d at 247.
198. Id. at 99, 481 A.2d at 247.
199. Id. at 99-100, 481 A.2d at 247-48.
200. Id. at 99, 481 A.2d at 247. The court noted that administrative questions are generally agreed to be outside the scope of Miranda. Id. See, e.g., Vines v. State, 285 Md. 369, 376, 402 A.2d 900, 904 (1979).
201. 60 Md. App. at 99, 481 A.2d at 247.
202. See id. at 99-101, 481 A.2d at 247-49.
intended to indicate the appropriate amount of bail and potentially serve the defendant.

At the bail hearing, the judge neither coerced nor compelled Schmidt to incriminate himself. Nor did Schmidt's admission take place in an isolated, inquisitorial environment. Rather, he made the statements in open court before a number of impartial observers who, by their presence, guarded against coercion, intimidation, or trickery. Given this element of public scrutiny, as well as the absence of either coercion or prosecutorial intent, the judge's inquiry did not constitute custodial interrogation. Therefore, Schmidt was not entitled to receive Miranda warnings at his bail hearing.

In Hamilton v. State, the Court of Special Appeals shifted its focus to the custody element of "custodial interrogations." In accordance with the decision of the Court of Appeals in Whitfield v. State, the court held that incarceration of the defendant at the time of the interrogation does not constitute custody per se for Miranda purposes. Rather, the element of "inherently compelling pressures" must be present, regardless of whether the defendant is incarcerated. In addition, the court endorsed and applied the Whitfield "objective reasonable person" approach to determine the

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203. Id. at 99, 481 A.2d at 247. The question was relevant in determining whether a substantial risk existed that Schmidt would not appear at trial as well as whether the alleged victim was potentially in danger. Id.
204. See id. at 95, 481 A.2d at 245.
205. Id. at 100, 481 A.2d at 248. The court compared the pressure involved in grand jury testimony to that in a bail hearing. Since Miranda warnings are not required in the grand jury setting, the far less intimidating setting of the bail hearing should not require them either. Id.
206. See id. The court noted that the Supreme Court, in United States v. Mandujano, 425 U.S. 564, 579-80 (1976), found that judicial inquiries are not the equivalent of custodial interrogations, in part because judicial inquiries are made in the public view with impartial observers to guard against intimidation and trickery. 60 Md. App. at 100, 481 A.2d at 248.
207. 60 Md. App. at 101, 481 A.2d at 248.
208. Id., 481 A.2d at 249. The court expressly declined to consider whether questions unrelated to bail or designed to elicit an incriminating statement might constitute custodial interrogation. Id. n.5, 481 A.2d at 248 n.5.
211. 62 Md. App. at 615, 490 A.2d at 769.
212. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court concluded "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. at 467.
213. 62 Md. App. at 611, 490 A.2d at 767.
existence of custody.\textsuperscript{214} \textit{Miranda} warnings, under this view, are required only if persons in the defendant's situation would reasonably believe that they were not free to leave or break off questioning.\textsuperscript{215} Thus, the court concluded that the police did not violate Hamilton's constitutional rights by asking his friend to tape his conversations with the defendant without giving \textit{Miranda} warnings.\textsuperscript{216}

In 1978, Hamilton was convicted of first degree murder, assault with intent to murder, assault and battery, and use of a handgun in the commission of a violent crime.\textsuperscript{217} Before these charges were brought, but while Hamilton was incarcerated for an unrelated offense, an acquaintance,\textsuperscript{218} acting as a police informant, secretly taped several conversations with him.\textsuperscript{219} After police surreptitiously arranged for Hamilton's release, the informant secretly taped another conversation.\textsuperscript{220} During each of these discussions, the informant deliberately elicited incriminating statements from Hamilton regarding his role in the killing.\textsuperscript{221} After denying a motion to suppress these statements, the trial court convicted Hamilton on all four counts.\textsuperscript{222}

Under the two-pronged \textit{Miranda} analysis, the court conceded that the challenged conversations were interrogations.\textsuperscript{223} The police solicited the informant, supplied him with questions, and told him the type of information that they sought.\textsuperscript{224} Therefore, it was

\textsuperscript{214} Id. at 614-15, 490 A.2d at 769.
\textsuperscript{215} Whitfield, 287 Md. at 140, 411 A.2d at 425.
\textsuperscript{216} 60 Md. App. at 616, 490 A.2d at 770.
\textsuperscript{217} Id. at 607 n.1, 490 A.2d at 765 n.1.
\textsuperscript{218} Two of the defendant's acquaintances took part in the taped interviews. On appeal, the defendant challenged only the admissibility of the interviews conducted by the acquaintance who visited him in jail. \textit{Id.} at 607-08, 490 A.2d at 765.
\textsuperscript{219} Id. at 607, 490 A.2d at 765.
\textsuperscript{220} Id. Hamilton sought to suppress the conversations taped in prison by characterizing them as custodial interrogations conducted without \textit{Miranda} warnings. The conversations taped after his release, he argued, had to be suppressed as the fruit of the poisonous tree. \textit{Id.} at 608, 490 A.2d at 765.
\textsuperscript{221} Id. at 607-08, 490 A.2d at 765. State police recruited the informant by promising him favorable consideration on charges then pending against him. \textit{Id.} at 607, 490 A.2d at 765. The State not only directed the informant to solicit conversations regarding the murder; it also furnished him with questions and informed him of the information that it sought to elicit. \textit{Id.} at 611, 490 A.2d at 767.
\textsuperscript{222} Id. at 607-08, 490 A.2d at 765.
\textsuperscript{224} 62 Md. App. at 607, 611, 490 A.2d at 765, 767.
immaterial that the informant was not actually a police officer. An interrogation occurs whenever any person acting as an agent of the police attempts to extract information from an accused.

Even though the taped conversations were interrogations, the court found that the interrogations were not conducted while Hamilton was in custody. The court reached this conclusion by expressly rejecting Hamilton's principal contention—that within the meaning of Miranda, an incarcerated person is necessarily in custody. Under Hamilton, an accused may literally be in custody without being in Miranda custody.

Five years earlier, in Whitfield v. State, the Court of Appeals implicitly reached this same conclusion. In Whitfield, the court did not equate incarceration with custody; rather, it noted that a majority of courts had adopted an "objective reasonable person" standard for determining whether custody exists. Furthermore, the cus-

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225. Id.
226. Id.
227. Id. at 615, 490 A.2d at 769. Hamilton was, of course, not in custody during the conversations taped after his release from prison. He argued, however, that the prison conversations were custodial interrogations; thus, his subsequent statements should be excluded as fruit of the poisonous tree. Id. at 608, 490 A.2d at 765. When the court refused to find that incarceration equals custody, Hamilton's house of cards collapsed. See id. at 616-17, 490 A.2d at 770.
228. Id. at 615-16, 490 A.2d at 769.
229. 287 Md. 124, 411 A.2d 415, cert. dismissed, 446 U.S. 993 (1980). Whitfield involved a prisoner who was interrogated without having been given Miranda warnings. Id. at 127-29, 411 A.2d at 418-19.
230. Id. at 139-141, 411 A.2d at 424-425. In Whitfield, the court found it unnecessary to adopt a per se rule because the defendant was in custody, both literally and objectively, using the reasonable person standard proposed by the court. Id. at 139, 411 A.2d at 424.
231. Id. at 139, 411 A.2d at 424-25. The court discussed at length the federal and state decisions on this issue. Id. at 137-41, 411 A.2d at 423-25. In Hamilton, the court nevertheless felt it necessary to undertake its own independent survey, but concentrated on the opinions of the United States Supreme Court. This exercise proved both inconclusive and, in light of Whitfield, largely superfluous. See 62 Md. App. at 611-14, 490 A.2d at 767-68.

The Supreme Court has yet to discuss thoroughly whether incarceration is custody per se. In Mathis v. United States, 391 U.S. 1 (1968), however, the Court did assume, albeit without discussion, that the interrogation in prison of an inmate fulfilled the Miranda custody requirement. Id. at 4. But Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), on which neither Hamilton nor Whitfield placed substantial emphasis, confronted the custody issue with a detailed analysis of the objective factors of an interrogation. See id. at 495. In United States v. Henry, 447 U.S. 264 (1980), however, the Supreme Court suggested that the element of compulsion was the key to the rationale of Miranda. Id. at 272. Henry, like Hamilton, involved the use of an undercover agent in jail. It was not a Miranda case, however, since it turned on sixth amendment grounds. Id. at 274.

Although the Henry statement is undoubtedly correct, see Miranda, 384 U.S. at 467, the court in Hamilton arguably took it out of context. The passage in Henry began with
tody determination should be made on a case-by-case basis.\textsuperscript{232} The dispositive question was "whether the defendant, as a reasonable person, would have felt free to break off the questioning."\textsuperscript{233} Objective criteria to which the court looked to make the determination included the duration and location of the interrogation, the presence of police and their activities, and the use of physical restraint, whether actual or in the guise of a guard or drawn weapon.\textsuperscript{234}

Applying each of these criteria to the situation in \textit{Hamilton}, the court found that the defendant was not in custody when questioned.\textsuperscript{235} The court noted as significant the fact that no police were present during Hamilton’s conversations with the informant.\textsuperscript{236} More importantly, Hamilton spoke "of his own volition, was not required to stay and continue the conversation and could have left . . . at any time."\textsuperscript{237} According to the court, any reasonable person in Hamilton’s position would probably have felt free to leave.\textsuperscript{238} Thus, having found insufficient restrictions on the defendant’s freedom, the court concluded that \textit{Miranda} warnings were not required.\textsuperscript{239}

The inherently coercive environment of custodial interrogation—an environment arguably "created for no purpose other than to subjugate the individual to the will of his examiner"—sparked the Supreme Court’s concern in \textit{Miranda}.\textsuperscript{240} This same concern guided the Court of Appeals' decision in \textit{Whitfield}.\textsuperscript{241} It has now reached its

\begin{itemize}
  \item an express reference to situations in which "the Government uses undercover agents to obtain statements from persons \textit{not in custody} but suspected of criminal activity prior to the time charges are filed." \textit{Id.} at 272 (emphasis added). \textit{See} 62 Md. App. at 613, 490 A.2d at 768.
  \item 232. 287 Md. at 139, 411 A.2d at 424.
  \item 233. \textit{Id.} at 141, 411 A.2d at 425 (quoting \textit{Hunter v. State}, 590 P.2d 888, 895 (Alaska (1979))).
  \item 234. \textit{Id.}
  \item 236. 62 Md. App. at 615, 490 A.2d at 769. Presumably, the absence of police officers encouraged Hamilton to speak more freely and on his own initiative.
  \item 237. \textit{Id.}
  \item 238. \textit{Id.}
  \item 239. \textit{Id.} at 616, 490 A.2d at 769.
  \item 240. \textit{See} 384 U.S. at 457.
  \item 241. \textit{See} 287 Md. at 139-42, 411 A.2d at 424-26.
\end{itemize}
logical conclusion with the Court of Special Appeals' decision in Hamilton.

5. Exclusion of Identification Evidence.—In Ferguson v. State, the Court of Appeals held that an in-court identification may be sufficiently attenuated from the taint of an illegal arrest to be admitted into evidence. The court reversed the defendant's conviction and remanded for a new trial, however, because the trial judge also relied on an out-of-court identification that the court concluded was not sufficiently free of taint from the illegal arrest.

The defendant Ferguson, along with two accomplices, allegedly robbed the victim at gun point and fired one shot in an attempt to murder him. A police officer who heard the shot fired, but did not know about the defendant's involvement in the robbery, apprehended Ferguson as he ran from the direction of the shot. The officer then transported Ferguson to the police station and learned of Ferguson's involvement in the robbery. The victim also went to the police station. About twenty minutes after Ferguson was arrested, the victim identified him as one of the men who robbed him.

The trial court excluded all the physical evidence taken from the defendant at the time of his arrest because the court found that the officer lacked probable cause to make the arrest. The trial court admitted both the in-court and out-of-court identifications, however, and subsequently convicted the defendant of robbery with a deadly weapon.

Ferguson argued that the trial court erred in not suppressing the out-of-court identification as the result of an illegal arrest.

243. Id. at 556, 483 A.2d at 1262.
244. Id. at 557, 483 A.2d at 1263.
245. Id. at 546, 483 A.2d at 1256-57. During the robbery, one of the accomplices put a gun to the victim's head and pulled the trigger three times with no results. The victim then struggled with his assailant, and the weapon discharged once without striking anyone. Id. at 546, 483 A.2d at 1256.

The police officer was sitting in his parked police cruiser when the defendant and another man ran past the car about fifteen seconds after the shot was fired. The officer arrested and searched the defendant, finding what later turned out to be property stolen from the victim. Id. at 546, 483 A.2d at 1256-57. A police radio bulletin revealed that a robbery had been committed only one block from where the officer had arrested Ferguson. Id., 483 A.2d at 1257.
246. Id. at 547, 483 A.2d at 1257. The victim's keys, watch, and wallet were found in Ferguson's possession at the time of his arrest. Id. at 546, 483 A.2d at 1257.
247. Id. at 547, 483 A.2d at 1257. The defendant was also convicted of assault with intent to murder and use of a handgun in the commission of a crime of violence. Id. n.1.
248. Id. at 547, 483 A.2d at 1257.
and the Court of Appeals agreed. The court first examined relevant Supreme Court decisions. *Wong Sun v. United States* requires that the indirect products of an illegal arrest be excluded as fruit of the poisonous tree unless the connection between the arrest and the evidence is sufficiently attenuated to dissipate the taint. *Brown v. Illinois* identified three factors that determine whether the taint has been dissipated: 1) the time between the illegal arrest and the discovery of the evidence, 2) the intervening circumstances, and 3) the purpose and flagrancy of the official misconduct.

The Court of Appeals then considered the Supreme Court's application of *Brown* in *Taylor v. Alabama* and *Dunaway v. New York*. As a result, the Court of Appeals concluded that the twenty minutes that elapsed in *Ferguson* did not constitute a sufficient attenuation to dissipate the illegal arrest's taint of the out-of-court identification. Furthermore, no intervening circumstances had occurred that would dissipate the taint. The court also found that the officer's conduct was flagrant because he arrested the defendant without probable cause. Thus, the Court of Appeals held that the trial court erred in admitting the out-of-court identification into evidence.

The court then turned its attention to the legality of the in-court identification. In determining its admissibility, the Court of

249. *Id.* at 553, 483 A.2d at 1260. "[T]he Court of Special Appeals did not address this argument, but instead affirmed the trial court's rulings on the basis that the identifications were not suggestive." *Id.* at 547, 483 A.2d at 1257.
251. *Id.* at 487-88.
252. 422 U.S. 590 (1975).
253. *Id.* at 603-04. The Court of Appeals noted that *Brown* did not decide the precise issue presented by *Ferguson*, but decided that *Brown*'s test could be applied to determine the admissibility issue in *Ferguson*. 301 Md. at 549, 483 A.2d at 1258.
256. 301 Md. at 550, 483 A.2d at 1259. The Supreme Court in *Taylor* and *Dunaway* found that six hours and two hours, respectively, were insufficient amounts of time to dissipate the taint of an illegal arrest from an out-of-court identification. *Taylor*, 457 U.S. at 691; *Dunaway*, 442 U.S. at 218.
257. 301 Md. at 550-51, 483 A.2d at 1259. The State argued that transporting the victim to the police station and having the victim identify the defendant in the defendant's cell were intervening circumstances. The court disagreed. "Properly considered, the focus should more appropriately be on the accused to determine whether there was any event that contributed to his ability to consider carefully and objectively his options and to exercise his free will." *Id.* at 551, 483 A.2d at 1259. See *Taylor*, 457 U.S. at 691.
258. 301 Md. at 552, 483 A.2d at 1260. The court compared the officer's conduct to that of the officer in *Taylor* who transported the defendant to the police station "'in the hope that something would turn up.'" *Id.* (quoting *Taylor*, 457 U.S. at 693).
259. *Id.* at 553, 483 A.2d at 1260.
Appeals found *United States v. Crews* to be dispositive. In *Crews*, the Supreme Court held that an in-court identification would not be excluded if based on an independent source free from the taint of an illegal arrest. The Court listed three factors that would aid a court in determining whether an independent source existed: 1) the presence of the victim at trial; 2) the victim's ability to articulate the crime and identify the defendant at trial; and 3) the presence of the defendant at trial.

In *Ferguson*, the victim testified at trial and had the knowledge and ability to reconstruct the crime and identify Ferguson in the courtroom. Therefore, the court held that the in-court identification of Ferguson was admissible as an independent source free from the taint of the illegal arrest. Despite this finding, the court reversed and remanded the case for retrial because it found that the judge relied to some extent on the inadmissible out-of-court identification.

### 6. State Suppression of Evidence

In *Tolen v. State*, the Court of Special Appeals reacted to the recent proliferation of suppression of evidence cases by reiterating the clear standard against which such cases are to be judged. In addition, the court traced the evolution of suppression arguments, leading to the position taken by the defendants in *Tolen*, in an effort to bring the issue back in line with its constitutional underpinnings.

A jury convicted defendants Tolen and Andrews of rape. Prior to trial, the defendants argued that the indictment should have been dismissed on due process grounds. According to Tolen and Andrews, the routine destruction of the victim's blood specimen by the hospital deprived them of the opportunity to prove that the victim was intoxicated at the time of the alleged rape. The defendants contended that these samples formed an essential element of their conviction.

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261. 301 Md. at 553, 483 A.2d at 1260.
262. 445 U.S. at 477.
263. *Id.* at 471.
264. 301 Md. at 556-57, 483 A.2d at 1262.
265. *Id.* at 556, 483 A.2d at 1262; see *Segura v. United States*, 104 S. Ct. 3380, 3386 (1984) (exclusionary rule not applicable when prosecution learns of the evidence from an independent source).
266. 301 Md. at 557, 483 A.2d at 1263. The court was unable to determine with any certainty which identification was outcome-determinative. *Id.*
268. *Id.* at 627, 477 A.2d at 798. Tolen was convicted of first degree rape, and Andrews was convicted of second degree rape. *Id.*
affirmative defense of consent.\(^{269}\)

The Court of Special Appeals upheld the trial judge's refusal to dismiss the indictment and found that the defendants' rights to due process of law had not been violated.\(^{270}\) Applying the three-prong test developed by the Supreme Court in *Moore v. Illinois*,\(^{271}\) the court examined the facts in *Tolen* to determine whether (1) the prosecution suppressed the evidence after it was requested by the defense; (2) the evidence was favorable to the defense; and (3) the evidence was material.\(^{272}\) The court held that none of the defendants' contentions came even "remotely close to satisfying any one of these criteria, let alone all three."\(^{273}\)

The routine destruction of the blood sample took place prior to the defendants' request and was part of an accepted practice by the hospital; it did not amount to suppression by the prosecution.\(^{274}\) It could not be determined whether the evidence would have been favorable to the defense. "[M]ere uncertainty or speculation as to the quality of the 'lost' evidence does not satisfy the rigorous requirements for a finding of unconstitutionality ...."\(^{275}\) In addition, even presuming the blood sample would have shown that the victim was intoxicated, that fact would not have exculpated Tolen and Andrews.\(^{276}\) Finally, the evidence provided by the blood sample was not material. To be material, the evidence must have the power to create a reasonable doubt that did not otherwise exist. It must therefore be evaluated in the context of the entire record.\(^{277}\) The blood sample would not have created this doubt, regardless of the results.\(^{278}\) Thus, the trial court properly found no constitutional

\(^{269}\) *Id.* at 629-30, 477 A.2d at 799-800. The defendants alleged that the victim had consumed alcohol and drugs. The victim said that she had consumed only two swallows of alcohol and no drugs before she was raped. *Id.* at 629, 477 A.2d at 799. The defendants wanted the actual blood samples taken from the victim by hospital staff during the course of her treatment for rape. The blood sample had not been tested for the presence of alcohol, nor are they normally tested for alcohol. *Id.*

\(^{270}\) *Id.* at 633-34, 477 A.2d at 801-02.

\(^{271}\) 408 U.S. 786, 794-95 (1972).

\(^{272}\) 59 Md. App. at 630, 477 A.2d at 800.

\(^{273}\) *Id.*

\(^{274}\) *Id.* at 631, 477 A.2d at 800. Note that the court could have ended its inquiry here because the Moore test requires that all three elements be satisfied. See Moore, 408 U.S. at 794-95.

\(^{275}\) 301 Md. at 631, 477 A.2d at 800.

\(^{276}\) *Id.* at 632, 477 A.2d at 801. The trial judge correctly noted that had the victim been intoxicated, that evidence "would only have gone to the peripheral issue of impeachment rather than being directly exculpatory. . . ." *Id.*

\(^{277}\) *Id.* at 633, 477 A.2d at 801.

\(^{278}\) *Id.* at 632, 477 A.2d at 801.
The court clearly demonstrated its irritation with the vast array of recent suppression arguments. "As exhilarating as it may be for defense contentions to soar ever upward from third and fourth generation orbits, they need reminding periodically that their feet still must rest on the elemental clay of the due process clause." In the court's view, these contentions have been checked by the 1984 Supreme Court case of California v. Trombetta, which was decided just after the defendants in *Tolen* were convicted.

In *Trombetta*, the Supreme Court reiterated the fundamental proposition that the due process clause "requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." The Court expressly refused to expand the principal to require that the State preserve potentially exculpatory evidence. It also required that the evidence have apparent exculpatory value prior to its destruction and be of such a nature that the defendant could not obtain comparable evidence through alternative means. Given the firm stance taken by both the Court of Special Appeals in *Tolen* and the Supreme Court in *Trombetta*, it seems clear that in Maryland little or no judicial tolerance will be shown future suppression arguments that do not meet the test reiterated in *Tolen*.

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279. *Id.* at 633, 477 A.2d at 801.

280. *Id.* at 635, 477 A.2d at 802. The "orbits" to which the court refers are the suppression arguments developed over the past 20 years. As the court presented them, initially courts were concerned that a vindictive prosecutor might deliberately suppress evidence that might exculpate the defendant. This concern developed into the requirement that the prosecution voluntarily disclose such evidence to the defense. From this concern evolved the notion that police and not just prosecutors might suppress evidence. Later, the concept covered evidence negligently lost following the defendant's request for it and even more recently included evidence negligently lost prior to a request for its production. The outermost orbits, prior to *Tolen*, would allow exculpatory evidence to include evidence that would impeach a key state witness. *Id.* at 634-35, 477 A.2d at 802.

The defendants' argument that the indictment should be dismissed especially irritated the court. "Nowhere in the growing corpus of suppression cases, even where all of the criteria have been satisfied, is the dismissal of charges called for." *Id.* at 633, 477 A.2d at 802. The court expressed hope that future suppression claims will not be "as patently inappropriate as the one at bar." *Id.* at 634, 477 A.2d at 802.


282. *Id.* at 2530.

283. *Id.* at 2534-35. In *Trombetta*, the defendants argued that the failure of the police to preserve samples of their breath taken as part of a drunk driving test violated their rights to due process. *Id.* at 2531.

284. *Id.* at 2534.
7. Search and Seizure.—The United States Supreme Court in *Maryland v. Macon*\(^{285}\) held that a search does not occur for fourth amendment\(^{286}\) purposes when an undercover policeman enters an adult book store in search of obscene material.\(^{287}\) Nor does a seizure occur under the fourth amendment when the undercover officer purchases allegedly obscene material from an adult bookstore.\(^{288}\) Therefore, in either case, the police office need not obtain a warrant before searching for and purchasing the material for use in conjunction with an obscenity charge. The Court also held that an illegal arrest of the seller made after the confiscation of the material does not taint the evidence and require its exclusion at trial;\(^{289}\) the fruit of the poisonous tree doctrine\(^{290}\) does not apply to evidence legally acquired prior to an illegal arrest.\(^{291}\) The Court appeared to have little trouble applying the basic requirements of the fourth amendment despite the fact that first amendment freedom of speech issues were necessarily involved.\(^{292}\)

The defendant in *Macon* was a clerk in an adult bookstore. An undercover police officer entered the store, browsed for awhile, and then purchased two magazines from Macon with a marked fifty dollar bill. A short time after the purchase, Macon was arrested and charged with distribution of obscene material.\(^{293}\) A jury convicted Macon, but the Maryland Court of Special Appeals reversed because the officer's purchase of the magazines was an unreasonable, con-


\(^{286}\) The fourth amendment, of course, protects against unreasonable searches and seizures and requires that no warrant be issued except upon a showing of probable cause. U.S. Const. amend. IV.

\(^{287}\) 105 S. Ct. at 2782.

\(^{288}\) Id.

\(^{289}\) Id. at 2783.

\(^{290}\) The fruit of the poisonous tree doctrine, first advanced by the Supreme Court in *Wong Sun v. United States*, 371 U.S. 471 (1963), requires that any evidence obtained by means of an unreasonable search and seizure must be excluded from evidence at trial. *Id.* at 487-88. See supra notes 250-251 and accompanying text.

\(^{291}\) 105 S. Ct. at 2783.

\(^{292}\) Justice Brennan did have trouble with the interplay between the first and fourth amendments, as noted in his dissent. *Id.* at 2783-86 (Brennan, J., dissenting).

\(^{293}\) *Id.* at 2780. The undercover officer left the bookstore immediately after he purchased the magazines. He conferred with other officers outside the store, and they determined that the material was obscene and thus, violated Md. Ann. Code art. 27, § 418 (1982). The officers applied criteria in making their determination that they had previously used in warrant applications. The officers entered the store, arrested Macon, allowed him to close the store, and retrieved the marked fifty dollar bill. The officers, however, failed to return the change received from the purchase of the magazines. 105 S. Ct. at 2780.
structive seizure within the meaning of the fourth amendment. The proper remedy in this situation, according to the court, was the exclusion of the magazines from evidence at trial and dismissal of the charges.

The Supreme Court granted certiorari "to resolve a conflict among the state courts on whether a purchase of allegedly obscene material by an undercover police officer constitutes a seizure under the Fourth Amendment." The Court acknowledged that the fourth amendment would have to be applied with "scrupulous exactitude" if the magazines were protected material under the first amendment. Although the Court concluded that the first amendment did protect the allegedly obscene magazines, the fourth amendment's exclusionary rule did not apply, because an undercover police officer's purchase of the magazines could not properly be classified as a seizure.

The Supreme Court's distinction necessarily turned on its definitions of search and seizure. No search occurred because Macon v. State, 57 Md. App. 705, 716, 719, 471 A.2d 1090, 1096, 1097, cert. denied, 300 Md. 795, 481 A.2d 240 (1984). Alternatively, the Court of Special Appeals held that Macon's illegal arrest required the exclusion of the magazines from evidence. Id. at 719, 471 A.2d at 1097. Therefore, the court ordered the charges dismissed; without the magazines, the State had insufficient evidence to support the conviction. Id. The court noted that a warrant was required both to seize the allegedly obscene material and to arrest the seller in order to provide a procedural safeguard for the first amendment freedom of expression. Id. at 710, 471 A.2d at 1092.

The Maryland courts have taken a minority position in this regard. Most state courts view a purchase by undercover police officers as something other than a seizure, regardless of whether the purchase money was retrieved. Id. at 2781. Brennan, in dissent, would have overturned the conviction on the grounds that the Maryland statute was "unconstitutionally overbroad and therefore facially invalid in its entirety." Id. at 2784 (Brennan, J., dissenting).

"A search occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'" 105 S. Ct. at 2782 (quoting United States v. Jacobsen, 104 S. Ct. 1652, 1656 (1984)).

"A seizure occurs when 'there is some meaningful interference with an individ-

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296. 105 S. Ct. at 2780. The Maryland courts have taken a minority position in this regard. Most state courts view a purchase by undercover police officers as something other than a seizure, regardless of whether the purchase money was retrieved. Id. at 2781. Brennan, in dissent, would have overturned the conviction on the grounds that the Maryland statute was "unconstitutionally overbroad and therefore facially invalid in its entirety." Id. at 2784 (Brennan, J., dissenting).

297. Id. at 2781.

298. Id. at 2783. "The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials, does not come into play in [Macon], and the purchase is analogous to purchases of other unlawful substances previously found not to violate the Fourth Amendment." Id. See, e.g., Lewis v. United States, 385 U.S. 206, 210 (1966) (purchase of narcotics). The dissent, on the other hand, argued that material protected under the first amendment can only be seized pursuant to a warrant issued by a neutral and detached magistrate. "'Without the authority of a constitutionally sufficient warrant, [seizure] is plainly a form of prior restraint and is, in those circumstances, unreasonable under the Fourth Amendment standards.'" 105 S. Ct. at 2784 (Brennan, J., dissenting) (quoting Roaden v. Kentucky, 413 U.S. 496, 504 (1973)).

299. "A search occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'" 105 S. Ct. at 2782 (quoting United States v. Jacobsen, 104 S. Ct. 1652, 1656 (1984)).

300. "A seizure occurs when 'there is some meaningful interference with an individ-
con did not have a reasonable expectation of privacy given the public nature of his bookstore. Therefore, the Court concluded that the police officer's examination of the magazines did not constitute a search within the meaning of the fourth amendment. Similarly, no seizure occurred; Macon transferred whatever possessory interest that he may have had in the magazines when he sold them to the undercover police officer.

Macon argued that the "bona fide nature of the purchase evaporated" after the officers arrested him because they retrieved the marked fifty dollar bill, but failed to return the change. Macon also argued that a subjective inquiry into the undercover officer's intentions at the time of purchase was the proper test for determining whether the purchase was actually a warrantless seizure. The Supreme Court rejected both arguments. "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time'..." Therefore, the Court concluded that no seizure had occurred.

Finally, the Supreme Court addressed the effect that Macon's arguably illegal arrest should have on the admissibility of the evidence. The Court held that the fourth amendment's exclusionary rule did not reach backward to taint the magazines as the fruit of an illegal arrest. The police had custody of the magazines prior to

301. Id. See Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, . . . is not a subject of Fourth Amendment Protection.").

302. 105 S. Ct. at 2782. After the seller accepted the officer's money in exchange for the magazines, "whatever possessory interest the seller had was in the funds, not the magazines." Id.

303. Id. at 2783.

304. Id.

305. Id.

306. Id. The Court added that, if a seizure had occurred, the proper remedy would have been the exclusion of the marked fifty dollar bill and not the magazines. Id. This exclusion would not have hurt the State's case because the fifty dollar bill was never introduced into evidence at trial. Id. at 2780. Justice Brennan argued that the purchase was a seizure and that the Court, by its decision, had given the authorities a free hand to harass "those who sell books and magazines that do not conform to the majority's dictates of taste." Id. at 2785 (Brennan, J., dissenting). Brennan added that the products of a warrantless seizure of material protected under the first amendment should be excluded from evidence at trial to prevent the police from restraining a person's exercise of first amendment rights contrary to the teachings of Roaden v. Kentucky, 413 U.S. 496 (1973). 105 S. Ct. at 2785 (Brennan, J., dissenting).

307. 105 S. Ct. at 2783. The Court expressly declined to address the legality of Macon's warrantless arrest and left "to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution
Macon's arrest; thus, they were properly admitted into evidence at trial.\textsuperscript{308}

The Court noted that, "[a]lthough a police officer may not engage in a 'wholesale search and seizure' in these circumstances, nothing in our cases renders invalid under the Fourth Amendment or the First Amendment the purchase as here by the police of a few of a large number of magazines and other materials offered for sale."\textsuperscript{309} The Court, however, failed to give law enforcement agencies adequate guidance on the line between a "few" and "wholesale." This omission should not cause problems in Maryland: The purchase of one obscene magazine is sufficient to sustain a conviction for distribution of obscene material in violation of the Maryland statute.\textsuperscript{310}

8. Death Penalty.—In Trimble v. State,\textsuperscript{311} the Court of Appeals held that neither the eighth amendment\textsuperscript{312} nor the Maryland Declaration of Rights\textsuperscript{313} prohibits the imposition of the death penalty upon a person who committed a capital offense before the age of majority.\textsuperscript{314} While the state and federal constitutions do not bar the execution of a juvenile offender, the court held that any inquiry into its propriety must proceed on an individualized case-by-case ba-

\textsuperscript{308} Id. at 2783. Justice Brennan argued that the Court had used precedents only applicable to ordinary cases to hold "that the illegality of an arrest in itself will not suffice to prevent the introduction of evidence lawfully obtained prior to the arrest, or to invalidate a conviction . . . ." Id. at 2785 (Brennan, J., dissenting) (citations omitted). "When First Amendment values are at stake mechanical application of these precedents is inappropriate." Id. at 2786 (Brennan, J., dissenting).

\textsuperscript{309} Id. at 2783 (citation omitted).

\textsuperscript{310} Under Md. Ann. Code art. 27, § 418 (1982), offering for sale any obscene matter triggers liability under the statute.

\textsuperscript{311} 301 Md. at 428, 435, 478 A.2d at 1164, 1168.

\textsuperscript{312} The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Trimble contended that the imposition of the death penalty upon a person who had committed a capital offense before his eighteenth birthday is per se cruel and unusual. 300 Md. at 428, 478 A.2d at 1143 (1984), cert. denied, 105 S. Ct. 1231 (1985).

\textsuperscript{313} Two articles of the Maryland Declaration of Rights track the language of the eighth amendment. Md. Const. Decl. of Rts. art. 16 provides "[t]hat sanguinary Laws ought to be avoided as far as it is consistent with the safety of the State; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter." Id. art. 25 provides "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law."
With this decision, the Court of Appeals joined the courts of several other states that have, at least in dicta, expressed a similar view. The Trimble opinion is particularly noteworthy because it provides a more complete survey of the death penalty as it relates to juveniles than any other court had previously undertaken, despite its narrow holding.

On July 3, 1981, Trimble and four friends were cruising in a van, drinking and using drugs. In the parking lot of a local tavern they picked up two women—Melanie Rae Newsom and Nila Kay Rogers. Shortly thereafter, inside the van, Trimble tried to kiss Newsom. When she resisted, he tore off her clothes and began to sexually assault her. His friends soon joined him, each taking turns raping and assaulting the two victims. When one of the young men—Anthony Kordell—attempted to drag Rogers from the van, Trimble seized a baseball bat and struck her about the head. Despite Kordell's attempts to intercede, Trimble continued beating

315. Id. at 428, 478 A.2d at 1164. The Court of Appeals has since followed Trimble in Johnson v. State, 303 Md. 487, 495 A.2d 1 (1985), a case involving a convicted murderer seventeen years, ten months of age.


The Supreme Court expressly reserved judgment on this issue in Eddings v. Oklahoma, 455 U.S. 104, 110 n.5 (1982). Eddings, a psychologically disturbed sixteen year old, had been convicted and sentenced to death for the slaying of an Oklahoma police officer. The Supreme Court granted certiorari, 450 U.S. 1040 (1981), expressly to consider the constitutionality of the death penalty as applied to juvenile offenders. 49 U.S.L.W. 3775 (1981). Although the Court reversed the conviction, it avoided the issue that it had granted certiorari to decide. Instead, it held that the trial court had erred in refusing to consider as a mitigating factor Eddings' history of beatings at the hands of his father. 455 U.S. at 113.

317. None of the state courts that had previously considered the issue of the constitutionality of the death sentence as applied to juvenile offenders engaged in more than cursory analysis. See Valencia, 124 Ariz. at 141, 602 P.2d at 809; Ice, 667 S.W.2d at 680; Harris, 48 Ohio St. 2d at 358-59, 359 N.E.2d at 71-72; Eddings, 616 P.2d at 1166-67. The Court of Appeals, however, conducted a thorough study of federal eighth amendment jurisprudence in order to discern and apply the methodology that the United States Supreme Court might apply were it to confront this issue. See 300 Md. at 417-421, 478 A.2d at 1158-1160.

318. After the court's complete survey of juvenile death penalty cases, the court expressly limited its holding to the facts in Trimble. 300 Md. at 428, 478 A.2d at 1164.
her. He then dragged Rogers' body into a cornfield beside the road and slit her throat.\(^{319}\)

On the date of the crime, Trimble was four months shy of his eighteenth birthday.\(^{320}\) He had a "below normal, full scale I.Q. of 64."\(^{321}\) His sole defense was insanity.\(^ {322}\) A jury convicted Trimble of first degree murder, first degree rape, two counts of first degree sexual assault, two counts of kidnapping, and one count of assault.\(^{323}\) After Trimble chose to be sentenced by the court, the trial judge imposed the death penalty, three life sentences, and an additional sentence of seventy years.\(^{324}\)

Of the eight hundred persons now awaiting execution in the

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\(^{319}\) Id. at 393-94, 478 A.2d at 1146. Ms. Rogers was a school friend of one of Trimble's companions, James Hanna. It was upon Hanna's invitation that the young woman entered the van. After attempting unsuccessfully to resist Trimble, the women persuaded the men to stop the van. Trimble's acquaintance James Hanna took Newsom to a nearby corn field where he tried unsuccessfully to have sexual intercourse with her. Rogers was left to fend for herself against the other three men. Id. at 393, 478 A.2d at 1146. According to the court, Trimble "slit [Rogers'] throat from ear to ear to make certain of her death." Id. at 430, 478 A.2d at 1165. The cause of her death, however, was listed as severe head injuries resulting from blows from a blunt object. Id. at 394, 478 A.2d at 1146.

\(^{320}\) Id. at 428, 478 A.2d at 1164.

\(^{321}\) Id. at 395, 478 A.2d at 1147.

\(^{322}\) Id. at 394, 478 A.2d at 1146. The State's experts acknowledged that Trimble had a low I.Q., an antisocial personality and a history of mixed substance abuse. Nonetheless, in their opinion, Trimble was legally competent. They testified "'to a reasonable degree of medical probablity' " that Trimble did not lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Id. at 394-395, 478 A.2d at 1146-1147; see Md. Health-Gen. Code Ann. § 12-108(a) (Supp. 1985).

Trimble's psychiatric expert was the sole defense witness. He testified "'to a reasonable degree of medical certainty' " that the defendant suffered from a number of psychological disorders, including mental retardation. He was able to state only that there was a "'reasonable possibility,' " however, that Trimble lacked substantial capacity to conform his conduct to the requirements of the law as a result of these disorders. 300 Md. at 395, 478 A.2d at 1147.

The Court of Appeals acknowledged that the trial court had erroneously instructed the jury that, under Maryland law, mental retardation does not absolve a defendant of criminal responsibility. 300 Md. at 396, 478 A.2d at 1147. Defense counsel failed to object at trial to this mistake, however, and the Court of Appeals refused to view the instructions as "'clear error," which would justify its review of the issue. Instead, the Court of Appeals found the erroneous instruction neither material to the defense nor fundamental to a fair trial. Id. at 399, 478 A.2d at 1149; see generally State v. Hutchinson, 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980) (court will intervene when error not preserved for review only in exceptional circumstances). Specifically, the court found that Trimble had not adduced sufficient evidence to generate a jury issue whether his mental retardation had rendered him legally insane. 300 Md. at 398-99, 478 A.2d at 1148-49.

\(^{323}\) 300 Md. at 393, 478 A.2d at 1146.

\(^{324}\) Id.
United States, only seventeen committed a capital offense before their eighteenth birthday.\textsuperscript{325} Before Trimble, only four state courts had determined the constitutionality of executing juvenile offenders: Kentucky,\textsuperscript{326} Oklahoma,\textsuperscript{327} Arizona,\textsuperscript{328} and Ohio.\textsuperscript{329} Although the Court of Appeals indicated that these decisions supported its conclusion,\textsuperscript{330} further study suggests that Maryland is the first state actually to send to Death Row a juvenile defendant who challenged

\textsuperscript{325} Id. at 422, 478 A.2d at 1161.
\textsuperscript{326} Ice v. Commonwealth, 667 S.W.2d 671 (Ky.), cert.denied, 105 S. Ct. 192 (1984). In Ice, the court saw no constitutional distinction between adults and juveniles, but it stressed that age "is an important factor" that "should be given serious consideration." \textit{Id.} at 680. This brief discussion proved unnecessary, however. The court reversed Ice's conviction because the trial court committed numerous prejudicial errors. \textit{Id.} at 675-677, 680.
\textsuperscript{327} Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd sub nom. Eddings v. Oklahoma, 455 U.S. 104 (1982). In Eddings, the best known of the four prior cases, the Oklahoma Court of Criminal Appeals upheld the death sentence of a psychologically disturbed sixteen-year-old youth. The Supreme Court reversed on the ground that the "sentence was imposed without the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." 455 U.S. at 105 (quoting Lockett v. Ohio, 438 U.S. 558, 606 (1978)). At the sentencing stage of Eddings' trial, the court had refused, as a matter of law, to consider the mitigating factor of Eddings' history of beatings at the hands of his father. \textit{Id.} at 109.

On remand, Eddings again received the death sentence. In the interim, however, the Oklahoma Court of Criminal Appeals had decided that an error by a judge at the sentencing stage of a capital trial requires automatic commutation of a death sentence to life imprisonment, Johnson v. State, 665 P.2d 815, 827 (Okla. Crim. App. 1983), and thus, modified Eddings' sentence, Eddings v. State, 688 P.2d 342, 344 (1984). One judge concurred specially in order to emphasize his concern regarding "'[t]he spectacle of our society seeking legal vengeance through execution of a child..." \textit{Id.} at 346 (Parks, J., concurring) (quoting Streib, \textit{Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen}, 36 OKLA. L. REV. 613, 637 (1983)).

\textsuperscript{328} State v. Valencia, 124 Ariz 139, 607 P.2d 807 (1979). In Valencia, the Arizona Supreme Court refused to hold the execution of a juvenile offender unconstitutional per se. \textit{Id.} at 141, 602 P.2d at 809. It reversed the defendant's conviction, however, because the trial judge committed prejudicial error by speaking with the victim's brother on the day before sentencing. \textit{Id.} at 140, 602 P.2d at 808. On remand, the death sentence was reimposed, but the Arizona Supreme Court modified that sentence to life imprisonment. The Arizona Supreme Court found the fact that Valencia was sixteen years old on the date of the offense was a factor "sufficiently substantial" to warrant this modification. Valencia v. State, 132 Ariz. 248, 250-51, 645 P.2d 239, 241-42 (1982).

\textsuperscript{329} State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976), vacated, 438 U.S. 911 (1978). In Harris, the Ohio Supreme Court summarily rejected the defendant's argument that uncontrolled discretion in the hands of the juvenile court judge rendered the proceedings unconstitutional. \textit{Id.} at 358-59, 359 N.E.2d at 72. After the United States Supreme Court vacated Harris' death sentence, however, no further reported decision appears. Harris ultimately received a lesser sentence because he is neither on death row nor has he been executed. \textit{See N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A.} (1985).

\textsuperscript{330} 300 Md. at 420, 478 A.2d at 1160.
the constitutionality of the sentence.\textsuperscript{331}

The Court of Appeals first reviewed pertinent Supreme Court decisions. It began by noting that \textit{Furman v. Georgia}, \textsuperscript{332} the landmark case in which the Supreme Court invalidated every state death penalty statute then in existence, \textsuperscript{333} provided no cohesive analytical framework.\textsuperscript{334} In \textit{Gregg v. Georgia}, \textsuperscript{335} however, the Court of Appeals discerned the beginning of a general analysis of eighth amendment issues.\textsuperscript{336} Drawing from \textit{Gregg}, the court noted that the eighth

\textsuperscript{331} See \textit{supra} notes 326-329.

\textsuperscript{332} 408 U.S. 238 (1972) (per curiam).

\textsuperscript{333} See \textit{id.} at 465 (Rehnquist, J., dissenting); \textit{N.Y. Times}, June 30, 1972, at A1, col. 8.

The immediate effect of \textit{Furman} was to vacate the death sentences of the several petitioners. It also had a far-reaching effect on the methods of sentencing capital defendants. Prior to \textit{Furman}, the states delegated to capital juries the discretion to impose the death penalty. \textit{See} 408 U.S. at 247 (Douglas, J., concurring). \textit{Furman} put an end to this tradition, but without holding that capital punishment itself was cruel and unusual. \textit{See id.} at 306 (Stewart, J., concurring); \textit{id.} at 310-11 (White, J., concurring).

Three of the five justices in the \textit{Furman} majority believed that the practice of vesting excessive discretion in capital juries had permitted state courts to impose the death sentence in a racially and economically discriminatory, \textit{id.} at 255-56 (Douglas, J., concurring), random and capricious, \textit{id.} at 309-10 (Stewart, J., concurring), or inconsistent, \textit{id.} at 313 (White, J., concurring), manner. These conclusions rendered capital punishment, as then administered, cruel and unusual, but not per se cruel and unusual. \textit{See id.} at 256 (Douglas, J., concurring); \textit{id.} at 309-10 (Stewart, J., concurring); \textit{id.} at 313 (White, J., concurring). Therefore, states could reinstitute capital punishment either by providing clearer standards to limit the discretion of juries or by enacting mandatory sentencing schemes to eliminate entirely the element of discretion. \textit{N.Y. Times}, June 30, 1972, at A1, col. 8; \textit{accord} \textit{Gregg v. Georgia}, 428 U.S. 153, 180 (1976) (plurality opinion).

\textsuperscript{334} See 300 Md. at 417-18, 478 A.2d at 1158. A five-member majority offered at least three separate rationales for striking the state laws at issue. Justice Douglas argued that the states had selectively imposed the death penalty against racial minorities and the economically disadvantaged. \textit{Furman}, 408 U.S. at 255-56 (Douglas, J., concurring). Justices Brennan and Marshall urged that the death penalty was unconstitutional under all circumstances. \textit{Id.} at 305 (Brennan, J., concurring); \textit{id.} at 358-59 (Marshall, J., concurring). But neither Justice Stewart nor Justice White felt it necessary to reach the ultimate question of the constitutionality of the death penalty. \textit{Id.} at 308 (Stewart, J., concurring); \textit{id.} at 310-11 (White, J., concurring). Instead, they expressed concern about the unpredictability of its application. \textit{Id.} at 309-10 (Stewart, J., concurring); \textit{id.} at 313 (White, J., concurring). For Justice Stewart this rendered the death penalty unconstitutional as applied. \textit{Id.} at 309-10 (Stewart, J., concurring). For Justice White, however, this unpredictability undermined the death penalty’s justification as a deterrent to violent crimes. \textit{Id.} at 313 (White, J., concurring).

The dissenters, led by the Chief Justice, presented a more unified front. They contended that neither the text of the Constitution itself nor the judicial gloss applied to it indicated that capital punishment was cruel or unusual. \textit{See id.} at 380-82 (Burger, C.J., dissenting). They further excoriated the majority for impermissibly substituting their personal views on capital punishment for the views of the democratically elected state legislators who had enacted the statutes at issue. \textit{See, e.g., id.} at 376-77 (Burger, C.J., dissenting).

\textsuperscript{335} 428 U.S. 153 (1976) (plurality opinion).

\textsuperscript{336} 300 Md. at 418, 478 A.2d at 1159.
amendment must draw its meaning "'from evolving standards of decency that mark the progress of a maturing society.'" 337 Public perceptions regarding such standards are not conclusive.338 If, in the opinion of the court, the sentence is excessive, then it is unconstitutional.339 This "flexible, dynamic" approach340 embodies a two-fold analysis: "A punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."341

Proceeding first with the proportionality inquiry, the Court of Appeals asked whether evolving standards of decency have led society to reject imposition of the death penalty upon juvenile offenders.342 Following the Supreme Court's analysis, the court cited several sources that have guided this inquiry: "state death-penalty legislation, jury verdicts in death-penalty cases, executive commutations, and scholarly and international views."343

The court placed great weight on the General Assembly's decision not to bar the execution of juveniles.344 "This legislative judgment, like all others in our limited exercise of judicial review, not only is entitled to a presumption of validity, but is persuasive evidence that at least this segment of society has not rejected capital punishment of juveniles."345 The court also stressed that twenty-

337. 300 Md. at 418, 478 A.2d at 1159 (quoting Gregg, 428 U.S. at 173 (citation omitted) (plurality opinion)).
338. Id. at 419, 478 A.2d at 1159.
339. Id.
340. The court used the terms "flexible" and "dynamic" in Trimble to describe the Supreme Court's approach in Gregg. 300 Md. at 418, 478 A.2d at 1159. The Court developed this approach further in Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion).
341. Coker, 433 U.S. at 592. In Trimble, the Court of Appeals expressed its task in these words: "First, we must ascertain, using objective indicia to the extent possible, society's 'evolving standards of decency' with respect to capital punishment of juveniles. Second, we must then satisfy ourselves that capital punishment of juveniles does in fact serve a penological purpose and is not excessive in this instance." 300 Md. at 420-21, 478 A.2d at 1160.
342. 300 Md. at 421, 478 A.2d at 1160.
343. Id. at 420, 478 A.2d at 1159.
344. See id. at 421, 478 A.2d at 1160. Md. ANN. CODE art. 27, § 412(b) (1982) provides that the punishment for first degree murder may be the death penalty. Md. CTS. & JUD. PROC. CODE ANN. § 3-804(c)(1) (Supp. 1985) divests the juvenile court of jurisdiction when a child 14 years of age or older is charged with a crime punishable by death if committed by an adult. Md. ANN. CODE art. 27, § 413(g)(5) (Supp. 1985) does require, however, that the sentencing court or jury consider, as a mitigating factor, "[t]he youthful age of the defendant at the time of the crime."
345. 300 Md. at 421, 478 A.2d at 1160.
nine of the fifty states — "an outright majority" — have enacted legislation permitting the execution of juveniles in some circumstances.\textsuperscript{346} A survey of jury verdicts, however, led to an ambiguous, and possibly conflicting, conclusion. "[O]nly seventeen . . . of approximately 800 total death row inmates . . . committed their offense while under age eighteen."\textsuperscript{347} The court conceded that jury verdicts may be more probative than a survey of legislative enactments; they should reflect the reactions of ordinary citizens when they are called upon to impose the death sentence.\textsuperscript{348} Nonetheless, the court discounted the reliability of this source, arguing that hidden variables—"prosecutorial discretion and the requirements of various state statutes"—distorted the statistics.\textsuperscript{349} International and scholarly opinion also seemed overwhelmingly opposed to the execution of juvenile offenders. Of the 117 nations that permit capital punishment, ninety-four have a minimum age of at least eighteen.\textsuperscript{350} Furthermore, two major international conventions and the Model Penal Code oppose capital punishment for juvenile offenders.\textsuperscript{351}

Despite these indices, the court was "unable to conclude that society's contemporary standards of decency have rejected capital punishment of juveniles."\textsuperscript{352} With only a cursory explanation of its rationale, it declared the legislative judgment to be "the most probative evidence of societal standards"\textsuperscript{353} and apparently did not attempt to weigh the conflicting indices against one another.\textsuperscript{354} Instead, the court asserted that

we must not lose sight of the purpose of this limited inquiry in the context of judicial review of a statute: we are to determine only whether society has rejected capital pun-

\begin{itemize}
  \item \textsuperscript{346} Id. at 421-22, 478 A.2d at 1160-61. The court did not explore these circumstances, but merely listed the states that permit the execution of juveniles. Id. at 421 n.23, 478 A.2d at 1160 n.23.
  \item \textsuperscript{347} Id. at 422, 478 A.2d at 1161 (footnote omitted).
  \item \textsuperscript{348} Id.
  \item \textsuperscript{350} 300 Md. at 423, 478 A.2d at 1161. An additional sixteen countries either do not have a minimum age or did not provide sufficient information to determine the minimum age. Patrick, The Status of Capital Punishment: A World Perspective, 56 J. CRIM L., CRIMINOLOGY & POL. SCI. 397, 398-404 (1965).
  \item \textsuperscript{351} 300 Md. at 423, 478 A.2d at 1161. The International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the American Law Institute's Model Penal Code all advocate abolishing the death penalty for juvenile offenders. Id.
  \item \textsuperscript{352} Id.
  \item \textsuperscript{353} Id.
  \item \textsuperscript{354} Id.
\end{itemize}
ishment of juveniles, not whether society should reject it, nor whether society eventually will reject it, nor whether were we legislators rather than judges [we] would reject it.355

The court then moved to the second inquiry under the "flexible, dynamic" approach: Would the punishment of this defendant for this crime make any "measurable contribution to acceptable goals of punishment"—retribution and deterrence.356 The court found that retribution, although unappealing, is "'essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.' '"357 It is a manifestation of "'society's moral outrage at particularly offensive conduct.' "358 As such, this instinct compels the conclusion that for the most heinous offenses, "'the only adequate response may be the penalty of death.' "359

The court also concluded that the death penalty "measurably contributes to society's interest in deterrence."360 The court found that Trimble's age did not diminish his culpability; thus, imposing the death sentence in his case would "send a message to others contemplating similar acts that society will respond harshly to their actions."361

In Trimble's case, the court concluded, the imposition of the death penalty would serve society's interests in both retribution and deterrence.362 It admitted that the defendant's age was not irrelevant in estimating the degree of moral outrage that his crime would invoke.363 But in gauging society's reaction, it evidently considered age important only as a measure of the defendant's prospects for rehabilitation.364 Because rehabilitation was unlikely, "the one factor that could temper society's justifiable moral outrage was notice-

355. Id.
356. Id. at 424, 478 A.2d at 1162.
357. Id. at 425, 489 A.2d at 1162 (quoting Gregg, 428 U.S. at 183).
358. Id. (quoting Gregg, 428 U.S. at 183).
359. Id. (quoting Gregg, 428 U.S. at 183).
360. Id. at 427-28, 478 A.2d at 1163-64.
361. Id. at 428, 478 A.2d at 1164.
362. Id.
363. Id. at 426, 478 A.2d at 1163.
364. See id. at 427, 478 A.2d at 1163. According to the court, the juvenile justice system reflects society's diminished moral outrage at the commission of crimes by young adults. Recognizing the defendant's youth, this alternate system emphasizes the "benign" goal of rehabilitation, rather than the more severe goals of punishment or retribution. Id. at 426-27, 478 A.2d at 1163. Nonetheless, the court acknowledged that "a particularly heinous act can take the juvenile outside of the protective umbrella of the juvenile system." Id. at 427, 478 A.2d at 1163.
ably absent." 365 Furthermore, in the court's judgment, the death penalty could be an effective deterrent, both for this crime and for this class of criminal: "seventeen year old youths can be deterred from committing brutal rape murders..." 366 The court found in Trimble's case that capital punishment was neither a "purposeless and needless imposition of pain and suffering" nor "grossly out of proportion to the severity of the crime." 367 Therefore, neither the federal 368 nor the state constitution 369 prohibited it. The court made clear, however, that its ruling had a limited scope: "We do not hold that the death penalty is constitutionally permissible as applied to all juveniles, nor do we hold that any particular chronological age serves as a bright line under which the death penalty may not be imposed." 370 Hence, Maryland courts may not summarily refuse to impose the death sentence upon persons who commit capital offenses before their eighteenth birthday; 371 each decision of this sort must turn on the facts of the particular case. 372

9. Speedy Trial.—After a flurry of speedy trial cases in 1984, 373 the Maryland appellate courts addressed only one noteworthy case in 1985. *Lee v. State* 374 presented two issues: First, does an intrastate detainer 375 filed prior to the filing of the first of two indict-

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365. *Id.* at 427, 478 A.2d at 1163.
366. *Id.* at 428, 478 A.2d at 1164.
367. *Id.* (quoting *Coker*, 433 U.S. at 592).
368. *Id.*
369. *Id.* at 435, 478 A.2d at 1168. The court reached this conclusion after rejecting the defendant's claim that the imposition of the death penalty would be inconsistent with the penalties previously imposed in Maryland for other rape-murders. *Id.* at 429-35, 478 A.2d at 1164-68.
370. *Id.* at 428, 478 A.2d at 1164.
371. See *id.*
372. *Id.*
373. In 1984, the Maryland Court of Appeals granted certiorari in eighteen speedy trial cases. Fifteen of these cases are discussed in *Survey of Developments in Maryland Law 1983-84—Criminal Law*, 44 MD. L. REV. 439, 461-78 (1985).
375. An intrastate detainer is a notice sent to the Division of Corrections that an untried indictment against a prisoner is pending elsewhere in the State. The receipt of such notice entitles the prisoner to request final disposition of the pending charge within 120 days after the receipt of the detainer notice. *Md. Ann. Code* art. 27, § 616S (1982) describes the exact procedure and rules covering intrastate detainers.

The express policy underlying Maryland's Intrastate Detainers Act is "to encourage the expeditious and orderly disposition of these [untried] charges and determination of the proper status of any and all detainers based upon untried indictments, informations, warrants, or complaints." *Id.* § 616S(a). It is thought that detainers for untried charges "may result in 'undue and oppressive incarceration.'" *State v. Barnes*, 273 Md. 195, 205, 328 A.2d 737, 743 (1974). Specifically, a prisoner subject to a detainer may not qualify for parole, work release programs or institutional opportunities for rehabilita-
ments for the same offense trigger the speedy trial clock?\footnote{376} If so, does the dismissal of the first indictment toll the clock?\footnote{377} To answer these questions, the Court of Special Appeals had to decide whether a detainer, in certain cases, might serve as an exception to the general rule that a dismissal of the indictment stops the speedy trial clock altogether.\footnote{378} Based on the facts in \textit{Lee}, the court held that a detainer did trigger the speedy trial clock and that the dismissal of the first indictment did not in any way toll the running of the clock.\footnote{379}

In \textit{Lee}, the defendant was already in jail on unrelated charges when the State filed a detainer concerning a forgery and uttering charge with the Division of Corrections on June 11, 1982.\footnote{380} The defendant, on August 31, 1982, in accordance with his rights under the Intrastate Detainers Act\footnote{381} filed for a final disposition on the intrastate detainer.\footnote{382} The State failed to take any action on the disposition request. The court dismissed the indictment without prejudice on March 8, 1983, the day of defendant's scheduled trial, because the State failed to comply with the Intrastate Detainers Act. Two days later, on March 10, 1983, the State reindicted the defendant on the same charges. The trial was set for April 11, 1983, but two continuances delayed it until December 12, 1983. The defendant was convicted by a jury of forgery and uttering. \textit{Lee} appealed the conviction on the ground that his sixth amendment right to a

\footnote{376. 61 Md. App. at 170, 485 A.2d at 1015.} \footnote{377. \textit{Id.} at 172, 485 A.2d at 1016.} \footnote{378. \textit{See id.} at 173-75, 485 A.2d at 1016-17. In United States v. McDonald, 456 U.S. 1 (1982), the Supreme Court held that the dismissal of an indictment at the prosecution's request, when the prosecution has acted in good faith in requesting the dismissal, permanently tolls the running of the speedy trial clock as to the first indictment. \textit{Id.} at 7. Maryland has adopted the same rule for the nol prossing of charges by the State. Curley v. State, 299 Md. 449, 462, 474 A.2d 502, 508 (1984). Both the federal and state constitutions give criminal defendants the right to a speedy trial. \textit{U.S. Const. amend VI; Md. Const. Decl. of Rts. art. 21. The Court of Appeals has construed these rights as analogous. \textit{See State v. Gee, 298 Md. 565, 568 n.1, 471 A.2d 712, 713 n.1 (1984). Maryland has implemented the speedy trial right by statute, Md. \textit{Ann. Code} art. 27, § 591 (Supp. 1985), and rule, Md. R.P. 4-271.}} \footnote{379. 61 Md. App. at 172-73, 485 A.2d at 1016.} \footnote{380. \textit{Id.} at 171, 485 A.2d at 1015.} \footnote{381. Md. \textit{Ann. Code} art. 27, § 616S (1982).} \footnote{382. 61 Md. App. at 171, 485 A.2d at 1015. Under the Intrastate Detainers Act, Md. \textit{Ann. Code} art. 27, § 616S (1982), the defendant should have been brought to trial, barring a continuance, within 120 days of June 11, 1982 or no later than October 9, 1982. \textit{Id.} § 616S(b).}
speedy trial had been violated.\(^{383}\)

In Barker v. Wingo,\(^{384}\) the Supreme Court established a four-pronged balancing test to determine whether a delay violates a defendant’s speedy trial right. In each case, the court must weigh four factors: (1) whether the length of the delay was of constitutional dimension; (2) what caused the delay; (3) whether and when the defendant asserted the right to a speedy trial; and (4) whether the delay prejudiced the defendant.\(^{385}\)

Establishing whether the delay was of constitutional dimension proved to be the court’s most difficult task. If the dismissal of the first indictment permanently tolled the running of the clock, the defendant would not have been deprived of his sixth amendment right to a speedy trial. If the dismissal of the first indictment did not toll the clock, however, the defendant’s conviction would have to be reversed.\(^{386}\)

The court first determined that the dismissal of the first indictment did not toll the speedy trial clock.\(^{387}\) Key to the court’s analysis was the presence or absence of good faith in the dismissal of the first indictment.\(^{388}\) As mandated by both the United States Supreme Court and the Maryland Court of Appeals,\(^{389}\) the dismissal of indictments stops the running of the speedy trial clock only if the prosecution takes such action in good faith.\(^{390}\) The action cannot circumvent in purpose or effect the defendant’s right to a speedy trial. In Lee, the court found that the State had not acted in good faith.\(^{391}\) "The negligent misplacing of appellant’s request for disposition which caused dismissal of the indictment, although not

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\(^{383}\) 61 Md. App. at 171-72, 485 A.2d at 1015. The State misplaced the disposition request altogether. Id. at 171, 485 A.2d at 1015. The time between the date of the detainer and the scheduled April 11, 1983 trial date was exactly 11 months; the time between the date of the original indictment and the scheduled trial date was approximately eight months. Eighteen months elapsed between the date of the detainer and the actual trial date; sixteen months elapsed between the original indictment and the actual trial date. See id.


\(^{385}\) Id. at 530.

\(^{386}\) See 61 Md. App. at 172-73, 485 A.2d at 1015-16. No exact formula determines what constitutes a delay of constitutional dimension. Rather, Maryland courts look to other cases which have found such a delay and compare the period of time to the period of time in issue. See, e.g., Smith v. State, 276 Md. 521, 528, 350 A.2d 628, 633 (1976).

\(^{387}\) 61 Md. App. at 177, 485 A.2d at 1018.

\(^{388}\) Id. at 174, 485 A.2d at 1016.

\(^{389}\) See supra note 378.

\(^{389}\) 61 Md. App. at 177, 174-75, 485 A.2d at 1016, 1016-17.

\(^{390}\) Id. at 174, 485 A.2d at 1017.

\(^{391}\) Id. at 177, 485 A.2d at 1018.
amounting to bad faith, is simply not the same as a good faith dismissal. . . ." 393 The court noted that the State, by virtue of the Intrastate Detainer Act, had a duty to bring the case to trial promptly. "Neglect of that duty is to perpetuate rather than obviate the mischief that the Intrastate Detainer Act sought to remedy." 394 Therefore, the court looked to the period of the first indictment, not the second, to determine when the speedy trial clock began. 395

The court then determined that the date on which the detainer was filed triggered the clock. 396 According to the court, "[i]t was at this time that appellant was actually restrained as if arrested. . . . [T]he restraints the detainer placed upon appellant's liberty were sufficient to satisfy the requirements of 'a formal indictment or information or . . . [t]he actual restraints imposed by arrest,' all of which activate the speedy trial clock." 397

After thus satisfying the threshold requirement that the delay be of constitutional dimension, the court had no trouble finding that the other three requirements of the Barker balancing test had been satisfied as well. The court found that the State was responsible for nine of the eighteen-month delay between the date of the detainer and the trial date. 398 The balance of the delay was either caused by the defendant or was considered neutral. 399 Thus, the court found that the prosecutorial indifference that led to the initial nine-month delay weighed heavily against the State. 400 The court also found that Lee had asserted his right to a speedy trial twice. 401 Finally, the court found that Lee had been prejudiced by the delay: during the intervening eighteen months, he was refused a parole hearing due to the detainer and therefore, was possibly subject to a longer pretrial incarceration period. 402 Overall, the court found that the factors weighed heavily in Lee's favor, particularly in view of society's interest in promoting a speedy trial as well as the extreme prosecu-

393. Id.
394. Id.
395. Id.
396. Id. at 178, 485 A.2d at 1018.
397. Id. at 177-78, 485 A.2d at 1018 (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).
398. Id. at 180, 485 A.2d at 1019.
399. Id., 485 A.2d at 1019-20.
400. Id. at 182-83, 485 A.2d at 1020-21. Specifically, the court charged the State with the nine-month delay between June 1982 and March 1983 because the State's failure to comply with the Intrastate Detainers Act necessitated the dismissal of the first indictment. Id. at 178-80, 485 A.2d at 1018-20.
401. Id. at 181, 485 A.2d at 1020. Lee filed motions to dismiss for lack of a speedy trial on June 24, 1983 and December 12, 1983. Id.
402. Id.
tional indifference shown by the State. Thus, the court reversed Lee's conviction.

B. Drinking And Driving

1. Sobriety Checkpoints.—Many states use police roadblocks (sobriety checkpoints) to enforce the laws against drinking and driving. The constitutionality of these checkpoints has become a major issue. State and lower federal courts have handed down conflicting decisions; the United States Supreme Court has not yet considered the issue. In Little v. State, Maryland joined the growing number of states that have found the use of sobriety checkpoints to be constitutional.

The appellants were stopped at a sobriety checkpoint operated as part of a pilot program. Comprehensive regulations controlled the establishment of checkpoints and the conduct of field officers. To ensure the safety of motorists, checkpoints were set up only where long stretches of road gave drivers sufficient warning to stop, as well as an opportunity to turn around before reaching the roadblock. At the roadblock, if the police had reason to believe that the motorist was intoxicated, the officer would motion the driver to the shoulder, ask for the driver's license and registration,

403. Id. at 182-83, 485 A.2d at 1020-21.
404. Id. at 183, 485 A.2d at 1021.
409. Id. at 489, 479 A.2d at 905-06.
410. Id. at 490-91, 479 A.2d at 905-06.
411. Id. at 490, 479 A.2d at 905.
and initiate field sobriety tests.\textsuperscript{412} The officer would then arrest the driver if sufficient evidence of intoxication existed.\textsuperscript{413}

In \textit{Little}, when the officers detected a strong odor of alcohol, they asked the appellants to pull over to the side of the road and perform several field sobriety tests.\textsuperscript{414} In each instance, the parties were arrested after performing poorly and charged with driving while intoxicated.\textsuperscript{415} At their trials, the appellants filed motions to suppress the evidence obtained as a result of the roadblock on the ground that their fourth amendment rights were violated.\textsuperscript{416} The trial court denied these motions and found the appellants guilty.\textsuperscript{417}

The Court of Appeals began its analysis by examining Supreme Court decisions discussing the application of the fourth amendment to other types of roadblocks.\textsuperscript{418} The fourth amendment "impose[s] a standard of 'reasonableness' upon the exercise of discretion by governmental officials in order 'to safeguard the privacy and security of individuals against arbitrary invasions. . . ."'\textsuperscript{419} In each case, constitutionality is determined by balancing the intrusion of the individual's fourth amendment rights against legitimate governmental interests.\textsuperscript{420}

The Supreme Court, applying these principles in \textit{United States v. Martinez-Fuerte},\textsuperscript{421} held that stops made without individualized suspicion at fixed border roadblocks did not violate the fourth amend-

\begin{itemize}
\item \textsuperscript{412} \textit{Id.} at 491, 479 A.2d at 906.
\item \textsuperscript{413} \textit{Id.}
\item \textsuperscript{414} \textit{Id.} at 492, 479 A.2d at 906. While the record does not reveal which field sobriety tests were required of the appellants, the tests usually include walking a straight line, touching the fingers to the nose, standing on one foot and reciting the alphabet. \textit{Id.} at 491 n.2, 479 A.2d at 906 n.2.
\item \textsuperscript{415} \textit{Id.} at 492, 479 A.2d at 906.
\item \textsuperscript{416} \textit{Id.}, 479 A.2d at 906-07.
\item \textsuperscript{417} \textit{Id.} at 492-93, 479 A.2d at 907. One appellant was found guilty of driving while intoxicated, the other of driving while under the influence of alcohol. \textit{Id.}
\item \textsuperscript{418} \textit{Id.} at 493-98, 479 A.2d at 907-09. The Court of Appeals considered the constitutionality of the roadblocks under both the fourth amendment to the federal constitution and Article 26 of the Maryland Declaration of Rights. Article 26 provides:
\begin{quote}
That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.
\end{quote}
\textit{MD. CONST. DECL. OF RTS.} art. 26. In \textit{Gahan v. State}, 290 Md. 310, 430 A.2d 49 (1981), the court stated that Article 26 is \textit{in pari materia} with the fourth amendment and decisions of the Supreme Court interpreting the fourth amendment are entitled to great respect. \textit{Little}, 300 Md. at 493 n. 3, 479 A.2d at 907 n.3.
\item \textsuperscript{419} \textit{Prouse}, 440 U.S. at 653-54 (footnote and citation omitted).
\item \textsuperscript{420} \textit{Id.} at 654.
\item \textsuperscript{421} 428 U.S. 543 (1976).
\end{itemize}
ment. The Court found that the government had a substantial interest in stemming the flow of illegal aliens, and that the subjective intrusion was much less than that involved in roving patrol stops held unconstitutional in United States v. Brignoni-Ponce. The Court noted that the fixed location of the roadblocks eliminated the element of surprise present in roving patrols and the regulations governing the fixed roadblocks limited the exercise of discretion by field officers and lessened the potential for abuse or harassment.

The Court of Appeals recognized that Martinez-Fuerte was restricted to fixed roadblocks. The court, however, found support for temporary roadblocks under certain conditions in two cases. In Delaware v. Prouse, the Supreme Court indicated that spot checks involving limited discretion on the part of the officers might be acceptable. In fact, the Court even suggested the alternative of “[q]uestioning . . . all oncoming traffic at roadblock-type stops.” In Brown v. Texas, the Court suggested that an alternative to a stop based on specific, objective facts is one “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”

The Court of Appeals next reviewed state court decisions. Some courts declared roadblocks unconstitutional when the state had not established procedures for setting up the roadblocks and limiting the exercise of discretion by field officers. A majority of state courts, however, have sustained the use of roadblocks, when regulated by a comprehensive plan developed by high-level

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422. Id. at 545.
423. Id. at 558.
426. Little, 300 Md. at 497-98, 479 A.2d at 909.
428. 440 U.S. at 663. In Prouse, the Court found unconstitutional the use of random license and registration checks without probable cause or articulated suspicion. The Court based this decision on two factors: First, the officers were unconstrained in their exercise of discretion, thus increasing the intrusive nature of the stop, and second, the State's interest could be more effectively served in other ways. Id. at 658-61. The intrusiveness of the stop, the Court concluded, outweighed the interest of the State. Id. at 659. See also United States v. Miller, 608 F.2d 1089 (5th Cir. 1979), cert. denied, 447 U.S. 926 (1980) (stating in dicta that Prouse permits temporary roadblocks).
429. 440 U.S. at 663.
431. Id. at 51.
officials.\textsuperscript{433} The court then applied the principles derived from these federal and state cases to Maryland’s checkpoint program.\textsuperscript{434} It found that the state had a compelling interest in controlling drunk driving, which the moderately effective checkpoint program advanced.\textsuperscript{435} Furthermore, the court determined that the intrusiveness of the stop was minimal because the carefully crafted, comprehensive regulations approved by high-level officials severely restricted the discretion of the field officers and thus reduced the risks of arbitrary

\textsuperscript{433} 300 Md. at 501-03, 479 A.2d at 911-12. The court discussed State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983), as illustrative of decisions upholding the constitutionality of sobriety checkpoints. 300 Md. at 501, 479 A.2d at 911. As a general rule, the use of checkpoints has been held constitutional when

(1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear or surprise is reduced by a display of legitimate police authority at the roadblock; and (4) vehicles are stopped on a systematic, nonrandom basis that shows drivers they are not being singled out for arbitrary reasons.

\textsuperscript{434} Id.

\textsuperscript{435} Id. at 504-05, 479 A.2d at 913. In finding a compelling interest, the court cited the high rate of alcohol-related automobile fatalities. According to the court, “[t]he magnitude of the problem created by intoxicated motorists cannot be exaggerated.” Id. at 504, 479 A.2d at 912.

In dissent, Judge Davidson argued that Prouse required a showing that the practice is an effective and necessary mechanism to promote public safety in order to justify the intrusion on fourth amendment rights. Id. at 513, 479 A.2d at 917 (Davidson, J., dissenting). She challenged the finding that the checkpoint program was even moderately effective and argued that the program was unnecessary because of the availability of effective alternatives. Id. at 513-17, 479 A.2d at 917-19. (Davidson, J., dissenting). See State v. Koppel, — N.H. —, 499 A.2d 977 (1985) (state must prove that roadblocks have substantially greater deterrent value than other enforcement methods).

The majority in Little was also impressed by evidence suggesting that the program had a substantial effect on the drunk driving problem as a whole. Such evidence included (1) that drunk individuals, out of fear of detection, asked someone sober to drive; (2) that taxi companies reported a considerable increase in business from intoxicated persons; and (3) that some groups chartered buses to transport revelers. 300 Md. at 505-06, 479 A.2d at 913.

Judge Davidson responded to the suggestion of substantial impact:

Nevertheless, there was absolutely no testimony concerning these police observations to indicate what if any portion of this modified behavior was attributable to the existence of the roadblock program rather than the improved traditional methods then simultaneously being employed. Under these circumstances I, unlike the majority, cannot conclude based on these police observations, that '[t]he prospect of being stopped at a roadblock thus convinced some individuals to find alternative means of transportation,' and, consequently, that 'the pilot program has a substantial impact on the drunk driving problem.'

\textsuperscript{Id. at 517-18, 479 A.2d at 919 (Davidson, J., dissenting).}
stops and police harassment.\textsuperscript{436} Although the temporary nature of the checkpoint did increase its intrusiveness, the court concluded that the state's interest outweighed the intrusion.\textsuperscript{437}

The appellants also argued that the checkpoint program violated Maryland's common law of arrest.\textsuperscript{438} The police can make warrantless arrests only if a misdemeanor has been committed in their presence or if they have probable cause to believe that the suspect has committed a felony.\textsuperscript{439} Thus, if a stop at a checkpoint constituted an arrest, the program might be invalid. The court found, however, that a formal arrest under Maryland common law does not occur when an officer approaches an individual and requests identification.\textsuperscript{440} Because the roadblocks are only investigatory in nature, limited in scope, and comparable to stops of individuals in public areas, checkpoint stops do not violate the Maryland common law of arrest.\textsuperscript{441}

2. \textit{Sobriety Tests-Right to Counsel.}-In Sites \textit{v. State},\textsuperscript{442} the Court of Appeals held that a person apprehended for drunk driving has a limited right to consult with counsel before deciding whether to

\begin{itemize}
\item \textsuperscript{436} \textit{Id.} at 506, 479 A.2d at 913-14. The regulations required the stopping of all vehicles and specified in detail the procedures to be used in operating the checkpoints. \textit{Id.}
\item \textsuperscript{437} \textit{Id.} at 507, 479 A.2d at 914. The court rejected as insignificant the fact that motorists could not learn the checkpoint location in advance since approaching drivers had notice of the roadblock and the opportunity to avoid it. \textit{Id.} at 506-07, 479 A.2d at 914. The court also dismissed the appellants' argument that the operation of the checkpoint program without a warrant was unlawful. \textit{Id.} at 508-09, 479 A.2d at 914-15. In United States \textit{v. Martinez-Fuerte}, 428 U.S. 543 (1976), the Supreme Court held that prior judicial authorization for a fixed roadblock was not necessary since the interests usually served by the warrant requirement were not advanced by its application to roadblocks. \textit{Id.} at 564-66. First, motorists are assured that field officers are acting within their power because of the visible manifestations of official authority. Second, the checkpoints are authorized by high-level officials; thus, there is no need to substitute the judgment of the magistrate for that of the officer. \textit{Id.} at 565-66.
\item \textsuperscript{438} 300 Md. at 509-11, 479 A.2d at 915-16.
\item \textsuperscript{439} \textit{Id.} at 509, 479 A.2d at 915.
\item \textsuperscript{440} \textit{Id.} at 510, 479 A.2d at 915.
\item \textsuperscript{441} \textit{Id.} The appellants also argued that the State Police were statutorily required to obtain a permit from the State Highway Administration before establishing a roadblock. \textit{Id.} at 511-12, 479 A.2d at 916-17. The statute provides in pertinent part: "Except as permitted by this section or in accordance with a permit obtained from the [State Highway] Administration, a person may not . . . [p]lace any structure on any State highway . . . or . . . [p]lace any obstruction on any State highway." \textsc{Md. Transp. Code Ann.} \textsection{8-646(a)}(1977). In response, the court determined that nothing in the statute was intended to interfere with State Police authority to display roadblocks to detect drunk drivers. 300 Md. at 512, 479 A.2d at 917.
\item \textsuperscript{442} 300 Md. 702, 481 A.2d 192 (1984).
\end{itemize}
submit to a chemical sobriety test. The appellant claimed a constitutional right to counsel under the sixth and fourteenth amendments and a statutory right to counsel based on section 16-205.1 of the Transportation Article and section 10-309 of the Courts and Judicial Proceedings Article. Although the court rejected the statutory and sixth amendment claims, it held that the fourteenth amendment and Article 24 of the Maryland Declaration of Rights require that a person detained for drunk driving be given, upon request, a reasonable opportunity to communicate with counsel, provided that the opportunity does not substantially interfere with the timely and efficacious administration of the sobriety test.

The fourteenth amendment’s due process clause has long been a source of a right to counsel independent of the sixth amendment. In Maryland, the right to counsel under this clause is broader than the guarantees under the sixth amendment. While the sixth amendment right to counsel attaches only at certain critical stages of the proceeding, due process requires access to counsel whenever the methods used to obtain a conviction would offend

443. Id. at 717, 481 A.2d at 200.
444. Id. at 709-12, 481 A.2d at 195-97.
445. Id. The sixth amendment right to counsel attaches only after formal initiation of adversarial proceedings. Kirby v. Illinois, 406 U.S. 682, 691 (1972). In Maryland, the formal charge initiates adversarial proceedings. Webster v. State, 299 Md. 581, 606, 474 A.2d 1305, 1318 (1984). Since the appellant was not charged until after he signed the consent form and took the sobriety test, he had no sixth amendment right to counsel before taking the test. Sites, 300 Md. at 712, 481 A.2d at 197. The court also noted that Article 21 of the Maryland Declaration of Rights only provides a right to counsel to the extent that the sixth amendment does. Id. n.3.

The court also refused to find a statutory right to counsel in unambiguous provisions that contained detailed requirements for performing chemical sobriety tests, but did not mention the right to confer with counsel prior to taking the test. Id. at 709-10, 481 A.2d at 195-96.
446. 300 Md. at 717-18, 481 A.2d at 200. A reviewing court, however, should show great deference to the police determination that denial of a request for counsel was reasonably necessary for the efficacious administration of the test. Id. at 718, 481 A.2d at 200. In Sites, the court found nothing in the record to show that the refusal to give the appellant an opportunity to consult with counsel violated his due process rights and consequently refused to order suppression of test results. Id. at 718-19, 481 A.2d at 200.
448. See Rutherford v. Rutherford, 296 Md. 347, 358, 464 A.2d 228, 234 (1983). The right to counsel under Article 21 of the Maryland Declaration of Rights is also narrower than that under the fourteenth amendment. See supra note 445.
449. See supra note 445.
fundamental fairness.\textsuperscript{450}

In Maryland, all drivers impliedly consent to take a chemical sobriety test upon request.\textsuperscript{451} The court recognized that this statute requires the driver to choose between potential sanctions, each of which affects vitally important interests.\textsuperscript{452} The temporary loss of a driver's license may be as burdensome, if not more, than a criminal conviction with its attendant fines or imprisonment.\textsuperscript{453} In fact, a driver's license, in certain circumstances, can only be revoked after affording the driver due process.\textsuperscript{454} Thus, the court held that a person detained for drunk driving must be given an opportunity to contact counsel before submitting to a chemical sobriety test as long as the timely and efficacious administration of the test is not substantially impaired.\textsuperscript{455}

Although the court attempted to give some guidelines, it recognized the impossibility of defining precisely what constitutes a reasonable delay that does not cause substantial interference.\textsuperscript{456} Since the statute requires that the test be administered no later than two hours after the driver's apprehension, the Court of Appeals determined that a reviewing court must show great deference to the police determination that a denial of a request for counsel was necessary for the timely administration of the test.\textsuperscript{457} This requirement for deference obviously reduces the significance of the right to consult with counsel prior to taking a sobriety test.\textsuperscript{458}

3.\ Statutory Construction.—In Willis v. State,\textsuperscript{459} the Court of Appeals held that an individual is apprehended, for purposes of the statutory requirement that a chemical sobriety test be administered within two hours,\textsuperscript{460} when an officer stops or detains the individual

\begin{footnotesize}
\begin{enumerate}
\item 300 Md. at 716, 481 A.2d at 199 (citing Palko v. Connecticut, 302 U.S. 319 (1937); Rochin v. California, 342 U.S. 165 (1952)).
\item 300 Md. at 717, 481 A.2d at 199.
\item Id., 481 A.2d at 199-200.
\item 300 Md. at 717-18, 481 A.2d at 200. The court found that both the fourteenth amendment and article 24 of the Maryland Declaration of Rights require this result. Id.
\item Id. at 718, 481 A.2d at 200.
\item Id.
\item The court refused to suppress Sites' test results even though only 40 minutes elapsed from the time he was stopped until he took the test. Because the record did not disclose when the appellant asked to contact counsel, the court deferred to the police's decision to refuse Sites' request. Id. at 718-19, 481 A.2d at 200.
\item 302 Md. 363, 488 A.2d 171 (1985).
\end{enumerate}
\end{footnotesize}
suspected of drunk driving.\textsuperscript{461} Willis had challenged the admissibility of her blood alcohol test results because the blood specimen was drawn almost four hours after the accident.\textsuperscript{462} During two of those hours, however, Willis was awaiting and receiving medical treatment.\textsuperscript{463} When the treatment was completed, the officer read the appellant the \textit{Miranda} and "DR-15" warnings.\textsuperscript{464} One hour and 50 minutes later, Willis' physician drew a blood specimen.\textsuperscript{465}

The court examined the language of section 10-303 of the Courts and Judicial Proceedings Article as well as the entire article, but found no indication of what the General Assembly intended.\textsuperscript{466} The court had previously concluded, however, that section 10-303 must be read together with section 16-205.1 of the Transportation Article.\textsuperscript{467} Thus, the court determined that the General Assembly intended that "apprehended" in Section 10-303 be the functional equivalent of a stop or detention in section 16-205.1.\textsuperscript{468} Therefore,

an accused is "apprehended" when a police officer (1) has reasonable grounds to believe that the person is, or has been, driving a motor vehicle while intoxicated or while under the influence of alcohol and (2) the police officer reasonably acts upon that information by stopping or detaining the person.\textsuperscript{469}

\begin{footnotesize}
\textsuperscript{461} Id. at 376, 488 A.2d at 178.
\textsuperscript{462} Id. at 369, 488 A.2d at 174. The accident occurred at 1:00 a.m. A police officer arrived at 1:10 a.m., spoke to the appellant, and took her driver's license. He then directed her to an ambulance, which remained at the accident scene until 2:37 a.m. The ambulance finally arrived at the hospital at 2:47 a.m., and the appellant received medical treatment until 3:00 a.m. At that point, the officer read appellant the \textit{Miranda} and "DR-15" warnings; a blood sample was taken at 4:50 a.m. \textit{Id.} at 366-68, 488 A.2d at 173-74.

The appellant contended that apprehension occurred either when her driver's license was taken, \textit{id.} at 377 n.15, 488 A.2d at 179 n.15, or when the officer first became aware of intoxication and decided to detain her for investigation, \textit{id.} at 371, 377 n.15, 488 A.2d at 175, 178 n.15. Based on the former contention, the appellant would have been apprehended at 1:18 a.m. \textit{Id.} at 366, 488 A.2d at 173. Based on the latter, she would have been apprehended at 2:37 a.m. when the officer checked on her in the ambulance and formulated the intent to detain her. \textit{Id.} at 371, 488 A.2d at 175. Under either theory, the test given at 4:50 a.m. would not have taken place within two hours after apprehension as required by Md. Cts. \& Jud. Proc. Code Ann. § 10-303.

\textsuperscript{463} 302 Md. at 368, 488 A.2d at 173-74.
\textsuperscript{464} \textit{Id.} at 368, 488 A.2d at 174. The "DR-15" warnings are formally called the Advice of Rights and Administrative Penalties for Refusal to Submit to a Chemical Test statement. The warnings are a standardized statement of detained driver's right under Md. Transp. Code Ann. § 16-205.1.

\textsuperscript{465} 302 Md. at 368, 488 A.2d at 174.
\textsuperscript{466} \textit{Id.} at 374-75, 488 A.2d at 177-78.
\textsuperscript{468} 302 Md. at 376, 488 A.2d at 178.
\textsuperscript{469} \textit{Id.}
\end{footnotesize}
This objective standard, in the court's view, would prevent an officer from manipulating the two-hour clock under Section 10-303.470

The court recognized the simplicity of applying this definition in ordinary drunk driving situations in which an officer observes signs of drunk driving and stops the motorist.471 It saw no more difficulty when an accident involving personal injury to the suspected drunk driver occurs.472 The officer's primary duty is to assist the injured before arrival of medical personnel.473 Once the medical personnel arrive, the officer is free to investigate as long as it does not interfere with the medical treatment.474

Applying this standard to the facts in Willis, the court found that the appellant was apprehended by the officer when her medical treatment was completed.475 Before that time, the officer had not had the opportunity to act upon his information and actually detain the appellant.476 The court dismissed the appellant's contention that she was apprehended when her driver's license was taken from her at the accident scene, since this action was an essentially neutral act required whenever an accident results in bodily injury or death.477 The court also rejected the appellant's argument that apprehension occurred when the officer first decided that he would, if necessary, detain her. The subjective intent of an officer does not control; apprehension occurs only when the officer acts on that intent.478

4. Legislative Development.—The 1985 General Assembly stiffened the penalties for second convictions for driving while intoxicated. The court must sentence anyone convicted within three years of a prior conviction to at least forty-eight hours’ imprisonment or eighty hours’ community service. The sentence cannot be suspended, nor can the defendant be placed on probation.479

470. Id. at 376-77, 488 A.2d at 178.
471. Id. at 377, 488 A.2d at 178-79
472. Id. at 378, 488 A.2d at 179.
473. Id.
474. Id. at 378-79, 488 A.2d at 179.
475. Id. at 379, 488 A.2d at 180.
476. Id. at 380, 488 A.2d at 180.
477. Id. at 377 n.15, 488 A.2d at 178.
478. Id. The court also rejected the appellant's argument that the blood test was unreliable because it was administered four hours after the accident. Id. at 380, 488 A.2d at 180. The court found no merit in this claim because any delay in the administration of the test ordinarily benefits the accused and therefore, is not prejudicial. Id.
C. Crimes

1. Elements.—(a) Accessories.—Since 1979, the Court of Appeals has reexamined the common law doctrine relating to the conviction of accessories in criminal cases. First, the court scrutinized the rule that an accessory could not be tried until the principal actor was tried, convicted, and sentenced. Under this rule, accessories could go free merely because the principal had escaped apprehension or died before sentencing. In 1979, the Court of Appeals abrogated the rule in Lewis v. State. This decision left an anomaly in the law, however; it did not address the related common law rule that an accessory could not be convicted of a greater crime than that of which the principal was convicted. If the case against the principal was weak, that principal might be found guilty of a lesser crime or even be acquitted. The accessory could benefit from this result only if the principal was tried, convicted and sentenced first. In such a situation, the principal's conviction or acquittal could serve to limit the accessory's conviction. If the accessory was tried first, however, the principal's subsequent conviction or acquittal could not affect the accessory's conviction in any way.

In 1985, the Court of Appeals recognized the need to correct this inconsistency. In Jones v. State, the court abrogated the remaining common law accessory rule, despite the fact that it dis-

480. The court's examination of these rules seems to have been prompted by the view held by many commentators that these common law procedural rules are obsolete. Jones v. State, 302 Md. 153, 158 & n.2, 486 A.2d 184, 187 & n.2 (1985).

481. This rule had limited exceptions. State v. Ward, 284 Md. 189, 396 A.2d 1041 (1978). For example, an accessory could consent to being tried before the principal. Id. at 202 n.16, 396 A.2d at 1049 n.16. If the accessory was convicted, however, judgment would be withheld until after the principal was tried because acquittal of the principal would annul the accessory's conviction. Similarly, an accessory could be tried jointly with the principal, but no judgment could be rendered as to the accessory until the accessory was found guilty. Id.

482. 285 Md. 705, 404 A.2d 1073 (1979). In Lewis, the court upheld the conviction of an accessory who appealed his conviction on the ground that he was convicted prior to the sentencing of the principal (even though his conviction occurred after that of the principal). Id. at 724, 404 A.2d at 1083. The court criticized the accessory rule as being illogical and noted that the rule could "'shield accessories from punishment notwithstanding overwhelming evidence of their criminal assistance.'" Id. at 715, 404 A.2d at 1079 (quoting Ward, 284 Md. at 192, 396 A.2d at 1044 (quoting W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 498-99 (1972))).

483. Note that the common law rule operated in two ways. As stated, it prevented an accessory from being convicted of a greater crime than that of which the principal was convicted. Ward, 284 Md. at 202, 396 A.2d at 1049. It also operated to prevent an accessory from being convicted of a greater statutorily designated degree of a crime. Id. at 206, 396 A.2d at 1052.

missed the *Jones* case as moot. In *Jones*, the defendant had been convicted of conspiracy to commit murder and of accessory before the fact to first degree murder. The Court of Special Appeals affirmed the conspiracy conviction, but reversed the accessory conviction because one of the two principals involved had already been convicted of second degree murder. Therefore, the common law accessory rule required reversal of Jones' accessory conviction.

The Court of Appeals recognized the conflict created by *Lewis* and struck down the common law accessory rule. The court found it "illogical to retain a rule governing the crime of which one may be convicted, when its applicability depends upon the fortuitous circumstances of which actor in an alleged criminal enterprise is tried first." Furthermore, "[m]erely because the evidence in the principal's trial may have been different, or the principal may have agreed to a favorable plea bargain arrangement, or the jury in the principal's trial may have arrived at a compromise verdict, is not a good reason for allowing the accessory to escape the consequences of having committed a particular offense."

(b) Assault.—In *Dixon v. State*, the Court of Appeals clarified what constitutes an assault for the purpose of satisfying the requisite

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485. The court found the question moot because Jones died in an aborted escape attempt after the case had been argued before the court. *Id.* at 155, 486 A.2d at 185. It acknowledged that normally it would refrain from addressing the merits of a moot question. *Id.* at 158, 486 A.2d at 187. The court justified its actions by noting that the presence of the inconsistency created an "urgency to establish a rule of future conduct on a matter of important public concern." *Id.*

Although the court dismissed the appeal, it carefully considered the action that should be taken on the conviction. Jones' attorney sought an order that Jones' conspiracy convictions be vacated with directions that the conspiracy indictments be dismissed as moot. *Id.* at 156, 486 A.2d at 186. The court refused to take this action and, relying on recent United States Supreme Court and out-of-state case law, left the conviction intact. *Id.* at 156-57, 486 A.2d at 186-87. The court distinguished between two types of criminal cases, each of which merits a different treatment when found moot on appeal. When a deceased petitioner has already had the benefit of appellate review, as in Jones' case, the Court of Appeals will not vacate a deceased petitioner's conviction. *Id.* at 157, 486 A.2d at 187. When the deceased petitioner dies while a direct appeal is pending, however, the conviction should be vacated because death has deprived the petitioner of his right to appellate review. *Id.*

486. *Id.* at 155, 486 A.2d at 185.

487. The other principal involved in the crime had been tried and convicted of first degree murder before Jones went to trial. His conviction was overturned, and he was awarded a new trial, which had not occurred prior to Jones' conviction. *Id.*

488. *Id.*

489. *Id.* at 160-61, 486 A.2d at 188.

490. *Id.* at 161, 486 A.2d at 188.

elements of assault with intent to rob. The court extended the definition of assault to include intimidation directed at one person by another and held that intimidation may be found when the defendant's actions were reasonably calculated to produce fear of bodily injury rather than actual injury. The defendant need not possess the ability to inflict the bodily harm feared by the victim.

In Dixon, the defendant, with a "'cold, hard look'" in his eyes, approached a service station cashier at night. The defendant carried a folded newspaper in such a fashion that the cashier thought that the newspaper concealed a weapon pointed directly at her. The defendant passed the cashier a note that stated "I want all your money and hurry." The defendant never orally threatened to harm the cashier, nor did he say that he had a weapon. The prosecution argued that an assault occurred because the victim believed that the defendant had concealed a gun in the newspaper. The defense argued that the defendant could at most be charged with the lesser offense of attempted robbery because the prosecution never

492. The essential elements for the common law crime of assault with intent to rob are: 1) an assault on the victim; 2) by the accused; 3) with intent to rob. Id. at 451, 488 A.2d at 963.
493. Id. at 458-63, 488 A.2d at 967-70.
494. Id. at 464, 488 A.2d at 970.
495. Id.
496. Id. at 452, 488 A.2d at 964.
497. Judge Eldridge found the note alone to be insufficient evidence to support a conviction for assault with intent to rob. According to him, "[t]he State provided no evidence of any action or conduct on Dixon's part 'reasonably tending to create the apprehension in another that [Dixon was] about to apply force'..." Id. at 464, 488 A.2d at 970 (Elridge, J., dissenting). Rather, Judge Eldridge believed that the State's argument was merely an attempt to save itself from the consequences of having charged the defendant with the wrong crime. Id. at 464-65, 488 A.2d at 970 (Elridge, J., dissenting).

The majority's view seems to be better supported. The discussion of the distinction between attempt and assaults in Hardy v. State, 301 Md. 124, 482 A.2d 474 (1984), supports the decision in Dixon. In Hardy, the court noted that attempts and assaults are nearly identical unless a statute requires "'present ability' for an assault. In such a case, the statute "'is interpreted to require an actual present ability rather than the common-law requirement of an apparent present ability. ...'" Id. at 130, 482 A.2d at 478 (quoting R. Perkins, Criminal Law 578 (2d ed. 1969)). Furthermore, acts that qualify as attempts but not assaults—lying in wait, enticing the victim to go to the planned site of the crime, reconnoitering, unlawful entry, possession of materials, and soliciting an agent—are substantial steps toward completing the crime, but do not give the defendant an actual or apparent ability to inflict injury on the victim. Id. at 130, 482 A.2d at 478. The fact that assault with intent to rob is a common law crime in Maryland suggests that the crime does not require "actual present ability." Furthermore, the close physical proximity of the defendant to the cashier lends support to the court's finding of an assault in Dixon.
proved that a gun was in fact present.\(^498\)

The court did not find an overt statement necessary to support an assault. The court noted that any attempt to apply force constitutes an assault.\(^499\) An attempt can be found whenever the defendant engages in action or conduct reasonably tending to create the apprehension in the victim of the defendant's intent to apply force.\(^500\) If the prosecution alleges that the assault occurred through intimidation, the evidence merely must show that the defendant acted with the apparent intention and ability to inflict a battery.\(^501\) The court also ruled that apparent ability to inflict a battery may be inferred from the surrounding facts and circumstances. Specifically, as applied to this case, possession of an undiscovered weapon may be and was properly inferred from the facts.\(^502\)

In *Anderson v. State*,\(^503\) the Court of Special Appeals held that the enactment of Maryland's child abuse law\(^504\) did not preempt or repeal common law assault and battery in the area of parent-child relationships.\(^505\) Anderson was originally charged in a two-count indictment with both statutory child abuse and common law assault and battery. A jury found him not guilty of child abuse but guilty of assault and battery.\(^506\) On appeal, Anderson argued that the statu-

\(^{498}\) 302 Md. at 456, 488 A.2d at 966.

\(^{499}\) Id. at 458-59, 488 A.2d at 967.

\(^{500}\) Id. at 459-60, 488 A.2d at 967. *See also* United States v. Alsop, 479 F.2d 65, 67 n.4 (9th Cir. 1973) (to take "by intimidation" means to take in such a way that would put an ordinary, reasonable person in fear of bodily harm); United States v. Baker, 129 F. Supp. 684, 686 (S.D. Cal. 1955) (attempt by intimidation means attempt by putting in fear instead of by force).

\(^{501}\) 302 Md. at 461-63, 488 A.2d at 968-70. *See also* United States v. Slater, 692 F.2d 107, 109 (10th Cir. 1982) (defendant acting with cool deliberation intimidated bank tellers by entering teller's area without showing weapon and seizing money from cash drawers); United States v. Harris, 530 F.2d 576, 579 (4th Cir. 1976) (proof that defendant handed bank teller a note but kept hand in pocket so that victim assumed defendant had a weapon was sufficient evidence of defendant's intent to produce fear); United States v. Robinson, 527 F.2d 1170, 1172 (6th Cir. 1975) (defendant intimidated victim in part by wearing leather coat in which weapon could presumably be concealed); United States v. Jacquillan, 469 F.2d 380, 385 (5th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973) (proof of actual fear not required to establish intimidation); United States v. Brown, 412 F.2d 381, 382 (8th Cir. 1969) (intimidation shown when defendant presented a note demanding money without display of a weapon).

\(^{502}\) 302 Md. at 464, 488 A.2d at 970.


\(^{505}\) 61 Md. App. at 448-49, 487 A.2d at 300. Note that the term "parent" is used loosely to include any person included in the class of potential violaters under *Md. Ann. Code* art. 27, § 35A(a)(1).

\(^{506}\) The Court of Special Appeals seemed to regard this verdict as somewhat strange. It noted that "[a] Baltimore City jury . . . somehow found him not guilty of child abuse but guilty of assault and battery." 61 Md. App. at 439, 487 A.2d at 295.
tory crime displaced the common law crime because it clearly overlaps with common law assault and battery in the parent-child context.\(^5\) Therefore, as a matter of law, Anderson could only be found guilty of statutory child abuse, if anything. Because he was acquitted of statutory child abuse, his assault and battery conviction should be reversed.\(^6\)

The court rejected Anderson's contention after comparing the scope of the common law crimes of assault and battery in the parental context with that of the child abuse statute.\(^7\) The common law provides parents with a defense to what would otherwise be assault and battery. The defense, known as privileged force, has two clear limitations:\(^8\) First, the force must "be used in the exercise of domestic authority by way of punishing or disciplining the child . . . and not be a gratuitous attack;"\(^9\) second, the "amount of force used [must] be moderate and reasonable."\(^10\) Similarly, the child abuse statute requires that the injury to the child be "a result of

\(^5\) Id.

\(^6\) Id.

\(^7\) Id. at 442-48, 487 A.2d at 297-300. The opinion provides a useful discourse on the common law crime of assault and battery in the parental context.

\(^8\) Id. at 443-44, 487 A.2d at 297-98. See also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 389-90 (1972) (discussing privileged force); R. PERKINS, CRIMINAL LAW 987 (2d ed. 1969) (same).

\(^9\) 61 Md. App. at 444, 487 A.2d at 298.

\(^10\) Id. at 445, 487 A.2d at 298. The situation in Anderson involved the use of immoderate force in the exercise of domestic authority. See id. at 459, 487 A.2d at 305. The court recognized that one or both of the crimes might apply in four contexts. The court illustrated the relationship between common law assault and battery and the child abuse statute with the following chart:

<table>
<thead>
<tr>
<th>Exercise of Domestic Authority</th>
<th>Gratuitous Attack</th>
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<tbody>
<tr>
<td>IMMODERATE FORCE</td>
<td>CHILD ABUSE and ASSAULT AND BATTERY</td>
</tr>
<tr>
<td>MODERATE FORCE</td>
<td>NO CRIME—not covered by the statute, privileged at common law</td>
</tr>
<tr>
<td></td>
<td>CHILD ABUSE as a aggregated form of ASSAULT AND BATTERY</td>
</tr>
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</table>

\(^11\) Id. at 448, 487 A.2d at 300.

If the attack is gratuitous, the assailant is guilty of assault and battery whether the force employed is moderate or immoderate. If the gratuitous attack "does not inflict sufficient physical injury to qualify under the statute, the assailant is still guilty of the common law misdemeanor of assault and battery." \(^12\) Id. at 445 n.10, 487 A.2d at 298 n.10. In this situation, the statute clearly does not preempt the common law crime. If the injury inflicted is sufficient to satisfy the statute, however, the statute acts as an aggravated assault statute by increasing the crime to a felony. Id.
cruel or inhumane treatment or . . . a malicious act." In *Bowers v. State,* the Court of Appeals found a perfect correlation between the force necessary to defeat the parental privilege of common law assault and battery and the degree of immoderation necessary to satisfy the child abuse statute. In fact, *Bowers* termed the level of force necessary to trigger the child abuse statute "to be nothing but a codification of the common law principles concerning the limits of permissible parental chastisement."

Despite the virtual identity of the two crimes, the court rejected Anderson's preemption argument. It relied on the theory, historically accepted in Maryland, that "'[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.'" The child abuse statute does not expressly repeal any common law crime; therefore, the court held that it did not preempt the common law crimes of assault and battery.

The court distinguished *Anderson* from situations in which the legislature enacted a statutory crime with a more lenient punishment than its common law counterpart. If the statutory punishment

515. Id. at 127, 389 A.2d at 348.
516. Id.
517. See 61 Md. App. at 448-49, 487 A.2d at 300.
518. Id. at 450, 487 A.2d at 301 (quoting 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 41 (Sands ed. 1974)). The court pays great deference to the common law because the common law of England is constitutionally guaranteed to the citizens of Maryland. 61 Md. App. at 449, 487 A.2d at 300. See Md. Const. Decl. of RTS. art. 5.
The Court of Appeals set forth the controlling principle for determining whether a statute abrogates the common law in *Lutz v. State,* 167 Md. 12, 172 A. 354 (1934).

The court distinguished *Anderson* from situations in which the legislature enacted a statutory crime with a more lenient punishment than its common law counterpart. If the statutory punishment

519. 61 Md. App. at 453, 487 A.2d 303. The Court of Special Appeals deliberately avoided addressing this same issue in *Worthen v. State,* 42 Md. App. 20, 399 A.2d 272 (1979). In *Worthen,* the defendant was also convicted of assault and battery, but acquitted of statutory child abuse. *Id.* at 21, 399 A.2d at 273. *Worthen* also argued that statutory child abuse supplanted common law assault and battery. *See id.* at 36-37, 399 A.2d at 281. The court did not reach the issue, however, because it was not properly preserved for appellate review. *Id.* at 37, 399 A.2d at 281. In *Worthen,* the defendant was also convicted of assault and battery, but acquitted of statutory child abuse. *Id.* at 21, 399 A.2d at 273. *Worthen* also argued that statutory child abuse supplanted common law assault and battery. *See id.* at 36-37, 399 A.2d at 281. The court did not reach the issue, however, because it was not properly preserved for appellate review. *Id.* at 37, 399 A.2d at 281. In dicta, it labeled *Worthen*'s contention a "palpable absurdity." *Id.* Cf. *Gray v. State,* 43 Md. App. 238, 403 A.2d 853 (1979) (common law crime of criminal attempt to commit second-degree rape not preempted by statutory sexual offenses); *DiBartolomeo v. State,* 61 Md. App. 302, 486 A.2d 256 (1985) (common law sodomy not preempted by statutory sexual offenses).
is more lenient that the common law punishment, a "clearly identifiable legislative intent to mitigate the harshness of the common law and to deal with the proscribed conduct in a more lenient fashion" exists.\textsuperscript{520} In such a case, the court would find preemption. In \textit{Anderson}, however, "the direction from the common law to the statutory crime is unmistakably upward."\textsuperscript{521} Thus, "[w]hen the obvious legislative intent is to deal more harshly with aggravated forms of already criminal behavior, there is no inherent incompatibility between the greater and lesser crimes; there is no preempting of the field and no repeal of the lesser, common law crime."\textsuperscript{522} The lesser crime may still be arbitrarily used to "avoid the available, but not compelled, harsher treatment."\textsuperscript{523}

\textit{(c) Homicide.}—In \textit{Hurley v. State},\textsuperscript{524} the Court of Special Appeals described the type of evidence that may be sufficient to prove the \textit{corpus delicti} in a homicide case when the body of the victim is not produced.\textsuperscript{525} The defendant's estranged wife disappeared without a
trace after entering the defendant's office. When the victim entered Hurley's office, she left her five and one-half year old daughter waiting in her car. When the daughter heard a scream a few minutes later, she got out of the car and peeked into the office window. She saw her mother's feet, in a prone position on the floor, and a man's feet and shoes. Sometime later, the defendant left the office, took the daughter from the car, and told her that plans had been changed. 526

At trial, the State could offer no evidence as to the presence of the victim's body. 527 The State did produce evidence, however, that the court considered sufficient to prove both the victim's death and the defendant's involvement:

(1) shortly after the victim's daughter last saw her mother alive, the daughter heard a scream and saw her mother on the floor of the defendant's office;
(2) the defendant's own statements contained numerous inconsistencies; 528
(3) the victim had a strained relationship with the defendant;
(4) the victim's character and patterns of behavior made her sudden disappearance unlikely; 529 and
(5) the victim's bank accounts and credit cards showed no activity, and she had made and no contact with family members, friends, or government agencies. 530

The court found that this evidence sufficiently supported the defendant's manslaughter conviction. 531

specifically, the court noted that the evidence did not demonstrate any hostility between Lemon and his alleged victim, the disappearance of the victim, or any governmental efforts to locate the victim. Id. at 487-88, 433 A.2d at 1190-91.
526. 60 Md. App. at 544, 483 A.2d at 1300-01.
527. Id. at 549, 483 A.2d at 1303.
528. Not only was the defendant unable to account for his whereabouts for several hours after the victim disappeared, but when he did have an explanation, he gave several versions of what did happen. His testimony was also contradicted by several witnesses. Id. at 544-48, 483 A.2d at 1301-03.
529. The State produced evidence that the victim was of good character and reputation and that she was devoted to her family. Id. at 548, 483 A.2d at 1303.
530. Id. at 549, 483 A.2d at 1303.
531. Id. at 554, 483 A.2d at 1306. The court also reviewed cases from eleven other jurisdictions that upheld convictions in similar circumstances. Id. at 550-52, 483 A.2d at 1304-05.

In a related and interesting attack on the conviction, Hurley argued that the judge violated his constitutional right to remain silent by increasing his sentence because he did not disclose the whereabouts of the victim's body. As evidence that the judge imposed a harsh sentence, Hurley noted that the sentencing guidelines called for a maximum of four years of imprisonment for manslaughter, yet he received a ten-year
Under section 3-804(d)(1) of the Courts and Judicial Proceedings Article, a juvenile court may not exercise jurisdiction over a minor 14 years or older charged with a crime that, if committed by an adult, carries with it a maximum penalty of death or life imprisonment.\textsuperscript{532} This statute allows the prosecution, in certain circumstances, to choose between circuit and juvenile court jurisdiction by only charging the minor with a crime that carries the prerequisite sentence. In \textit{Hardy v. State},\textsuperscript{533} the Court of Appeals held that circuit court jurisdiction was properly invoked when the prosecution charged the minor defendant with attempted murder rather than assault with intent to murder.\textsuperscript{534}

The State charged Hardy with two counts of attempted murder in the first degree in order to try him as an adult.\textsuperscript{535} In an attempt to avoid being charged as an adult, Hardy argued that the circuit court lacked jurisdiction because attempted murder is substantively the same as assault with intent to murder. Since assault with intent to murder is punishable by a maximum of 30 years' imprisonment,\textsuperscript{536} the juvenile court had exclusive jurisdiction. The circuit sentence. The court rejected Hurley's argument, noting that the sentencing guidelines are not mandatory. When a sentencing judge chooses to disregard them, the judge need only explain the reasons for doing so. Looking to the substance of the judge's comments at sentencing, the court found the judge's recited reasons acceptable. The court reminded the defendant that the judge's comments must be read in context. The court also noted that it was not improper to consider the impact of the offense on the victim's family. \textit{Id.} at 560-65, 483 A.2d at 1309-12.


(d) The court does not have jurisdiction over:

(1) A child 14 years old or older alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed under Article 27, § 594A.

\textsuperscript{533} 301 Md. 124, 482 A.2d 474 (1984).

\textsuperscript{534} \textit{Id.} at 140, 482 A.2d at 483. The court made the distinction in response to the defendant's argument that the two crimes were substantively the same. See infra note 535 and accompanying text.

\textsuperscript{535} 301 Md. at 127, 482 A.2d at 476. Hardy was initially indicted on two counts of attempted common law murder, assault with intent to rob, and related offenses. Two months after the first indictment, Hardy was charged with two counts of attempted murder in the first degree. The State ultimately nol prosed the counts under the first indictment. The State argued that the charge of attempted murder in the first degree triggered circuit court jurisdiction because, by statute, first degree murder causes a penalty of death or life imprisonment. Md. Code Ann. art. 27, § 412(b) (1982). The maximum sentence for attempt to commit first degree murder may also be death or life imprisonment, because under Md. Code Ann. art. 27, § 644A (1982), the maximum sentence for attempt may not exceed the punishment for the completed crime. 301 Md. at 127, 482 A.2d at 476.

court agreed with Hardy and dismissed the case. The Court of Special Appeals reversed, and the Court of Appeals granted Hardy’s petition for certiorari.\textsuperscript{537}

Hardy argued that the statute setting forth the maximum penalty for assault with intent to murder had preempted the common law crime of attempted murder.\textsuperscript{538} The court rejected the argument for two reasons: First, the court found nothing in the language of the statute to suggest an intent to preempt,\textsuperscript{539} and Maryland courts will not construe statutes to alter the common law by implication.\textsuperscript{540} Second, the statute addressed only the crime of assault with intent to murder, which the court found to be a distinctly different offense from attempted murder.\textsuperscript{541}

The court acknowledged that assault with intent to commit any crime is very similar to an attempt to commit that same crime.\textsuperscript{542} Both crimes require intent, and both require an overt act beyond mere preparation.\textsuperscript{543} Because the overt act necessary to an attempt frequently results in an assault, the two crimes have significant overlap.\textsuperscript{544} All overt acts associated with an attempt do not result in an assault, however.\textsuperscript{545} Assault requires two additional elements: a greater degree of proximity to success and an actual present ability to commit a battery.\textsuperscript{546} The difference is not always a matter of degree. The court listed several activities that could qualify as an attempt, yet not constitute an assault: “lying in wait, enticing the

\begin{itemize}
\item 537. 301 Md. at 127, 482 A.2d at 476.
\item 538. Md. Code Ann. art. 27, § 12 (1982) states in pertinent part that “[e]very person convicted of the crime of an assault with intent to murder is guilty of a felony and shall be sentenced to imprisonment for not less than two years nor more than 30 years.”
\item 539. Id. at 132, 482 A.2d at 478.
\item 540. Id. at 131, 482 A.2d at 478. This rule is an outgrowth of article 5 of the Maryland Declaration of Rights “which guarantees to Maryland citizens the common-law of England.” Id. at 131-32, 482 A.2d at 478. \textit{See also} Anderson v. State, 61 Md. App. 436, 487 A.2d 294 (1985) (child abuse statute does not preempt common law assault and battery) (discussed at supra notes 503-23 and accompanying text).
\item 541. Id. at 128-31, 482 A.2d at 476-78.
\item 542. Id. at 129, 482 A.2d at 477.
\item 543. Id. at 128, 482 A.2d at 476-77.
\item 544. Id. at 129, 482 A.2d at 477.
\item 545. Id. The court gave several examples:
\begin{quote}
[A]n attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. Lying in wait can be sufficient to establish attempt, but it would not constitute an assault. A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault.
\end{quote}
\item 546. Id. at 130, 482 A.2d at 478.
\end{itemize}
victim to go to the planned site of the crime, reconnoitering unlawful entry, possession of materials and soliciting an agent.”

Hardy also argued that attempted murder should be presumed to be attempted second degree murder. Because second degree murder carries a maximum sentence of 30 years, the juvenile court would have exclusive jurisdiction. Hardy relied primarily on the fact that attempted murder, unlike murder, is not divided into degrees by statute. This omission, according to Hardy, indicated that Maryland recognizes only the basic crime of attempted common law murder. Therefore, the offense should be presumed to be attempted second degree murder.

The court acknowledged that the legislature had not created degrees of attempted murder, but noted that it did not have to do so. When the legislature passed the murder statute dividing the common law crime of murder into degrees, the “law did not create a new offense . . . . The design was to discriminate in awarding the punishment . . . .” In addition, under Maryland law, it is well settled that a defendant may be convicted of first degree murder

547. Id. at 130-31, 482 A.2d at 478.
548. Id. at 131, 482 A.2d at 478. Hardy also argued that it would be inherently unfair to allow the lesser-included offense of attempted murder to carry a heavier penalty than the greater offense of assault with intent to murder. Id. at 132-33, 482 A.2d at 479. The court made a two-pronged reply: First, it noted that it is the legislature’s duty, not the court’s, to rewrite legislation to make statutory punishments more symmetrical. Id. at 133, 482 A.2d at 479. Second, it observed that “[n]othing is inherently wrong with creating a greater offense with a lighter penalty than a lesser-included offense with a heavier penalty.” Id. Consequently, the maximum punishment for attempted murder is not determined by the maximum punishment for assault with intent to murder. Id. at 135, 482 A.2d at 480.
549. Id.
550. Hardy also argued that the evidentiary presumption that murder is presumed to be murder in the second degree should be applied. The court rejected the argument as completely without merit. The court noted that the presumption merely affects the burden of proof placed on the prosecution at trial. The prosecution must present sufficient evidence at trial to upgrade the offense to first from second degree murder. Id. at 135-36, 482 A.2d at 480. For purposes of determining proper jurisdiction, “the juvenile is presumed to have committed the crime charged.” Id. at 136, 482 A.2d at 481.
551. Id. at 135-36, 482 A.2d at 480. That the offense of attempted common law murder would be presumed to be attempted second degree murder follows from the fact that second degree murder is considered to include all kinds of murder not specifically defined as being first degree murder. Newton v. State, 280 Md. 260, 268, 373 A.2d 262, 266 (1977). Thus, Hardy argued that all attempted murders constitute second degree attempted murder unless specifically defined as first degree attempted murder. 301 Md. at 135-36, 482 A.2d at 480.
552. 301 Md. at 139, 482 A.2d at 482.
553. Id. at 137, 482 A.2d at 481 (quoting Weighorst v. State, 7 Md. 442, 451 (1855)).
whether charged with common law murder by common law indictment or by the statutorily created short form. 554

These attributes of common law murder apply with equal force to the crime of attempted common law murder. The court noted that the crime of attempt is really an “adjunct” crime. It cannot exist alone, but must occur in connection with another crime. 555 Therefore, even though no statute defines the crime of attempt, the court concluded that a defendant charged with attempted common law murder can be convicted of attempted murder in the first degree, or any degree appropriate to the evidence. “The crime of attempt by definition expands and contracts and is redefined commensurate with the substantive offense.” 556

(d) Public Intoxication.—In Curtin v. State, 557 the Court of Special Appeals broadly construed the public intoxication statutes 558 in what appears to be part of a concerted effort to discourage the over-consumption of alcohol. 559 In construing these statutes, the court held that an arresting officer’s citation of the wrong statute did not

554. Id. The “short form” to which the court refers is set forth in Md. Code Ann. art. 27, § 616 (1982). The statute dispenses with the requirement that the charging document include all the particulars of the offense and manner or means of death. Rather, the statute recites general language that, if used, will be deemed to have adequately charged the defendant with murder or manslaughter.

555. 301 Md. at 139, 482 A.2d at 482.

556. Id. (footnote omitted). It is interesting to note that had the State indicted Hardy for both attempted murder and assault with intent to murder, the two crimes would have merged. As a result, Hardy would have faced only the lesser penalty of thirty years’ imprisonment because the penalty of the greater offense would have taken precedence over that of the lesser-included offense.


[a] person may not drink any alcoholic beverage, as defined in this article, while:

(1) On public property, unless authorized by a governmental entity that has jurisdiction over the property;

(2) On the mall, adjacent parking area, or other outside area of any combination of privately owned retail establishments, like a shopping center, where the general public is invited for business purposes, unless authorized by the owner of the shopping center;

(3) On an adjacent parking area or other outside area of any other retail establishment, unless authorized by the owner of the establishment; or

(4) In any parked vehicle located on any of the places enumerated in this subsection, unless authorized.

559. See supra notes 405-79 and accompanying text for a discussion of other recent alcohol-related court decisions.
invalidate an arrest if the officer had probable cause to make the arrest. The court also determined that "public place" in the public disturbance statute includes an apartment building's parking lot and that the statute did not require a causal connection between the drinking and the disturbance.

In *Curtin*, the arresting police officer was approached in the parking lot of an apartment complex by the defendant Curtin. He was carrying an open bottle of beer and acted abusively. Noticing Curtin's watery eyes and unsteady balance, the officer thought that he was violating the public intoxication statute. After tolerating Curtin's abusive remarks for five to ten minutes, the officer decided to issue a citation for public drinking. When Curtin refused to sign the ticket, he was arrested. A struggle followed, after which Curtin was subdued and transported to the police station.

Curtin argued that this public intoxication arrest was illegal because the officer was acting under the misapprehension that the apartment parking lot was public property. The court rejected this argument. The legality of the arrest depended not on whether the officer correctly assumed the parking lot to be public property, but whether the officer had probable cause to believe that the public intoxication statute had been violated. Given the proximity of the parking lot to a public highway and the fact that the applicable definition of public property includes certain kinds of private parking lots, the court concluded that a jury could find that the officer

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560. 60 Md. App. at 344, 483 A.2d at 85.
562. 60 Md. App. at 346, 483 A.2d at 85-86.
563. Id. at 347-48, 483 A.2d at 86.
564. Id. at 341-43, 483 A.2d at 83-84. The arresting officer was in the midst of arresting a drunk driver when she was approached by the defendant. When she asked the defendant for his identification, the defendant finished his beer and went to retrieve his identification from his parked van. When he returned, he continued verbally abusing the officer. In response to the noise, a group of bystanders gathered, and a woman in a nearby apartment yelled to keep the noise down. By the time the officer completed writing the ticket, five other police officers had arrived to aid in the arrest. Id.
565. Id. at 343, 483 A.2d at 84.
566. Id. at 344, 483 A.2d at 85. The court noted that "probable cause has often been characterized as a 'non-technical conception of a reasonable ground for belief of guilt requiring less evidence for such belief than would justify conviction, but more evidence than that which would arouse mere suspicion.' " Id. at 344-45, 483 A.2d at 85 (quoting Collins v. State, 17 Md. App. 376, 384, 302 A.2d 699, 697 (1983)).
567. Private parking lots located on land owned, leased or operated by the State of Maryland or specified state or local agencies are considered public property for purposes of the public intoxication statute. Md. Ann. Code art. 2B, § 210(a)(2) (Supp. 1985).
had probable cause to believe that a violation of the public intoxication statute had taken place.\textsuperscript{568}

Furthermore, the court determined that the State presented sufficient evidence for the jury to find that the officer had probable cause to believe that Curtin had violated the public disturbance statute as well. The officer's citation to the wrong statute was immaterial. The appellant appeared drunk, and the officer saw him consume alcohol. Together, these two facts justified the officer's belief.\textsuperscript{569}

The court also determined that the term "public place" as used in the public disturbance statute included the apartment parking lot.\textsuperscript{570} The court based this holding on the limited meaning given the term "public property" in the related public intoxication statute.\textsuperscript{571} The court examined the use of the term in both statutes and concluded that the legislature intended to place a greater limit on disorderly drinking or intoxication than on the mere consumption of alcohol.\textsuperscript{572} Therefore, "public place" as used in the public disturbance statute, has a broader meaning and encompasses the apartment parking lot.\textsuperscript{573}

The court turned next to the proper definition of "public disturbance" as used in the public disturbance statute. Because the legislature had provided no indication that any definition other than the common one would apply, the court looked to the term's dictionary meaning. The court held that public disturbance meant any open and visible commotion or disturbance.\textsuperscript{574} Therefore, the court concluded that Curtin's conduct was a public disturbance, which, coupled with his consumption of alcohol in a public place, justified his arrest for creating a public disturbance.\textsuperscript{575}

The court also considered whether the public intoxication or drinking must be the cause of the public disturbance.\textsuperscript{576} The court adopted the trial judge's construction of the statute, which con-

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\textsuperscript{568} 60 Md. App. at 345, 483 A.2d at 85.
\textsuperscript{569} Id.
\textsuperscript{570} Id.
\textsuperscript{571} Id. at 345-46, 483 A.2d at 85. The public intoxication statute, Md. ANN. CODE art. 2B, § 211, and the public disturbance statute, Md. ANN. CODE art. 2B, § 207, are both found under the same subheading, "Disorderly Intoxication."
\textsuperscript{572} 60 Md. App. at 345-46, 483 A.2d at 85.
\textsuperscript{573} Id. at 346, 483 A.2d at 85.
\textsuperscript{574} Id.
\textsuperscript{575} Id.
\textsuperscript{576} The court focused on Md. ANN. CODE art. 2B, § 207(a)(2), which provides that “[a] person may not . . . [b]e intoxicated or drink any alcoholic beverage in a public place and cause a public disturbance.” (Emphasis added.)
strued the words of the statute in accordance with their ordinary and natural meanings. Accordingly, the court rejected the notion of causality because nothing indicated that the legislature intended the elements to be linked in such a fashion. According to this construction, the elements need only exist at the same time for a violation to occur.\textsuperscript{577}

2. Defenses.—(a) Insanity.—In United States v. Gould,\textsuperscript{578} the United States Court of Appeals for the Fourth Circuit declined to allow a pathological gambling disorder to serve as the basis for an insanity defense.\textsuperscript{579} The court reached this decision only after formulating and applying what had to be “a special test appropriate to the peculiar nature of this wholly exculpating defense.”\textsuperscript{580}

Indicted for unlawful entry of a bank with intent to commit robbery and intent to commit larceny, Gould attempted to raise the insanity defense. He argued that he suffered from a pathological gambling disorder, which caused him to perform the acts that precipitated the attempted bank robbery charges. The trial court rejected the defense and ordered the jury to disregard any evidence that related to the gambling disorder. The jury found Gould guilty of committing both offenses, and Gould appealed.\textsuperscript{581}

The Fourth Circuit has adopted the American Law Institute (ALI) test for the insanity defense.\textsuperscript{582} This test requires a causal connection between the defendant’s disease or defect and the criminal conduct.\textsuperscript{583} Procedurally, the defense is raised when the defend-

\begin{itemize}
\item \textsuperscript{577} Id. at 347-48, 483 A.2d at 86.
\item \textsuperscript{578} 741 F.2d 45 (4th Cir. 1984).
\item \textsuperscript{579} Id. at 52. Although the court held that a gambling disorder would not support the insanity defense at the present time, the court did not suggest that the disorder would never support such a defense. \textit{Id}.
\item \textsuperscript{580} Id. at 48.
\item \textsuperscript{581} Id. at 46-47. Gould made it clear in advance of the trial that he intended to raise the insanity defense. As a result, the government conducted several pretrial mental examinations and evaluations of Gould. After the examinations, the government filed a motion to exclude evidence of Gould’s gambling disorder from the trial. The court deferred ruling on the motion and instead included the ruling as part of the jury instructions. \textit{Id}.
\item \textsuperscript{582} United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc).
\item \textsuperscript{583} Id. at 926. The test states:
\begin{enumerate}
\item A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
\item The term “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. \textit{Model Penal Code} § 4.01 (Proposed Official Draft 1962).
\end{enumerate}
\end{itemize}
ant produces "slight"\textsuperscript{584} evidence of nonresponsibility under the ALI test. Once raised, the burden shifts to the government to prove beyond a reasonable doubt that the defendant is responsible.\textsuperscript{585} Although both parties agreed that the ALI test applied in insanity defense cases, they disputed its application to Gould's gambling disorder.\textsuperscript{586}

The court acknowledged that the development of new insanity defenses is highly dependent on emerging scientific theories.\textsuperscript{587} Therefore, it had to determine, as a threshold matter, whether the scientific community acknowledged that a causal connection may exist between the gambling disorder and Gould's conduct. To do this, the court adopted the Second Circuit's\textsuperscript{588} threshold relevancy test: The defendant must show that the newly identified mental disease or defect has gained substantial acceptance within the scientific community as a disorder that may deprive some persons of the capacity to appreciate the wrongfulness of the particular conduct or to conform their conduct to the particular requirements of law in

\textsuperscript{584} The evidence need not even raise a reasonable doubt to be sufficient to shift the burden to the prosecution. Hall v. United States, 295 F.2d 26, 28 (4th Cir. 1961). In Gould, the court stated that the slight evidence must show that the "general hypothesis [the causal link between the disorder and the crime charged] might have application to the particular defendant's case. . . ." 741 F.2d at 50.

\textsuperscript{585} 741 F.2d at 47.

\textsuperscript{586} Id.

\textsuperscript{587} See id. at 48-49. The court cited specifically Judge Haynsworth's "wise and prescient observations" about the insanity defense in Chandler, 393 F.2d at 926-27. 741 F.2d at 48-49. According to the court, Judge Haynsworth recognized that the law concerning the insanity defense needed to be flexible enough to adapt to changing scientific ideas, but "might well have to yield not on scientific grounds but on the basis of overriding policy considerations of society's interests in protection of its members." Id. at 49. The court noted that this case highlighted the need to strike a proper balance between the two considerations. Id.

\textsuperscript{588} United States v. Torniero, 735 F.2d 725 (2d. Cir. 1984). In that case, the defendant argued that he should not be found guilty of interstate transportation of stolen goods because a compulsive gambling disorder rendered him legally insane. Id. at 727. The Second Circuit rejected the defense by focusing on whether the evidence offered was sufficient to establish the necessary causal connection under the ALI test and whether the volitional prong of the test was satisfied. To do this, the Second Circuit analyzed the problem in terms of foundational relevance. Id. at 730-32.

In United States v. Lewellyn, 723 F.2d 615 (8th Cir. 1983), the Eighth Circuit also focused on the appropriate test to establish the causal connection between the disease and the criminal conduct. Unlike Torniero, Lewellyn relied on the general acceptance standard of the Frye test to reject the defendant's insanity argument. Id. at 619.

\textsuperscript{589} 741 F.2d at 49. The court based this test on Fed. R. Evid. 401, which provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
issue.\textsuperscript{590} Once the defendant has satisfied this burden, the defendant can then introduce only slight evidence that the exculpatory defect did in fact prompt the defendant to commit the crime in question. The burden then shifts to the prosecution to demonstrate the defendant’s sanity beyond a reasonable doubt.\textsuperscript{591}

After reviewing the evidence that Gould had introduced, the court held that he had not shown that the pathological gambling hypothesis had gained substantial acceptance in the scientific community.\textsuperscript{592} Thus, the Fourth Circuit agreed with the other two circuits to consider the question.\textsuperscript{593}

(b) Alibi.—In \textit{United States v. Hicks},\textsuperscript{594} the United States Court of Appeals for the Fourth Circuit held that evidence which is admissible only if offered by the prosecution can serve as the foundation for an alibi defense instruction beneficial to the defense.\textsuperscript{595} The court refused to limit the foundation for a defense instruction solely to evidence admissible if offered by the defendant.\textsuperscript{596} Instead the court adopted the broader view that, upon proper request, a defendant is entitled to a jury instruction for any theory of defense for which an evidentiary foundation has been laid.\textsuperscript{597}

Shortly after his arrest for allegedly driving the getaway car in a bank robbery, Hicks told the FBI that he had been with his girlfriend at the time that the crime occurred. At the trial, however, neither

\textsuperscript{590} 741 F.2d at 49-50. The court did not expressly define “substantial acceptance,” but noted that the standard is less stringent than the widely used “general acceptance” test first announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The court did explain that to pass the test, the evidence must show “some degree of proven acceptance within the appropriate discipline. . . .” 741 F.2d at 49 n.2.

The court acknowledged that commentators and other courts have suggested that \textit{Fed. R. Evid.} 401’s “any tendency” standard effectively undercut Frye’s “general acceptance” standard. \textit{Id.} These comments also apply to Gould’s “substantial acceptance” standard. In \textit{Gould}, the court maintained, however, that the substantial acceptance test was needed to relieve courts of the necessity of reviewing in depth the “substantial questions about the validity of new [exculpatory] hypothesis.” Because acceptance of any new hypothesis is “tantamount to exculpation from otherwise proven guilt,” the court opted for a stricter standard than the “any tendency” standard of \textit{Fed. R. Evid.} 401. \textit{Id.}

\textsuperscript{591} 741 F.2d at 47.

\textsuperscript{592} \textit{Id.} at 51. Because the issue was dealt with as a matter of threshold evidentiary relevance, the court did not address “whether pathological gambling is a ‘mental disease or defect’ under the ALI test; whether in relation to some conduct it might constitute an effective insanity defense; and (3) whether Gould was afflicted with the disorder at the critical times.” \textit{Id.} at 50 (footnote omitted).

\textsuperscript{593} See \textit{supra} note 588.

\textsuperscript{594} 748 F.2d 854 (4th Cir. 1984).

\textsuperscript{595} \textit{Id.} at 857.

\textsuperscript{596} \textit{Id.}

\textsuperscript{597} \textit{Id.}
the defendant nor his girlfriend testified. The government introduced Hicks' out-of-court statement as evidence of a false exculpatory statement suggesting consciousness of guilt.\textsuperscript{598}

Even though the state introduced the evidence for its falsity, the court noted that it still put before the jury the factual question of whether Hicks had an alibi.\textsuperscript{599} "Once it appeared that there was sufficient alibi evidence to permit the factfinder to pass on the issue, Hicks had a Sixth Amendment and due process right to have that issue submitted to a jury . . . ."\textsuperscript{600} To allow the judge to refuse to give a jury instruction on the alibi evidence would deprive Hicks of his right to a jury trial. The trial judge, by refusing the instruction, effectively directed a verdict on that issue against the defendant.\textsuperscript{601}

The court also discussed Hicks' fifth amendment right against self-incrimination. The court suggested that failure to allow Hicks to prove the alibi defense other than by his own testimony would abridge that right. Because the court found that neither of these violations was harmless beyond a reasonable doubt, it reversed the conviction and remanded for a new trial.\textsuperscript{602}

\hspace{1cm} \textit{(c) Imperfect Self-Defense.}—In \textit{State v. Faulkner},\textsuperscript{603} the Court of Appeals recognized the mitigation defense of imperfect self defense\textsuperscript{604} and applied it to the statutory crime of assault with intent to murder.\textsuperscript{605} The defendant raises the defense by showing an honest but unreasonable belief that the victim was about to inflict death or serious bodily harm on the defendant.\textsuperscript{606}

Although a series of manslaughter statutes enacted in England

\textsuperscript{598} \textit{Id.} at 856-57.
\textsuperscript{599} \textit{Id.} at 857.
\textsuperscript{600} \textit{Id.}
\textsuperscript{601} \textit{Id.} at 857-58.
\textsuperscript{602} \textit{Id.} at 858. In dissent, Judge Sprouse argued that the failure to give an alibi instruction, while error, was harmless error because Hick's involvement in the robbery was directly confirmed at the trial by the testimony of three witnesses and indirectly confirmed by a fourth. \textit{Id.} at 859-60 (Sprouse, J., dissenting).
\textsuperscript{603} 301 Md. 482, 483 A.2d 759 (1984).
\textsuperscript{604} \textit{Id.} at 500, 483 A.2d at 769.
\textsuperscript{605} \textit{Id.} at 505, 483 A.2d at 771. Although the crime of assault with intent to murder is not expressly defined by statute, Md. Ann. Code art. 27, § 12 (1982) sets forth the penalties available for the crime. For a discussion of the elements of the crime, see \textit{supra} notes 542-48 and accompanying text.

The court summarily determined that imperfect self defense mitigated assault with intent to murder to simple assault. 301 Md. at 504, 483 A.2d at 771. When applied to a murder charge, it would serve to mitigate murder to manslaughter by negating the element of malice. \textit{Id.} at 486, 483 A.2d at 761.
\textsuperscript{606} 301 Md. at 499-500, 483 A.2d at 768.
between 1496 and 1547 recognized imperfect self defense, it first appeared in Maryland law only in 1975. Prior to *Faulkner*, only the Court of Special Appeals had considered whether the state recognized the defense. The Court of Appeals had never addressed the issue, and the doctrine's applicability and boundaries were unclear.

In *Faulkner*, the court conducted a thorough review of the defense as recognized by other states, both in common law and statute. The court noted that states recognizing the defense through case law did not agree on the standard that should apply. The majority of the states that had enacted imperfect self defense statutes, however, had adopted the honest but unreasonable belief standard. The Court of Appeals adopted this standard as well. For the defense to apply, the defendant must demonstrate a subjective, honest belief that the actions taken were necessary for the defendant's safety, although an objective appraisal by a reasonable person would have led that person to believe that such actions were not necessary. If the defense can show that the defendant subjec-

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607. According to commentators, the early manslaughter statutes reflected a compromise between murder and complete exoneration when the defendant's conduct warranted neither a murder conviction nor acquittal. Out of these statutes the mitigating defense of imperfect self defense arose. While some mitigating defenses apply to "crimes of passion" such as killing a spouse discovered in the act of sexual intercourse with another, mutual combat, or assault and battery, the defense of imperfect self defense covers crimes committed without "passion." This, suggests the commentators, "strikes a middle ground as a matter of policy . . . ." Id. at 487, 483 A.2d at 762 (quoting R. Moreland, *The Law of Homicide* 92 (1952)).

608. Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975), aff'd, 287 Md. 197, 362 A.2d 629 (1976) acknowledged the existence of the doctrine, but characterized it as "little more than an academic possibility." Id. at 658 n.4, 349 A.2d at 314 n.4.

609. A Maryland court first seriously considered the doctrine in Shuck v. State, 29 Md. App. 33, 349 A.2d 378 (1975), cert. denied, 278 Md. 733 (1976). In *Shuck*, the court recognized the defense as one involving the defendant's honest but unreasonable belief of a right to intervene on behalf of a companion involved in a nondeadly confrontation. Id. at 42-43, 349 A.2d at 383.

610. 301 Md. at 488-95, 483 A.2d at 762-66.

611. Id. at 492, 483 A.2d at 764-65.


613. 301 Md. at 500, 483 A.2d at 769.
tively believed "that the use of force was necessary to prevent imminent death or bodily harm, the defendant is entitled to a [jury] instruction on imperfect self defense." 614

The court's adoption of the imperfect self-defense doctrine admittedly makes homicide cases more complex. Any evidence that generates the issue of justification or excuse by way of perfect self defense necessarily raises the issue of mitigation by means of imperfect self defense. 615 The reasonableness of the defendant's belief is at issue both in arguing self defense and imperfect self defense. 616 When the evidence is present to raise either defense, the jury could reach one of three verdicts:

(1) if the jury concluded the defendant did not have a subjective belief that the use of deadly force was necessary, its verdict would be murder; (2) if the jury concluded that the defendant had a reasonable subjective belief, its verdict would be not guilty; and (3) if the jury concluded that the defendant honestly believed that the use of force was necessary but that this subjective belief was unreasonable under the circumstances, then its verdict would be guilty of voluntary manslaughter. 617

614. Id. The court expressly rejected the State's contention that the defense should be available only in "extreme extenuating circumstances." Id. at 501, 483 A.2d at 769. Although the State did not provide a definition for "extreme extenuating circumstances," the court found that a defendant may have an honest but unreasonable belief in "extraordinary as well as mundane situations." Id.

The court also rejected the State's argument that the defense is not necessarily raised whenever perfect self defense is raised. Id. at 502-03, 483 A.2d at 770. The court noted that both a perfect self defense argument and an imperfect self defense argument involve the reasonableness of the defendant's view. Id.

Finally, the court rejected the argument that the defense rewards unreasonableness for two reasons: "[C]riminal law is predicated on the concept that an offender's level of culpability is dependent on his mental state. . . . [A] mitigation defense such as imperfect self defense provides little reward for unreasonableness: a conviction of manslaughter rather than murder." Id. at 503, 483 A.2d at 770.

615. Id. at 502-03, 483 A.2d at 770.

616. Id. The court summarized the elements of self defense to homicide, other than felony murder, as follows:

(1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
(2) The accused must have in fact believed himself in this danger;
(3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
(4) The force used must not have been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

Id. at 485-86, 483 A.2d at 761.

617. Id. at 500-01, 483 A.2d at 769. The third option was not available before the defense was recognized.
3. **Legislative Development.**—In an apparent attempt to limit sorority and fraternity initiation practices, the Maryland General Assembly enacted legislation that prohibits student hazing which subjects a student to serious bodily injury. The penalty for any conviction under this misdemeanor statute is the imposition of a fine of not more than $500 or imprisonment for not more than six months, or both. It is expressly not a defense to this crime that the student either implicitly or expressly consented to the hazing.

**D. Procedure**

1. **Warrants.**—In *State v. Intercontinental, Ltd.*, the Court of Appeals held that article 27, section 551(a) of the Maryland Annotated Code authorized a Maryland judge to issue a warrant to seize property in Maryland that related to violations of another state’s penal laws. Despite the apparent limitation to “property subject to seizure under the criminal laws of this State,” the court concluded that “nothing in the statute limited the issuance of a search warrant to offenses committed under the law of Maryland.”

Intercontinental, Ltd., a New Jersey business with offices in Baltimore County, was allegedly violating several New Jersey criminal laws. A Maryland State Trooper and a New Jersey State Police Detective obtained a search warrant based upon an application and

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620. Id. § 268H(c).


> Whenever it be made to appear to any judge of any of the circuit courts in the counties of this State, or to any judge of the District Court, . . . that there is probable cause, . . . to believe that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge, or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, premises, place or thing, then the judge may forthwith issue a search warrant . . . to seize any property found liable to seizure under the criminal laws of this State . . . .

623. 302 Md. at 140, 486 A.2d at 178.


625. 302 Md. at 136, 486 A.2d at 176.

626. Id. 486, A.2d at 175. The alleged violations included conspiracy, theft by deception, and unlawful employment under the New Jersey Casino Act. *Id.*
affidavit that claimed that evidence of those violations was located at Intercontinental’s Maryland offices. After the warrant was executed, the defendant filed a petition for the return of the seized documents. The circuit court agreed with the defendant’s argument that a Maryland judge has no authority to issue a warrant for the seizure of evidence relating to crimes committed in another state and ordered the records returned.

The Court of Appeals disagreed and held that the legislature did not intend to limit the issuance of search warrants to the seizure of evidence relating to intrastate crimes. In reaching this conclusion, the court examined the language, purpose, and history of the search warrant statute, as well as the practical effects of interpreting the statute as either allowing or prohibiting the seizure of evidence of out-of-state crimes.

627. Nothing in the affidavit alleged that either Intercontinental or its president had violated any law of Maryland, “nor did the affidavit quote any part of the laws of New Jersey, upon which the application was predicated.” Brief for Appellee at 8, State v. Intercontinental, Ltd., 302 Md. 132, 486 A.2d 174 (1985).

628. 302 Md. at 135, 486 A.2d at 175. The trial court found it relevant that no Maryland law was alleged to have been violated. Its opinion stated that

[i]t is to the statute that the court looks to determine the legislative intent. The court determines that for probable cause to exist for the issuance of a warrant there must be established that:

1. any misdemeanor or felony is being committed by any individual . . . within the jurisdiction of the judge, or that

2. any misdemeanor or felony is being committed . . . in any building, apartment, premises, place or thing within the territorial jurisdiction of the judge, or that

3. any property subject to seizure under the criminal laws of the State is situated, or located on the person of any such individual or in or on any such building, apartment, premises, place or thing.

When one of these three elements has been established, the judge may forthwith issue a search warrant, but there is a limit to:

—search such suspected individual, building, apartment, premises, place or thing, and to

—seize any property found liable to seizure under the criminal laws of this State.

All of this command is the legislative directive that it is only Maryland crimes or property subject to seizure under Maryland law with which the authority must be associated.

New Jersey law cannot be violated within the jurisdiction of this court. There is no property subject to seizure under the criminal laws of Maryland. There is no probable cause. The property must be restored.

Brief for Appellee, supra note 627, at 15-16 (quoting Opinion of Trial Court at 3-4).

629. 302 Md. at 140, 486 A.2d at 178.

630. The court interpreted § 551(a) as being “plainly susceptible of more than one meaning.” Id. at 137, 486 A.2d at 176. Because of this ambiguity, the court considered “not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment[,]” as well as “the consequences of a proposed construction and [the] adopt[ion of] that construction which
When article 27, section 551(a) was first enacted in 1939, only property in which the state could establish a superior property right was subject to seizure under a search warrant. This principle, known as the mere evidence rule, precluded a lawful seizure of mere evidence because there was "no known theory under which the State could assert a superior property right." The prevailing view in 1939 was that explicit statutory authorization was a necessary precondition for any search warrant other than one to search for stolen goods.

Viewing the phrase "property subject to seizure . . . under the laws of this state" in its historical context, the court concluded that the legislature had understood that searches by warrant were limited by the mere evidence rule. Thus, the phrase "under the criminal laws of this State" relates not to the offense, but only to the "property" which is subject to seizure. The court found that section 551(a) imposes only one jurisdictional requirement: "that the property to be seized be located within the territorial jurisdiction of the issuing judge.”

avoids an illogical or unreasonable result, or one which is inconsistent with common sense." Id. (citations omitted).

631. Id. at 138, 486 A.2d at 177.

632. Id. at 139, 486 A.2d at 177. At the time, the Supreme Court adhered to the view that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . .” Gouled v. United States, 255 U.S. 298, 309 (1921).

633. In re Special Investigation No. 228, 54 Md. App. 149, 165 n.13, 458 A.2d 820, 828 n.13 (1983). Judge Moylan provided an exhaustive history of Md. ANN. CODE art. 27, § 551 and contrasted it with the exclusionary rule. 54 Md. App. at 157-69, 458 A.2d at 824-35. He noted that, in the past, searches and seizures made pursuant to warrant composed but a small percentage of all searches. 54 Md. App. at 159-60, 458 A.2d at 825-26.


"There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."

Id. at 196, 367 A.2d at 1228 (quoting Hayden, 387 U.S. at 307). The court concluded that "[u]nder the Hayden formulation, so long as police have probable cause to believe that what they see is contraband, or the fruit or instrumentality of some unspecified criminal activity, they may seize the object.” Id.

636. 302 Md. at 140, 486 A.2d at 178. The court interpreted the statute as failing to distinguish between crimes committed within or out of the state. Id.

637. Id.; see, e.g., Gattus v. State, 204 Md. 589, 105 A.2d 661 (1954) (evidence seized
Thus, under Maryland law, a judge asked to issue a search warrant only has to determine whether probable cause exists to believe that evidence relating to criminal activity is located within Maryland's boundaries. The court reasoned that "[t]o otherwise conclude would unreasonably and illogically ascribe to the legislature an intention to provide a sanctuary within this State's borders to shelter evidence of crime from search warrant seizure simply because the crime was not committed in Maryland."

The court also rejected defendant's argument that permitting the issuance of a warrant relating to crimes committed in another state violates the rule that a Maryland court may not convict a person of a crime committed in another state. The issuance of a warrant precedes the actual criminal prosecution and, according to the court, plays a limited role in the conviction of a suspected criminal. Because the issuance of a warrant does not itself result in convicting a person of a crime, a warrant to search for evidence of a crime committed out-of-state does not violate Maryland law.

The court noted that only one state, Montana, expressly limits the issuance of a search warrant to intrastate crimes, while three states have rules permitting the issuance of warrants for crimes com-

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638. 302 Md. at 140, 486 A.2d at 178.
639. Id.
640. Id. at 140-41, 486 A.2d at 176. This principle was first announced in Worthington v. State, 58 Md. 403 (1882), in which the court concluded that a person who steals goods in another state and then brings those goods into Maryland cannot be punished for the crime committed outside the state. Id. at 409. The court circumvented this rule, however, by finding that the act of bringing the goods into Maryland constituted a "new" larceny for which the person may be indicted and punished. Id. More recently, in Bowen v. State, 206 Md. 368, 111 A.2d 844 (1954), the court held that Maryland lacked jurisdiction over a defendant charged with larceny and embezzlement. Although the defendant had delivered the improperly drawn checks to the trustee in Maryland, the checks had been deposited, paid, and withdrawn in the District of Columbia. Id. at 379, 111 A.2d at 849.
641. 302 Md. at 141, 486 A.2d at 178.
642. Id. at 140-41, 486 A.2d at 178.
643. Id. at 141-42, 486 A.2d at 179. Those statutes, Mont. Code Ann. §§ 46-5-203, 46-201(7) (1983), provide in relevant part that a "search warrant may authorize the seizure of . . . any person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state," id. § 46-5-203, and that 'Offense' means a violation of any penal statute of this state or of any ordinance of its political subdivisions," id. 46-1-201(7). Following their own rule, the Montana court stated that a state magistrate is without jurisdiction to issue a search warrant when the crime was committed outside the state of Montana. State v. Kelly, 668 P.2d 1032 (Mont. 1983).
mitted beyond state boundaries. Most states, however, have statutes similar to Maryland's. For example, the District of Columbia's statute provides in part that "property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it . . . constitutes evidence of or tends to demonstrate the identity of a person participating in the commission of an offense." The District of Columbia Court of Appeals interpreted this language as broad enough to permit a judge to issue a warrant when the crime was committed outside of the District.

The Maryland court's decision in Intercontinental is not surprising, considering the court's trend toward making it harder for defendants to overturn a conviction based on a questionable search warrant. Considering the ambiguous language of section 551(a), however, a strong case can be made for reading the statute as applying only to crimes committed in Maryland. Such an interpretation would be consistent with Maryland's rule against convicting defend-

644. COLO. REV. STAT. § 16-3-301 (1978) ("A search warrant may be issued . . . to search for and seize any property . . . which would be material evidence in a subsequent criminal prosecution in this state or in another state . . ."); KAN. CRIM. PROC. CODE ANN. § 22-2502 (Vernon 1981) ("A search warrant shall be issued . . . for the seizure of . . . [a]ny things which have been used in the commission of a crime, or any contraband or any property which constitutes or may be considered a part of the evidence, fruits or instrumentalities of a crime under the laws of this state, any other state or of the United States . . ."); N.J. RULES 3:5-2 (covering any property constituting evidence of a "violation of the penal laws of this State or any other state").

A New Jersey court interpreted this rule to allow a New Jersey court to compel state residents to provide blood and hair samples to a New York district attorney engaged in a murder investigation. In re Morgenthal, 188 N.J. Super 303, 308, 457 A.2d 472, 475 (1983).


ants of crimes committed in other jurisdictions. If the legislature truly intended the statute to allow warrants to be issued for out-of-state crimes, it could certainly amend the statute to apply more clearly to this situation.

The Court of Appeals also construed article 27, section 551 in *Valdez* v. *State*. The court held that a judge's written notes, sworn to and signed by the affiants and attached to an application for a search warrant, satisfied the statutory requirements for a valid affidavit.

The Howard County police attempted to obtain judicial authorization by telephone for a search. The judge refused, but instructed the officers to come to her house where she would read back the notes that she had taken during their telephone conversation. If the officers would swear that her notes were correct, she would sign a search warrant. Both officers swore under oath that what she read was true and correct and signed their names in the lower corner of both pages of her notes. The notes were stapled to the warrant and the signed warrant application.

The appellants attacked the warrant as invalid on several grounds. First, they argued that the judge's notes, sworn to by the police officers, did not constitute an affidavit within the meaning of section 551. The court relied on the definition of "affidavit" in the Maryland Rules of Procedure to reject this contention.

649. *Id.* at 166, 476 A.2d at 1165. Md. Ann. Code art. 27, § 551(a) (1982 & Supp. 1985) requires that a "written application signed and sworn to by the applicant, accompanied by an affidavit . . . containing facts within the personal knowledge of the affiant or affiants" be submitted to a judge in order to demonstrate probable cause and obtain a warrant.

650. 300 Md. at 164, 476 A.2d at 1164. Maryland law does not allow telephone authorizations for warrants. *Id.* at 166, 476 A.2d at 1165. *But see* Fed. R. Crim. P. 41(c) (allowing telephone authorizations).

651. 300 Md. at 164, 476 A.2d at 1164.
652. *Id.* at 165, 476 A.2d at 1164.
653. *Id.*
654. Md. R.P. 5(c) (1977) provided that
"Affidavit" means an oath that the matters and facts set forth in the paper writing to which it pertains are true to the best of the affiant's knowledge, information and belief. An "oath" means a declaration or affirmation made under penalties of perjury, that a certain statement of fact is true. An oath may be made before an officer or other person authorized to administer an oath, or may instead be made by signing the paper containing the statement required to be under oath and including therein the following representation: "I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct."

This definition now appears at Md. R.P. 1-202(b).
655. 300 Md. at 166-67, 476 A.2d at 1164.
"The concept of an affidavit is not limited to a writing prepared by the affiant. The affiant is required only to make an oath that the matters set forth in the writing are true."656 Thus, the court determined that the judge's notes, "unorthodox though they may be as an affidavit, did serve as an adequate affidavit in this particular case."657

The court also rejected appellants' argument that the judge's notes were illegible and thus could not provide a prewarrant recordation of the facts relied upon.658 First, the court found the notes difficult to read but not illegible.659 Second, the rule that probable cause must be demonstrated within the four corners of the affidavit does not bar consideration of evidence that aids in deciphering the words in the affidavit.660

The decision in Valdez v. State reflects the court's growing reluctance to invalidate a probable cause determination on hypertechnical grounds. The Court of Appeals expressly adopted the Supreme Court's view that "[a] grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."661

Consistent with this approach, the Court of Appeals held in Winters v. State662 that a state court is not required to determine whether probable cause existed for an earlier federal search that provided the information for the second warrant.663 The court also rejected challenges to the validity of the federal warrant.664

Winters was the target of a cooperative investigation by the Drug Enforcement Administration (DEA), the Attorney General's office, and the Maryland State Police. During the drug investigation, detectives obtained reliable information that Winters was evad-
ing the payment of state income taxes. A federal magistrate issued a warrant to search Winters’ home for drugs and records of drug transactions. The warrant stated that it was to be executed by “‘Special Agent William L. Athas or any other agent of the Drug Enforcement Administration.’” 665 Detective Carr, a Maryland State Trooper, assisted in executing the warrant. During the search, Carr discovered several yellow papers which he identified as evidence related to the state tax evasion investigation. 666

Carr then prepared an affidavit that stated his reasons for believing that the yellow papers were evidence of tax evasion and described the joint investigation as authority for his presence in Winters’ home. Based on the affidavit, the federal search warrant, and an application for a state search warrant, a Maryland District Court judge issued a warrant, and the yellow papers were seized. The trial court refused to suppress this evidence. 667

The Court of Appeals affirmed. 668 It rejected appellant’s broad reading of Brooks v. State, 669 in which the Court of Special Appeals said, in dicta, that an application and affidavit for a second warrant must do more than claim that the first warrant had been issued. 670 The Court of Appeals read Brooks as simply restating general fourth amendment principles. 671 When it applied these principles to the facts in Winters, the court found no fourth amendment violation. Unlike the officer in Brooks, Detective Carr submitted the federal warrant with the application for the state warrant. Given the deference owed to a judicial determination of probable cause, the state judge could reasonably rely on the validity of the federal warrant. Thus, according to the court, the judge had an adequate basis for issuing the state warrant. 672

Winters also argued that Detective Carr illegally participated in the execution of the federal warrant and thus, the yellow papers that incriminated appellant on the tax evasion charges should be sup-

665. Id. at 229, 482 A.2d at 893.
666. Id. at 220-21, 482 A.2d at 889.
667. Id. at 221-22, 482 A.2d at 890. The state search took place the same day as the federal search. Id.
668. Id.
670. Id. at 156, 282 A.2d at 519. In Brooks, appellants’ convictions were upheld because the appellants lacked standing to object to the search warrant. The Court of Special Appeals clearly indicated, however, that the search warrant would have been declared invalid had the appellants possessed standing. Id.
671. 301 Md. at 223, 482 A.2d at 890.
672. Id. at 224, 482 A.2d at 891.
pressed as fruit of an illegal search. The court rejected this contention based on its reading of the federal statute governing execution of warrants, which authorizes the presence of persons assisting the executing officers. Since Detective Carr was aiding the authorized officer in executing the federal warrant, the court concluded that he was legally on the premises.

Finally, in *Potts v. State*, the Court of Appeals held that the totality of the circumstances test, as set forth in *Illinois v. Gates*, applied to a pre-*Gates* search. Potts was convicted of six narcotics-related offenses based upon evidence obtained with a search warrant that would have been invalid under the strict, two-pronged *Aguilar-Spinelli* test. Potts argued that applying *Gates* retroactively would violate the purpose of the exclusionary rule by improperly validating police conduct that was unlawful when it occurred.

The court rejected this argument. Retroactive application of a new rule of criminal procedure may be inappropriate when it announces an unanticipated legal principle. *Gates*, however, did not create a new standard; according to the Supreme Court, it reaffirmed traditional probable cause analysis. Thus, the defendant could not have relied on *Aguilar-Spinelli* to his detriment. Further-

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673. *Id.* at 225, 482 A.2d at 891.

674. *Id.* at 229-31, 482 A.2d at 893-94. 18 U.S.C. § 3105 (1982) provides that [a] warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

The court noted that the United States Court of Appeals for the Fifth Circuit had interpreted this statute in *United States v. Martin*, 600 F.2d 1175, 1181-82 (5th Cir. 1979), to authorize assistants such as Detective Carr. 301 Md. at 230, 482 A.2d at 894.

675. 301 Md. at 230-31, 482 A.2d at 894. The court also rejected appellant's claim that the affidavit used to obtain the federal warrant contained a material false statement that invalidated the federal warrant. *Id.* at 225-29, 482 A.2d at 891-93. Although the federal investigator erroneously characterized an informant's statement as against her penal interests, the affidavit contained enough information to satisfy the probable cause standard enunciated in *Illinois v. Gates*, 462 U.S. 213 (1983). 301 Md. at 229, 482 A.2d at 893.


678. 300 Md. at 583, 479 A.2d at 1343.

679. *Id.* at 570, 479 A.2d at 1337. The *Aguilar-Spinelli* test required that the police explain 1) why the informant believed the incriminating evidence to be located in the claimed place and 2) why they believed the information to be credible. *Spinelli v. United States*, 393 U.S. 410, 418 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

680. 300 Md. at 576-77, 479 A.2d at 1340.


683. 300 Md. at 582, 479 A.2d at 1343. The court also noted that other jurisdictions have uniformly applied *Gates* to cases pending on direct review. *Id.* at 578, 479 A.2d at
more, the police conduct challenged by Potts met fourth amendment standards under Gates; thus, no illegal conduct would be deterred by applying Aguilar-Spinelli.

2. Indictments.—In Williams v. State, the Court of Appeals relaxed the technical requirement that every element of the charged crime must be elaborated in the indictment. Williams challenged the criminal information for failing to set forth the essential elements of armed robbery. The charging document alleged that Williams "unlawfully with a dangerous weapon did rob the Complainant of the aforesaid property..." The title and caption of the information elaborated the facts of the crime. The document did not allege that Williams intended to deprive the victim permanently of her property, an essential element of the crime charged. Nevertheless, the court found the information to be sufficient and affirmed Williams' conviction.

The court first discussed the purpose of the information. Article 21 of the Maryland Declaration of Rights requires that persons charged with crimes be informed of the accusations against them. This provision ensures that criminal defendants can defend themselves against the accusations and avoid subsequent prosecutions for the same offenses. To satisfy this requirement, the charging


684. 300 Md. at 575, 479 A.2d at 1339-40. The court also rejected Potts' argument that the search violated Md. CONST. DECL. OF RTS. art. 26. 300 Md. at 575-76, 479 A.2d at 1339-40. The court has consistently interpreted article 26 as the Supreme Court interprets the fourth amendment. See, e.g., Little v. State, 300 Md. 485, 479 A.2d 903 (1984); Lilchow v. State, 288 Md. 502, 419 A.2d 1041 (1980); Johnson v. State, 193 Md. 136, 66 A.2d 504 (1949).

685. 300 Md. at 582, 479 A.2d at 1343.


687. Id. at 793, 490 A.2d at 1280.

688. Id. at 790, 490 A.2d at 1278-79. Williams did not raise his objection at trial. Id. Md. R.P. 4-252(c) provides in relevant part that "[a] motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time." A claim that an information fails to charge or characterize an offense challenges the jurisdiction of the court and thus, can be raised for the first time on appeal. 302 Md. at 792, 490 A.2d at 1280.

689. 302 Md. at 790, 490 A.2d at 1278.

690. Id.

691. Id., 490 A.2d at 1279.

692. Id. at 793-94, 490 A.2d at 1280.

693. Id. at 791 n.1, 490 A.2d at 1279 n.1.

694. Id. at 791, 490 A.2d at 1279.
document usually avers each element of the crime. If the information charges no cognizable crime, a court lacks power to exercise the subject matter jurisdiction necessary to render a judgment.

According to the court, by stating that the defendant "did rob" the victim, the information implied every essential element of armed robbery and thus, met the requirements of article 21. Since the crime is defined as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by putting in fear," the term "did rob" necessarily contained the elements of the crime and fully informed the accused of the specific conduct with which he was charged.

A lengthy dissent by Judge Cole pointed out numerous inconsistencies in the majority's argument. First, he claimed that the decision went against the "plethora of Maryland cases that have consistently required the state to include all the 'essential' or 'material' elements of the crime in the charging document so as to guard against a wrongful prosecution." Second, the information failed to satisfy the legislatively prescribed short form by not alleging either that the defendant "violently did steal" or that he "felo-

niously" committed the act. Third, by assuming that the defendant could discern the essential elements of the crime from the term "rob", the majority ignored the misconceptions attached to the word as it is used in common parlance. Finally, Judge Cole asserted that the decision effectively rewarded the state's attorney for slipshod charging practices.

In a companion case to Williams, the court held that a chal-

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695. Id. at 793, 490 A.2d at 1280.
696. Id. at 792, 490 A.2d at 1279.
697. Id. at 793, 490 A.2d at 1280.
699. 302 Md. at 793, 490 A.2d at 1280.
700. Id. at 794-95, 490 A.2d at 1281 (Cole, J., dissenting). See, e.g., Ayre v. State, 291 Md. 155, 164, 433 A.2d 1150, 1156 (1981); State v. Canova, 278 Md. 483, 498, 365 A.2d 988, 997 (1976). The majority distinguished Williams on the grounds that, in those cases, "averments essential to characterizing a statutory crime were completely omitted from the charging documents." 302 Md. at 793-94, 490 A.2d at 1280.
702. 302 Md. at 798-99, 490 A.2d at 1283 (Cole, J. dissenting).
703. Id. at 801, 490 A.2d at 1284 (Cole, J., dissenting). The dissent argued that the common understanding of "did rob" does not include the necessary larcenous intent. Since only a legal dictionary or treatise on criminal law would include this element, the charging document failed to inform Williams of the crime charged. Id. at 801-02, 490 A.2d at 1284-85.
704. Id. at 805, 490 A.2d at 1286 (Cole, J., dissenting).
lenged indictment "sufficiently characterized the statutory crime charged so that the . . . offense [was] within the jurisdiction of the circuit court." The indictment charged that the defendant "unlawfully did wear and carry concealed upon and about his person a certain dangerous and deadly weapon, to wit: a knife. . . ." The Maryland statute that prohibits carrying a concealed dangerous weapon expressly excepts penknives without switchblades from its definition. The court rejected Hall's argument that the indictment was defective because it failed to allege that the knife used in the crime did not fall within the statutory exception.

Hall and Williams indicate the Court of Appeals' willingness to examine whether a defendant in fact had sufficient notice of the crime charged. The court rejected both defendants' argument that rigid, technical rules should determine the trial court's jurisdiction. In both cases, however, the court noted that nonjurisdictional objections to the charging documents could have been, but were not, raised at trial.

3. Discovery.—In White v. State, the Court of Appeals held that former Maryland Rule 741 did not require the State to produce prior to trial a copy of a criminal defendant's letter to an accomplice. Former rule 741 a 2 required automatic disclosure of


706. Id. at 808, 490 A.2d at 1287-88.

707. MD. ANN. CODE art. 27, § 36(a) (1982) provides in relevant part that "[e]very person who shall wear or carry any dirk knife, switchblade knife, sandclub, metal knuckles, razor, nunchaku, or any other dangerous or deadly weapon of any kind, whatsoever (penknives without switchblades and handguns, excepted) concealed upon or about his person . . . shall be guilty of a misdemeanor. . . ." (Emphasis added.)

708. 302 Md. at 808-09, 490 A.2d at 1288. Md. R.P. 4-202(d) (formerly Md. R.P. 711d (1977)), provides that a charging document "need not negate an exception, excuse, or proviso contained in a statute . . . creating or defining the offense charged." The court read this rule as allowing the type of charging document used in Hall. 302 Md. at 808-09, 490 A.2d at 1288. Cf. Mackall v. State, 283 Md. 100, 387 A.2d 762 (1978) (when an offense contains a statutory exception that constitutes a material part of the offense, State has burden of proving that charged offense was not within the exception).

709. See Williams, 302 Md. at 793, 490 A.2d at 1280; Hall, 302 Md. at 809. 490 A.2d at 1288.

710. Williams, 302 Md. at 794, 490 A.2d at 1280; Hall, 302 Md. at 809, 490 A.2d at 1288.


713. 300 Md. at 732-36, 481 A.2d at 207-09.
"[a]ny relevant material or information regarding . . . the acquisition of statements made by the defendant . . .;"714 section b 2 required disclosure upon request of any statement made by the defendant to a State agent that the State intended to use at trial.715 White argued that the State violated this rule when it used, without advance notice, a letter that White sent to his accomplice Anthony.716

The court first noted that former rule 741 b 2 applied only to statements made to a State agent.717 Because Anthony was not a State agent, section b 2 did not require disclosure.718 The court also rejected White's argument that section a 2 mandated disclosure. Although a literal reading of the rule supports White's position, the court concluded that the section also applied only to statements made to a State agent that the State intended to use at trial.719

The court based its conclusion on the history of the former rule.720 Records of the Rules Committee reflect that former rule 741 a 2 was intended to force the defendant to file a pretrial motion to suppress an unlawfully obtained statement.721 Generally, only statements made to State agents can be the subject of a motion to suppress; thus, White's letter to Anthony did not fall within the disclosure requirements of former rule 741 a 2.722 Since current Maryland Rule 4-263 has virtually identical provisions, the court would presumably construe it in accord with White.

4. Contemporaneous Objection.—In Holmes v. State,723 the Court of Special Appeals allowed the appellant to raise the issue of an alleged

714. Md. R.P. 741 a 2 (Supp. 1983) (recodified as Md. R.P. 4-263(a)(2)).
715. Id. b 2 (recodified as Md. R.P. 4-263(b)(2)).
716. 300 Md. at 731-36, 481 A.2d at 207-09. During re-cross-examination of White's accomplice Anthony, White's counsel produced a letter from Anthony to White. Anthony's letter referred to a letter written by White to Anthony. On re-direct, the State, over defense counsel's objection, introduced the letter. In it, White urged Anthony to refuse to cooperate with the police. The prosecutor learned of the existence of the letter about one week before trial, but the State did not obtain it until the morning on which Anthony testified. Id. at 731-32, 481 A.2d at 207.
717. Id. at 733, 481 A.2d at 208.
718. Id.
719. Id. The court also indicated that the defendant has the burden of demonstrating that the State intends to use the requested material at trial. Id.
720. Id. at 733-36, 481 A.2d at 208-09.
721. Id. at 734, 481 A.2d at 208. "Rule 741 became effective July 1, 1977. It was part of the revision of ch. 700 (Criminal Causes) proposed by the Fifty-Third Report of the Rules Committee." Id.
722. Id. at 736, 481 A.2d at 209.
error during the prosecutor's opening statement even though defense counsel did not immediately object to the prosecutor's comments. Since counsel did make an objection "in close vicinity" to the allegedly improper and prejudicial comments, he preserved defendant's right to appeal. The court based this result on prior decisions that allowed objections to closing arguments to be made after counsel finished speaking.

5. Jury Challenges.—In White v. State, the Court of Appeals affirmed Calhoun v. State and held that defense counsel waived any objection to a denial of a challenge for cause by announcing satisfaction with the jury after the exhaustion of peremptory challenges. The appellant's counsel unsuccessfully challenged a prospective juror for cause; the defense then used a peremptory challenge to exclude this juror. After the selection of the jury, defense counsel expressed satisfaction with the panel and noted only an objection to the striking of one juror for cause. The court reasoned that these statements constituted a waiver of any error in the earlier

724. Id. at 164, 492 A.2d at 354. No Maryland rule addresses the timing of objections to opening and closing arguments. But see Md. R.P. 4-322 (requiring that objections to the admission of evidence and other rulings and orders be made promptly). The State challenged the appealability of the allegedly improper opening statement in Holmes based on Md. R.P. 1085, which precludes appellate review of any point not decided by the lower court. 63 Md. App. at 164, 492 A.2d at 354.

725. 63 Md. App. at 164, 492 A.2d at 354.

726. Curry v. State, 54 Md. App. 250, 458 A.2d 474 (1983); Holbrook v. State, 6 Md. App. 265, 250 A.2d 904 (1969). The court noted in both cases that an immediate objection might be preferable. Curry, 54 Md. App. at 256, 458 A.2d at 478; Holbrook, 6 Md. App. at 271, 250 A.2d at 907. It noted, however, that an immediate objection could draw undue attention to the allegedly improper comments. If the trial judge overruled the objection, the "correctness" of the remarks would be further emphasized. Curry, 54 Md. App. at 256, 458 A.2d at 478. Thus, an objection should be considered timely if the trial court has "a reasonable opportunity to correct the situation at the conclusion of the argument." Holbrook, 6 Md. App. at 271, 250 A.2d at 907.


729. 300 Md. at 731, 481 A.2d at 207.

730. Id. at 726-27, 481 A.2d at 204.

731. Id. at 728, 481 A.2d at 205.

732. Id. at 728, 481 A.2d at 205. After appellant's counsel had used nineteen of twenty peremptory challenges, he expressly accepted the jury panel. Id. at 727, 481 A.2d at 204-05. The State, however, continued to strike jurors, and defense counsel used his last peremptory challenge. Id. at 728, 481 A.2d at 205. The final jury panel had two different members from the one which defense counsel indicated as acceptable. He failed to object to this new panel or indicate that he would have challenged either of the jurors if any peremptory challenges remained. Id.
denial of the challenge for cause, despite the trial court's recognition that this earlier objection remained on the record.

In *Hurley v. State*, the Court of Special Appeals recognized that *White* did not address the waiver of objections to the exclusion of prospective jurors for cause. Despite the State's argument that *White* applied and precluded review, the court assumed that Hurley's counsel preserved the error.

In *Hurley*, the appellant was convicted of manslaughter absent proof of the victim's body. During voir dire, the State had successfully challenged for cause those prospective jurors who admitted that they could not convict someone of murder or manslaughter without proof of the body. Defense counsel objected to each exclusion and argued that these exclusions deprived Hurley of his right to a fair and impartial jury.

The Court of Special Appeals rejected this argument. The Maryland Declaration of Rights guarantees criminal defendants the right to a fair and impartial jury; the primary requirement is a panel of competent jurors who are "'without bias or prejudice for or against the accused and . . . [whose] mind[s] [are] free to hear and impartially consider the evidence, and to render a verdict thereon without regard to any former opinion or impression . . . formed upon rumor or newspaper reports.'" Since the excluded jurors admitted to being unable to convict without proof of the body, they could not be impartial. Thus, the trial court properly excluded them for cause, and Hurley was not deprived of his right.

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733. *Id.* at 731, 481 A.2d at 207. Appellant relied on *Tisdale v. State*, 30 Md. App. 334, 353 A.2d 655 (1976) to argue that he had not waived the error. The court noted, however, that *Calhoun* had overruled *Tisdale*. 300 Md. at 729, 481 A.2d at 206.

734. 300 Md. at 728, 481 A.2d at 205. In dissent, Judge Cole argued that the majority distorted the facts and misapplied the law. He would have reversed and remanded for a new trial based on the error in jury selection. *Id.* at 749-59, 481 A.2d at 215-21 (Cole, J., dissenting).


736. *Id.* at 555-56, 483 A.2d at 1306-07.

737. *Id.* at 554, 488 A.2d at 1306.

738. *Id.* at 556, 483 A.2d at 1307.

739. *Id.* at 554, 483 A.2d at 1306.

740. *Id.* at 554-56, 483 A.2d at 1306-07.

741. *Id.* at 554, 483 A.2d at 1306.

742. MD. CONST. DECL. OF RTS. art. 21.


744. 60 Md. App. at 557, 483 A.2d at 1307-08.
to a fair and impartial jury.\footnote{Id., 483 A.2d at 1308.}

6. Jury Instructions.—In \textit{Goodmuth v. State}, \footnote{302 Md. 613, 490 A.2d 682 (1985).} the Court of Appeals reiterated its disapproval of the traditional \textit{Allen} charge.\footnote{Id. at 623, 490 A.2d at 687. The Supreme Court approved the following jury instruction, now known as an \textit{Allen} charge, in \textit{Allen v. United States}, 164 U.S. 492 (1896):

\begin{quote}

[Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it [is] their duty to decide the case if they [can] conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number [are] for conviction, a dissenting juror should consider whether his doubt [is] a reasonable one which [makes] no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority [is] for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which [is] not concurred in by the majority. \footnote{309 F.2d 852, 854 (5th Cir. 1962); Fields v. State, 342 P.2d 197, 200 (1959) (called Voecckell instruction); State v. Garza, 185 Neb. 443, 448-49, 176 N.W. 2d 664, 666-67 (1970); Commonwealth v. Spencer, 442 Pa. 328, 336-38, 275 A.2d 299, 303-05 (1971); Note, \textit{Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge}, 53 Va. L. Rev. 123, 143 (1967).}]

\end{quote}


\begin{quote}
The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the
In *Goodmuth*, the Court of Appeals mandated the use of the instruction recommended by the ABA rather than the traditional *Allen* charge, whether included in the initial instructions to the jury or given when the jury is deadlocked.\(^{750}\) The court found that the inherent coerciveness of the *Allen* charge did not change based on the time when it was given.\(^{751}\) Thus, *Burnette v. State*\(^{752}\) controlled, although *Burnette* rejected the use of an *Allen* charge given a deadlocked jury.\(^{753}\)

7. Appeals of Interlocutory Orders.—In *Parrott v. State*,\(^{754}\) the Court of Appeals held that removal orders in criminal trials cannot be immediately appealed.\(^{755}\) A grand jury indicted Parrott for murder, and the State sought the death penalty.\(^{756}\) Pursuant to article IV of the Maryland Constitution,\(^{757}\) the State also requested removal, which the trial court ordered. Parrott then appealed this order.\(^{758}\) The Court of Appeals applied the collateral order doctrine rather than the constitutional rights analysis in dismissing Parrott’s appeal.\(^{759}\)

The court acknowledged that its earlier cases held that removal orders could be immediately appealed because they finally adjudicated a constitutional right.\(^{760}\) The collateral order doctrine, how-

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\(^{750}\) 302 Md. at 622-23, 490 A.2d at 686-87. The court noted that in criminal cases the judge should substitute that the jury is judge of both the law and facts. *Id.* See Md. CONST. DECL. OF RTS. art. 23.

\(^{751}\) 302 Md. at 623, 490 A.2d at 687.

\(^{752}\) 280 Md. 88, 371 A.2d 663 (1977).

\(^{753}\) 302 Md. at 622, 490 A.2d at 686.

\(^{754}\) 301 Md. 411, 483 A.2d 68 (1984).

\(^{755}\) *Id.* at 426, 483 A.2d at 75.

\(^{756}\) *Id.* at 413, 483 A.2d at 69.

\(^{757}\) Md. Const. art. IV, § 8(b) mandates removal in death penalty cases when requested by either party. In all other cases, the party requesting removal must demonstrate to the trial court that removal is necessary to ensure a fair and impartial trial. *Id.* § 8(c).

\(^{758}\) 301 Md. at 413, 483 A.2d at 69.

\(^{759}\) *Id.* at 414, 483 A.2d at 69.

\(^{760}\) *Id.* See, e.g., McMillan v. State, 68 Md. 307, 308, 12 A. 8, 8 (1888); Griffin v. Leslie, 20 Md. 15, 19 (1863). In Condon v. Gore, 89 Md. 230, 234, 42 A. 900, 902 (1899), the court asserted "that an appeal lies from any order which settles a constitutional right." As the court noted in *Parrott*, this broad statement regarding the appeala-
ever, had increasingly replaced the constitutional rights analysis in determining the appealability of interlocutory orders. In \textit{Parrott}, the court made clear that it had adopted the collateral order doctrine in \textit{Stewart v. State} and would apply it to all interlocutory appeals.

The collateral order doctrine allows appeals from interlocutory orders in the relatively few instances in which the following criteria are met:

1) An important question is involved;
2) the trial court has finally decided it;
3) the matter can be separated from the merits of the action, and
4) an important right will be irretrievably lost if immediate review is unavailable.

For example, the double jeopardy clause of the United States Constitution protects persons from being tried twice for the same offense. Once the trial court rules on a double jeopardy claim, it is final and unrelated to the principal issue—the guilt or innocence of the defendant. Most importantly, if the court did not permit a direct appeal, the defendant would lose the right to be free from the second trial.

In \textit{Parrott}, the Court of Appeals determined that erroneous removal orders could be remedied on appeal after a final judgment. The Maryland Constitution's removal provision concerns the proper place of a trial, not the propriety of a trial.

8. \textit{Legislative Developments.—(a) Child Abuse.—}\ The 1985 General Assembly adopted the recommendations of the Governor's
Task Force on Child Abuse and enacted legislation designed to protect child abuse victims from further traumatization in a courtroom. The statute provides that the testimony of a child abuse victim may be taken outside the courtroom and shown by closed circuit television during the proceeding if the judge determines that courtroom testimony would cause serious emotional distress and render the child unable to testify. Under this provision, only the judge and attorneys for both sides may question the child. In addition to attorneys for both sides and the operators of the television equipment, anyone whose presence, in the court's opinion, will contribute to the child's well-being may be present in the room with the child, unless the defendant objects. The judge and the defendant must remain in the courtroom, but may communicate with the persons in the room in which the child is testifying. The act is not intended to preclude the presence of the child in the courtroom for purposes of identifying the defendant.

(b) Competency to Stand Trial.—The 1985 General Assembly gave the courts more discretion to determine the appropriate place of confinement for a criminal defendant awaiting a competency examination. The prior law required jail confinement pending an examination; the statute now provides that the defendant may be

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770. Id. § 9-102(a)(1)(ii).

771. Id. § 9-102(a)(2).

772. Id. § 9-102(b)(1).

773. Id. § 9-102(b)(2).

774. Id. § 9-102(b)(3).

775. Id. § 9-102(d). The provisions of this act do not apply if defendants represent themselves. Id. § 9-102(c).


confined in jail. If the court determines that confinement would endanger a defendant apparently suffering from a severe mental disorder or retardation, the court may order the Department of Health and Mental Hygiene to confine the defendant in an appropriate medical facility or to conduct an immediate examination.

(c) Child Pornography.—The General Assembly also passed legislation designed to strengthen the existing child pornography law. The new law provides for a maximum fine of $25,000 or imprisonment for ten years, or both, when a person is convicted of engaging in the prohibited conduct. It is not necessary that the State's Attorney identify the child depicted in the obscene matter or produce testimony from the child, if the child cannot be identified or is not within the jurisdiction of the court. Furthermore, the court or jury may determine the age of the child by observation of the obscene matter, oral testimony of a witness to the production of the obscene matter, expert medical testimony, or any other method authorized by the law or rule of evidence.

(d) Missing Children.—In recognition of the increasing number of missing children, the General Assembly passed the State's first law governing the investigation and reporting of missing children. This statute establishes a state clearinghouse for information on missing children and a nine-member advisory council to review the activities of the clearinghouse, the training of law enforcement personnel, and the investigatory procedures used to locate missing children. The new law also requires law enforcement agencies, upon receipt of a missing child report involving a child with a mental or physical handicap, under a child fourteen years of age, or a child believed to have been abducted, to

779. Id. § 12-104(c)(2).
782. Md. Ann. Code art. 27, § 419A(d) (Supp. 1985). The law is intended to prohibit the promotion, distribution or possession with intent to distribute of any matter or visual representation depicting a child engaged in sexual conduct. Id. § 419A(c).
783. Id. § 419A(e)(1).
784. Id. § 419A(e)(2).
787. Id. § 9-403(c).
institute immediately intensive search procedures. Otherwise, the law enforcement agency must immediately determine the circumstances of the child’s disappearance and implement intensive search procedures within twelve hours of the filing of a missing child report. The act expressly forbids the adoption of rules, regulations, or policies that prohibit or discourage the filing of such reports.

E. Sentencing

1. Aggravating Circumstances.—Article 27, section 413(d) of the Maryland Annotated Code lists the aggravating circumstances that a judge must consider before imposing the death penalty. The list included the situation in which “[t]he victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.” In Trimble v. State, the Court

788. Id. § 9-402(a), (b).
789. Id. § 9-402(c).
790. Id. § 9-402(e)(2).
791. Md. ANN. CODE art. 27, § 413(d) (1982) provided:
   (d) Consideration of aggravating circumstances.—In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:
   (1) The victim was a law enforcement officer who was murdered while in the performance of his duties.
   (2) The defendant committed the murder at a time when he was confined in any correctional institution.
   (3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
   (4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
   (5) The victim was a child abducted in violation of § 2 of this article.
   (6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
   (7) 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.
   (8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.
   (9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.
   (10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.


792. Md. ANN. CODE art. 27, § 413(d)(4) (1982).
of Appeals held that the term hostage includes the victim of any kidnapping or abduction regardless of whether any demands are made on third parties.\textsuperscript{794}

Trimble was sentenced to death for the abduction, rape and murder of Nila Kay Rogers.\textsuperscript{795} As grounds for imposing the death penalty, the court identified the abduction as an aggravating circumstance under section 413 (d)(4), despite the fact that Trimble had not made any demands on a third party.\textsuperscript{796} On appeal,\textsuperscript{797} the defendant sought to narrow the scope of (d)(4) by defining "hostage" as one held to enforce demands on a third person.\textsuperscript{798} The Court of Appeals rejected this narrow definition because "[s]uch a construction would eliminate as an aggravating circumstance under (d)(4) any kidnapping or abduction, however heinous, if the accused does

\textsuperscript{793} 300 Md. 387, 478 A.2d 1143 (1984). See supra notes 311-72 and accompanying text for a discussion of Trimble's constitutional challenge to the death penalty.

\textsuperscript{794} 300 Md. at 409, 478 A.2d at 1154.

\textsuperscript{795} Trimble was convicted by a jury, but waived his right to be sentenced by a jury. \textit{id}. at 395, 478 A.2d at 1147.

\textsuperscript{796} \textit{id}. at 405-06, 478 A.2d at 1152. The facts indicate that Trimble did not abduct Rogers for the purpose of making demands on a third person. Trimble and several of his friends offered Rogers and her female companion a ride in their van. Rogers and one of Trimble's friend's knew each other from school. Once inside the van, Trimble initiated a sexual assault on both women. The murder of Rogers occurred shortly thereafter. \textit{id}. at 393-94, 478 A.2d at 1146.

\textsuperscript{797} The Court of Appeals reviewed this case pursuant to Md. ANN. CODE art. 27, § 414 (1982). The statute mandates an automatic review of death sentences by the Court of Appeals and also allows appeals from the verdict to be consolidated at this review. Section 414(e)(2) requires the court to determine "[w]hether the evidence supports the jury's or court's findings of a statutory aggravating circumstance under § 413(d)."

\textsuperscript{798} 300 Md. at 406, 478 A.2d at 1152. Trimble also argued that the trial court erred:

\textsuperscript{1} when it failed to include mental retardation in instructions to the jury as a basis for finding insanity, \textit{id}. at 395-99, 478 A.2d at 1147-49;

\textsuperscript{2} when it admitted testimony elicited from the State's expert on redirect examination, \textit{id}. at 399-403, 478 A.2d at 1149-51;

\textsuperscript{3} when it allowed the prosecution to make certain remarks during the closing argument which questioned the qualifications of the defendant's expert witness who was deemed by the trial court to be an expert, \textit{id}. at 403-05, 478 A.2d at 1151-52;

\textsuperscript{4} when it applied its own standards in examining other mitigating circumstances in conjunction with the sentencing of the defendant, \textit{id}. at 410-13, 478 A.2d at 1154-56;

\textsuperscript{5} when it placed the burden upon the defendant to prove insanity as a mitigating circumstance, \textit{id}. at 413-16, 478 A.2d at 1156-58; and

\textsuperscript{6} when it imposed the death penalty on a person under age 18, \textit{id}. at 416-24, 478 A.2d at 1158-62. See supra notes 311-72 and accompanying text.

The Court of Appeals rejected all of these arguments. Judge Davidson dissented, however. She believed that reversible error had occurred when the trial judge allowed the prosecution to attack the qualifications of the defendant's expert witness in his closing arguments. \textit{id}. at 437-43, 478 A.2d at 1168-72 (Davidson, J., dissenting).
not make a demand on a third person." 799 Absent express language
in the statute to that effect, the court could not conclude that the
legislature intended such a narrow definition. 800 Although not men-
tioned by the court, the legislature amended section 413(d)(4), after
Trimble's sentencing, to delete the words "a hostage." 801

2. Victim Impact Statements.—In Lodowski v. State, 802 the court, in
dicta 803 upheld the constitutionality of the admission of a victim im-
pact statement at the sentencing stage of a trial. 804 The court also
found that the victim of a crime or a member of his family "may, in
the discretion of the judge presiding at the sentencing stage of the
trial, testify in open court concerning the impact [on the victim]." 805

799. 300 Md. at 409, 478 A.2d at 1154.
800. Id. In reaching this conclusion, the court noted that the Governor's Chief Legis-
lative Officer, Thomas J. Petticord, Jr., had drafted § 413. Mr. Petticord also prepared
and submitted to the General Assembly a memorandum explaining the bill. The court
relied heavily on this memorandum and found the following particularly significant:

(1) The memorandum used the term hostage to describe a kidnap victim only;

(2) it noted that the intent of the statute was to deter kidnappers from murdering
their victims; and

(3) it referred to the Maryland definition of kidnapping, which does not require
demands on a third person. The court justified its heavy reliance on the memorandum
because the General Assembly adopted the provision without amendment. Id. at 407-
08, 478 A.2d at 1153-54.

art. 27, § 413(d)(4) (Supp. 1985)). Despite the General Assembly's clarification, this
case may imply a willingness by the Court of Appeals to expand the circumstances under
which a judge may identify aggravating circumstances.

802. 302 Md. 691, 490 A.2d 1228 (1985). Lodowski was partially vacated by the U.S.
Supreme Court. Maryland v. Lodowski, 106 S. Ct. 1452 (1986). See supra notes 137 and
140.

803. Id. at 725, 490 A.2d at 1245. The court reversed Lodowski's convictions on the
ground that statements made by the defendant were improperly admitted into evidence
by the trial court. According to the court, this error denied Lodowski his fifth and four-
teenth Amendment rights to the assistance of counsel. Id. at 722, 490 A.2d at 1244. See
supra notes 137-40, 167-74 and accompanying text for a discussion of the right to coun-
sel aspects of Lodowski.

Despite its decision to reverse the conviction on the right to counsel issue, the court
considered the numerous other issues raised by Lodowski "in the hope of avoiding the
burden of further appeals with respect to the issues discussed." 302 Md. at 725, 490
A.2d at 1245. Judge Eldridge concurred in the judgment, but objected to the court's
unnecessary decision of the constitutional issue. Id. at 752, 490 A.2d at 1259 (Eldridge,
J., concurring). Judge Cole also concurred, but wrote a lengthy opinion disputing the
court's conclusion on the constitutional issues. Id. at 753-86, 490 A.2d at 1259-77 (Cole,
J., concurring).

804. 302 Md. at 751, 490 A.2d at 1259.
805. Id. at 749, 490 A.2d at 1257-58.
In any case in which the death penalty is requested . . . , a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under art. 27, § 413.806

(a) The Constitutionality of Section 124.—Without specifying the exact grounds, Lodowski claimed that the statute was unconstitutional.807 Article 27, section 414(e)(1) commands the Court of Appeals to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."808 Lodowski argued that the broad discretion provided by section 124 presented an "arbitrary factor" and was therefore unconstitutional.809 The court rejected this argument. It pointed out that the legislature reenacted section 124 in 1983 in the face of section 414(e)(1).810 The court reasoned that this reenactment after the enactment of section 414 established that the legislature did not consider section 124 to be arbitrary and outside of the permissible confines of section 414(e)(1).811

The Court of Appeals also relied on its decision in Calhoun v. State812 upholding Maryland’s death penalty statute.813 In Calhoun, the defendant claimed that Maryland’s death penalty law was unconstitutional because the sentencing authority could consider such a

If the victim is deceased, under a mental, physical, or legal disability, or otherwise unable to provide the information required [for the victim impact statement], the information may be obtained from the personal representative, guardian, or committee, or such family members as may be necessary.

Judge Cole, in his concurrence, noted a peculiarity in § 124. The statute “does not authorize the use of victim impact statements in every case where a defendant is convicted of murder, but only authorizes these statements when the State seeks the penalty of death in a first degree murder prosecution and obtains a conviction for that specific crime.” 302 Md. at 762, 490 A.2d at 1264 (Cole, J., concurring).

807. 302 Md. at 738, 490 A.2d at 1252. The court termed Lodowski’s constitutional argument as one that might “implicate due process.” However, the court made no further attempt to phrase the argument in constitutional terms. Id.

808. Id.
809. Id.
810. Id.
811. Id. According to Judge Cole, the section was inserted in a Senate bill in the waning hours of the 1983 session of the General Assembly. He claimed that the adoption of § 124(d) was considered in haste. Id. at 762 n.4, 490 A.2d at 1264 n.4 (Cole, J., concurring).

813. Id. at 630-38, 468 A.2d at 77-81.
wide range of evidence in deciding whether to impose the death penalty or life imprisonment. In upholding the statute's constitutionality, the Court of Appeals noted that "the sentencing authority in a capital punishment case ought to be provided all relevant information." In Lodowski, the court applied this standard to the victim impact statute and found "no constitutional impediment to the legislature's determination that victim impact statements are relevant in a capital sentencing proceeding . . . ." Since the legislature considered victim impact statements relevant, such statements "do not constitute an arbitrary factor."

In a lengthy concurrence, Judge Cole argued that the majority missed the point when it dismissed Lodowski's claim by saying that "the legislature did not believe that victim impact evidence was an arbitrary factor." According to Cole, "[t]he point is whether the admission and use of victim impact evidence in capital sentencing proceedings comports with the Constitution, not what the legislature may have perceived." Cole concluded that the victim impact evidence submitted in this case violated the eight amendment's proscription of cruel and unusual punishment.

Cole undertook an extensive examination of Supreme Court rulings on capital sentencing statutes. Those rulings, according
to Cole, emphasized that the "sentencing authority's discretion must be suitably directed and limited so as to immunize the risk of wholly arbitrary and capricious action."\textsuperscript{822} Statements by victims (or their families) that have "the effect of arousing the passion and prejudice of the sentencer [do] not satisfy this constitutional standard. Similarly, evidence irrelevant to the sentencing decision has no place in a capital sentencing proceeding."\textsuperscript{823}

\textbf{(b) The Application of Henry v. State.---}The court also rejected Lodowski's argument that the use of victim impact statements is inconsistent with the standards established by \textit{Henry v. State}.\textsuperscript{824} In \textit{Henry}, the court stated that "the sentence should be fashioned, to the best of the sentencing judge's ability, to the facts and circumstances surrounding the crime and the individual then being sentenced."\textsuperscript{825} Lodowski argued that victim impact statements do not relate to the crime or the defendant being sentenced.\textsuperscript{826} The court, however, did not read \textit{Henry} so narrowly. According to the court, \textit{Henry} recognized that the sentencing judge has sufficient discretion to consider the gravity of the offense.\textsuperscript{827} Furthermore, the court found a "reasonable nexus between the impact of the offense upon the victim or the victim's family and the facts and circumstances surrounding the crime especially as to the gravity or aggravating quality of the offense."\textsuperscript{828}

Judge Cole, in his concurrence, rejected \textit{Henry}'s application because \textit{Henry} was a noncapital case.\textsuperscript{829} He argued that the proper approach, consistent with the eighth amendment, required "'consideration of the character and record of the individual offender and the circumstances of the particular offense.'"\textsuperscript{830} Cole did not believe that the
information contained in victim impact statements could possibly be construed as relating to "the circumstances of the particular offense." Rather, he thought that this phrase meant the "specific circumstances of the crime, such as whether it was committed in the course of a capital felony or whether it was committed upon a peace officer or judicial officer." Since the victim’s family members did not know Lodowski personally, they could not shed light on his "character" and "record". Since they were not present at the time of the crime, they could not shed light on the "circumstances" of the particular offense. Therefore, Cole concluded that the statements were inadmissible.

(c) Statutory Construction of Section 124 Concerning Live Testimony.—Lodowski also contended that sections 124(c) and 124(d) precluded live testimony because they do not expressly provide for its use. The majority rejected this construction based on its reading of the legislative history of section 124(d). That examination showed that both houses debated whether live testimony should be mandatory or permissive. Although the final product did not mention live testimony, the court accepted the State’s argument that the “legislature thought the live testimony was in any event admissible and that no legislation expressly providing for it was necessary.”

Judge Cole claimed that the court’s review of the legislative his-

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831. Id. at 774, 490 A.2d at 1270 (Cole, J., concurring).
832. Id.
833. Id.
834. Id. at 743, 490 A.2d at 1254. Lodowski was also aware of the legislative history of § 124(d) and used it to enforce the significance of the section’s failure to provide expressly for the use of live testimony. Id.
835. Id. Live testimony was given by one victim’s widow and the other victim’s mother. “The statements and testimony described in graphic detail the adverse impact the murder of each victim had on his respective family.” Id. at 735-36, 490 A.2d at 1251.
836. Id. at 748, 490 A.2d at 1257. According to the majority, the General Assembly opposed a mandatory provision for live victim impact statements because a failure to include live victim testimony would invalidate the sentence. Id. at 747, 490 A.2d at 1256-57.
837. Id. at 748, 490 A.2d at 1257. The court relied heavily on the traditional practice of allowing live testimony in juvenile proceedings despite a lack of explicit authorization. Id. at 745, 490 A.2d at 1255-56. The court attached significance to the fact that the legislature has never abrogated the practice in juvenile proceedings. Id. at 748, 490 A.2d at 1257. The court also cited one United States Supreme Court case and six Maryland cases that support the proposition that “a sentencing judge, in his discretion, may obtain information relevant to the imposition of sentence in open court through live testimony.” Id. at 748-49, 490 A.2d at 1257.
tory and intent was unnecessary. According to him, the majority failed to apply one of the cardinal rules of statutory construction. Because section 124 was neither ambiguous nor obscure, the court had "no need to look elsewhere to ascertain the intent of the General Assembly." Cole also criticized the majority's conclusions concerning the legislative history. His examination revealed that the "General Assembly has rejected, on at least eight occasions, bills that would have authorized victim allocution at sentencing." This evidence weakened the majority's conclusion that the statute's silence indicated the permissibility of live testimony.

In Reid v. State, the Court of Appeals considered whether Maryland's victim impact statute establishes the minimum or maximum standards for providing information to judges prior to sentencing. Section 124(c)(2)(ii) provides that "[i]f the court does not order a presentence investigation, the State's Attorney may prepare a victim impact statement to be submitted to the court and the defendant. . . ." The court held that this provision "sets a minimum standard for what the sentencing judge in a circuit court must consider as far as the effects of the crime on the victim." Therefore, it does not prevent the State's Attorney from submitting additional statements by the victim, the victim's family or the State's Attorney whether or not the court has ordered a presentence investigation.

838. Id. at 776-77, 490 A.2d at 1272 (Cole, J., concurring).
839. Id. at 776, 490 A.2d at 1272 (Cole, J., concurring).
840. Id. at 777, 490 A.2d at 1272 (Cole, J., concurring).
841. Id. at 777-78, 490 A.2d at 1272 (Cole, J., concurring). Judge Cole advanced three other reasons for his conclusion that § 124 does not authorize live testimony. First, states that do authorize such statements have expressly done so in their statutes. Cole did not name these states, however. Id. at 778, 490 A.2d at 1272-73. Second, Cole rejected the majority's analogy to juvenile proceedings. He noted that very different constitutional constraints apply to capital sentencing proceedings. Id. at 778-79, 490 A.2d at 1273. Third, Cole systematically rejected the majority's use of Maryland case law to support the court's historic acceptance of live testimony in sentencing proceedings. Id. at 779-80, 490 A.2d at 1273.
844. Id. § 124(c)(2)(ii). A presentence investigation is usually conducted by the Division of Parole and Probation at the court's request. A victim impact questionnaire is sent to the victim. The victim completes the questionnaire and sends it to a probation officer. The officer uses the questionnaire to fill out the Division's standard form victim impact statement. 302 Md. at 813, 490 A.2d at 1290.
845. 302 Md. at 821, 490 A.2d at 1294.
846. Id. Though statements not expressly required by the statute may be offered to the sentencing judge, it is solely "within the judge's discretion whether to consider them at sentencing." Id. If the court orders a presentence investigation, that report must be considered. Id.
In Reid, the defendant was convicted of first degree rape, first degree sexual offense and robbery with a dangerous and deadly weapon. The victim, a seventeen year old female, was threatened with a knife, bound, gagged and blindfolded, and then raped. The trial court ordered a presentence investigation. The State's Attorney, on its own initiative, also prepared a victim impact statement. Reid argued that the statute should be strictly construed to bar victim impact statements when the court orders a presentence investigation. The sentencing judge rejected Reid's argument and considered the victim impact statement. On appeal, Reid requested that the sentence be vacated because the sentencing judge improperly considered the statement filed by the State's Attorney.

The court rejected Reid's contention based on the legislative history of the statute. The majority stated that "the cardinal rule of statutory construction is to ascertain and carry out the real legislative intent." After a brief examination of the stated purposes of the legislation and statements made by its sponsor, the majority stated that the court was satisfied that the sentencing judge disregarded the victim's opinion on sentencing. Therefore, its inclusion in the victim impact statement was not prejudicial.

847. Id. at 813, 490 A.2d at 1290.
848. Id. In contrast to the usual procedure, supra note 844, the Division was "notified by the State that a victim impact statement had been prepared by the victim and that it was forwarded directly to the court." Id. The victim impact statement submitted by the Division included a reference to the statement provided by the State's Attorney concerning the psychological impact on the victim's personal welfare or familial relationships. The victim impact statement submitted by the State's Attorney included psychological effects. It also included the victim's opinion of the appropriate sentence for the defendant. Id. at 813-14, 490 A.2d at 1290-91.
849. Id. at 814, 490 A.2d at 1291. Reid filed a motion to strike the State's victim impact statement. When the sentencing judge denied the motion, he said that he would not consider the victim's opinion as to sentencing to be determinative. Id. Note that the Court of Appeals in Henry v. State, 273 Md. 131, 328 A.2d 293 (1974), held that "the sentence should be fashioned, to the best of the sentencing judge's ability, to the facts and circumstances surrounding the crime and the individual then being sentenced." Id. at 150, 328 A.2d at 304. Although the sentencing judge has broad discretion to determine what facts and circumstances to consider, see Lodowski v. State, 302 Md. 691, 749, 490 A.2d 1228, 1257-58 (1985), the permissible factors do not include consideration of the victim's recommended sentence. In Reid, however, the court was satisfied that the sentencing judge disregarded the victim's opinion on sentencing. Therefore, its inclusion in the victim impact statement was not prejudicial. 302 Md. at 821-22, 490 A.2d at 1294-95.
850. Id. at 814-15, 490 A.2d at 1291.
851. Id. at 816, 490 A.2d at 1292.
852. The stated purposes of the statute as recited by the court were (1) to require the Division of Parole and Probation to prepare presentence investigations in certain cases; (2) to require the Division of Parole and Probation to include a victim impact statement within a presentence investigation prior to the sentencing of certain defendants; (3) to authorize a State's Attorney to prepare a victim impact statement under certain circumstances; (4) to require the court to consider the victim impact statement; and (5) to
ity concluded that "the intent of [section 124(c)] was to provide the victim access to the sentencing process by ensuring that at least in one way the effects of the crime on the victim will be presented to and considered by the sentencing judge." The majority also found that the General Assembly would have required victim impact statements for misdemeanors as well as felonies had it not been for fiscal constraints. The legislature was aware that some jurisdictions considered victim impact statements in all cases. Since the legislature did not state its disapproval of such practice, the court concluded that "the legislature intended to extend, rather than restrict existing practices."

In its construction of section 124(c), the majority also relied on the common law rule that a sentencing judge has wide discretion to consider relevant information. This discretion has only three restrictions: First, the sentence must not constitute cruel and unusual punishment or violate constitutional requirements; second, the judge must not be motivated by ill will, prejudice or other impermissible considerations, and third, the sentence must be within the statutory limitation. Within these limits, a sentencing judge should be allowed to consider as much information about the defendant, the victim, and the crime as possible. The court concluded that "[t]here is no justification for limiting the broad discretion of the judge with regard to the victim's role in sentencing."

Judge Eldridge, in dissent, claimed that the majority construed the language of section 124(c)(2)(ii) to mean "exactly the opposite

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provide for the contents of the victim impact statement. Id. at 815-16, 490 A.2d at 1291-92.

853. Senator Garrity sponsored the legislation. He testified that most judges considered victim impact; the bill would insure that all did. He appeared to be most concerned with providing a mechanism to factor the harm to the victim into the sentence imposed. Id. at 816, 490 A.2d at 1292.

854. Id. at 816-17, 490 A.2d at 1292. Reid argued that the purpose of the statute was to provide "an objective and detached review by the probation officer of the often emotional victim statement." Id. at 815, 490 A.2d at 1291. He claimed that such a review was "necessary to achieve [the] balance, objectivity and fairness to which the defendant is entitled at sentencing." Id.

855. Id. at 818-19, 490 A.2d at 1293.

856. Id. at 818, 490 A.2d at 1293.

857. Id. at 819, 490 A.2d at 1293.


860. 302 Md. at 819, 490 A.2d at 1293.

861. Id. at 821, 490 A.2d at 1294.
from what it says." Eldridge argued that the majority should not have examined the legislative history because the statute contained no ambiguity on its face. In addition, he found the history to be entirely ambiguous. Thus, it did not furnish "an adequate basis for ignoring clear and unambiguous statutory language."

Judge Eldridge's position is persuasive. The legislative history discussed by the majority is ambiguous, and the statutory language is clearly contrary to their construction. Even granting that the General Assembly intended to extend existing practice, the statute's provision does that by mandating a victim impact statement in all felonies and certain violent misdemeanors. From a policy standpoint, and in light of the facts of this case, the majority's position is more desirable and comports better with the common law discretion given to judges. But statutes which are clearly written may prescribe such common law powers. Since section 124(c)(2)(ii) is clearly written, the majority's construction is highly questionable.

3. Restitution.—In Walczak v. State, the Court of Appeals held that a sentencing court may not order restitution for a crime unless the defendant has first been convicted of committing that crime. Walczak and three others allegedly robbed Esther Gardner and Judith Martin. A Cecil County grand jury indicted Walczak on two counts of armed robbery and twelve related offenses. Under a plea agreement, the State tried Walczak only for the robbery of Gardner. A judge found him guilty upon an agreed statement of facts, and the State nol prossed the remaining charges. The circuit court imposed a twenty year prison sentence, but suspended the last five years in exchange for five years of probation. As a condition of

862. Id. at 823, 490 A.2d at 1295 (Eldridge, J., dissenting). Eldridge charged that the majority in effect deleted the word "not" from the provision in order to reach its decision. Id.
863. Id.
864. Id., 490 A.2d at 1296 (Eldridge, J., dissenting):
At best, as the majority state[d] "[t]his legislative history suggests an intent to establish minimum standards for the information to be provided to judges..." The majority relie[d] on a negative, i.e., that there is 'no evidence from... the legislative history... of an intent to limit the victim's role to the single Victim Impact Statement of the presentence investigation.'
Id.
867. Id. at 429, 488 A.2d at 952.
868. All fourteen counts concerned assault, robbery with a dangerous weapon and related offenses. Seven counts referred to crimes against Gardner and seven counts referred to crimes against Martin. Id. at 424, 488 A.2d at 950.
probation, the court ordered Walczak to pay full restitution not only to Gardner, but to Martin as well. Walczak did not object at the sentencing, but did attempt to contest the restitution order on appeal. The Court of Appeals reversed, holding that the circuit court could not order Walczak to pay Martin restitution.

Although several Maryland statutes authorize the payment of restitution, article 27, section 640(b) addresses the issue most directly. Section 640(b) allows a restitution order upon conviction

869. Id. The court ordered Walczak to make restitution in the amounts of $8,325.00 to Gardner and $8,816.95 to Martin. Id.

870. Walczak did express doubts about his ability to satisfy the full amount of restitution within the five-year probationary period. Nevertheless, he signed the order of probation requiring the payments. Id. at 424-25, 488 A.2d at 950.

The Court of Special Appeals upheld the restitution order in an unpublished opinion that did not reach the merits. Because Walczak failed to object to the restitution order at trial, the court held that Maryland Rule 1085 precluded his raising the issue on appeal. Id. at 425, 488 A.2d at 950. Maryland Rule 1085 provides:

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court, but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

Md. R. P. 1085.

Walczak petitioned the Court of Appeals for a writ of certiorari, and the State filed a conditional cross-petition seeking affirmation of the Court of Special Appeals' decision. If the restitution order was found to be preserved for review, the State argued that the restitution order was legal. The Court of Appeals granted both the petition and the cross-petition. 302 Md. at 425, 488 A.2d at 950.

871. 302 Md. at 433, 488 A.2d at 954. As a threshold issue, the Court of Appeals had to address the defendants' failure to preserve the restitution order for appellate review. The court noted that a lack of uniformity characterized past interpretations of Rule 1085 and illegal sentences. Past decisions had dealt with the subject by (1) refusing review entirely, (2) labeling the error "jurisdictional" and thus reviewable, and (3) either applying the doctrine of plain error or simply relying on the inherent power of appellate courts to correct error. In an effort to resolve the conflicting approaches used by Maryland appellate courts, the court held "that when a trial court has allegedly imposed a sentence not permitted by law, the issue should ordinarily be reviewed on direct appeal even if no objection was made in the trial court." Id. at 426-27, 488 A.2d at 951. The court also relied on the language of Md. R.P. 4-345(a), which states that a "court may correct an illegal sentence at any time." Id.

872. Md. ANN. CODE art. 27, § 640(b) states in relevant part:

(b) Restitution may be ordered upon conviction of certain crimes; priority of payment.—Upon conviction for a crime where property of another has been stolen, converted, unlawfully obtained, or its value substantially decreased as a direct result of the crime, or where the victim suffered actual medical expenses, direct out of pocket losses, or loss of earning as a direct result of the crime, or if as a direct
and repeatedly asserts that restitution depends on damage resulting directly from the crime.\textsuperscript{873} The court attached significance to the repetitive nature of the provision and found that "the statute authorizes the court to order restitution only where the court is otherwise authorized to impose punishment."\textsuperscript{874} Since the circuit court could not punish Walczak for the robbery of Martin, it could not order him to pay her restitution.\textsuperscript{875} Thus, the court remanded the case to the Court of Special Appeals with directions to modify the judgment.\textsuperscript{876}

In \textit{Smitley v. State},\textsuperscript{877} the Court of Special Appeals held that restitution ordered as a condition of probation or parole must abate if a court reimposes the original sentence in full.\textsuperscript{878} The circuit court

\begin{quote}
\textit{result of the crime}, the victim incurred medical expenses that were paid by the Department of Health and Mental Hygiene or any other governmental entity, the court may order the defendant to make restitution in addition to any other penalty provided for the commission of the crime.
\end{quote}

(Emphasis added.)

The court also cited Md. Ann. Code art. 27, §§ 486, 488 (1982), which provide:

\textit{§ 486. In general.} Every person convicted of the crime of robbery, or an accessory thereto before the fact, shall restore the thing robbed or taken to the owner, or shall pay to him the full value thereof, and be sentenced to the penitentiary for not less than three nor more than ten years.

\textit{§ 488. Robbery with deadly weapon.} Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto, shall restore to the owner thereof the thing robbed or taken, or shall pay him the full value thereof, and be sentenced to imprisonment in the Maryland Penitentiary for not more than twenty years.

\footnote{873. See supra note 872.}

\footnote{874. 302 Md. at 429, 488 A.2d at 952. The court also quoted with approval the Court of Special Appeals decision in Mason v. State, 46 Md. App. 1, 415 A.2d 315 (1980). In \textit{Mason}, the Court of Special Appeals concluded that "the clear sense of § 640(b) . . . seems unmistakably to contemplate restitution for the crimes as to which incarceration might otherwise be imposed." \textit{Id.} at 6, 415 A.2d at 317.}

\footnote{875. 302 Md. at 430, 488 A.2d at 953. The court rejected the State's argument that Coles v. State, 290 Md. 296, 429 A.2d 1029 (1981) controlled this situation. In \textit{Coles}, the Court of Appeals upheld a restitution order despite the fact that the defendant's conviction was not for a crime specifically enumerated in the § 640 restitution statute. 290 Md. at 304-05, 429 A.2d at 1033. The court found statutory authority elsewhere to support the restitution order. \textit{Id}. In \textit{Walczak}, the court distinguished \textit{Coles} by noting that, unlike Walczak, Coles had been convicted of the crime for which the court had ordered restitution. 302 Md. at 430, 488 A.2d at 953.}

\footnote{876. The court concluded its opinion by noting that most state and federal jurisdictions limit restitution to the crime for which the defendant was convicted. \textit{Id.} at 431-33, 488 A.2d at 953-54. The court did acknowledge, however, that a minority of jurisdictions have reached the opposite conclusion. \textit{Id.} at 433 n.4, 488 A.2d at 954 n.4.}

\footnote{877. 61 Md. App. 477, 487 A.2d 315 (1985).}

\footnote{878. \textit{Id.} at 485, 487 A.2d at 319.}
suspended defendant Smitley's two-year prison sentence in favor of two years of probation. As conditions of probation, the court ordered Smitley to obey all laws and to pay restitution to his victim. Less than two years later, the circuit court found Smitley in violation of both conditions. The court reimposed the original two-year sentence in full and continued the order of restitution. Defense counsel objected, claiming that the continued order of restitution constituted an increase in the defendant's original sentence, which had consisted solely of the jail term. The court overruled this objection, and Smitley appealed.

The Court of Special Appeals vacated the sentence and remanded the case based on its reading of article 27, section 640, subsections (c) and (e). As outlined by the court, subsections (c) and (e) allow two methods of ordering and enforcing restitution. A court may order restitution as a sentence under subsection (c), and may hold the defendant in contempt for failure to pay under subsection (e). The court may also order restitution as a condition of

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879. Id. at 478, 487 A.2d at 315.
880. Id. at 479, 487 A.2d at 315-16. The court ordered Smitley to make restitution in the amount of $1,200.00 and to pay court costs of $220.00. Although the court also attached seven other conditions to the probation, none were disputed in this appeal. Id.
881. Id., 487 A.2d at 316. Specifically, the court found that Smitley had paid only $169.50 towards the $1,420 he owed. The court also noted that he had been convicted of disorderly conduct, malicious destruction of property and assault while on probation. Id.
882. Id. at 480-81, 487 A.2d at 316. The sentence called for two years in prison followed by six months of probation. The court ordered that Smitley, upon his release from prison, must pay the unpaid balance of the court costs and restitution, which the court calculated to be $1,274.50. Id.
883. Id. at 480, 487 A.2d at 316. The State contended that the issue was not properly preserved for appellate review because defense counsel had not clearly objected at trial. The Court of Special Appeals found that "[a]lthough counsel's articulation of the objection would likely have caused his English grammar teacher justifiably to seek early retirement, it does, nonetheless, suffice to preserve the issue for our review." Id. at 481, 487 A.2d at 317.
884. Id. at 486, 487 A.2d at 319. Md. Ann. Code art. 27, § 640(c), (e) (1982) provide:

(c) Sentence or condition of probation or parole.—When an order of restitution has been entered pursuant to subsection (b), compliance with the order may be made as a sentence or condition of probation or parole.

(e) Failure to make restitution.—When a defendant fails to make restitution as ordered, the Division shall notify the court. The court may hold a hearing to determine if the defendant is in contempt of court or has violated the terms of the probation or parole.

(Emphasis added.)
885. 61 Md. App. at 483, 487 A.2d at 318. The contempt proceedings do not increase the original sentence, but they do provide powerful incentive for compliance because an independent sentence may be imposed for a contempt conviction. See id. at 484, 487 A.2d at 318.
probation or parole under subsection (c). If the defendant violates that condition, the court may revoke the probation and reinstate the original sentence under subsection (e). The court emphasized that both methods must conform to article 27, section 642, which provides that no court may increase a validly imposed sentence. The circuit court's action constituted an increase in Smitley's original sentence; thus, it exceeded the court's sentencing power under section 642.

In *U.S. v. Dudley*, the United States Court of Appeals for the Fourth Circuit distinguished an order of restitution from a criminal penalty and held that an order of restitution does not abate when the defendant dies during the pendency of an appeal. The Ninth

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886. *Id.* at 483, 487 A.2d at 318. This method also encourages compliance because the original sentence may be reinstated. *See id.* at 484, 487 A.2d at 318.


> Whenever any person is convicted of any offense in any of the courts of record of this State, having criminal jurisdiction, and the judge presiding does not impose sentence or suspends sentence generally or for a definite time places the offender upon probation, or makes another order and imposes other terms as she or he may deem proper, and that person at any time thereafter is brought before the court to be sentenced upon the original charge of his conviction, or for a violation of the terms and conditions of the order of probation in the case, the judge who then is presiding in that particular court, if he determines that the offender violated the terms and conditions of probation, may proceed to sentence the person to serve the period of imprisonment prescribed in the original sentence or any portion thereof, or if no sentence was imposed, any sentence provided for by law for the crime for which that person was originally convicted. The sentence may be suspended in whole or in part and the offender may be placed on further probation on the terms and conditions the judge deems proper but no term of probation may exceed the maximum prescribed by § 641A of this article.

(Emphasis added.)


889. *See id.* at 485-86, 487 A.2d at 319. Note that the judge in *Smitley* could have continued the restitution without increasing the original sentence by revoking the probation and reimposing the suspended sentence. A portion of the sentence could then be suspended, and the defendant could be placed on further probation. The restitution order could continue as a condition of the new probation. *Id.* at 484, 487 A.2d at 318.

890. 739 F.2d 175 (4th Cir. 1984).

891. *Id.* at 178. Pursuant to a conviction for food stamp fraud and distribution of Demerol, the United States District Court for the District of Maryland sentenced Dudley to four years in prison. The court also ordered him to pay restitution to the Department of Agriculture. *Id.* at 175-76. Following Dudley's death during the appeal process, defense counsel moved under F.R. App. P. 42(b) to dismiss Dudley's appeal as moot and remand the case with an order to vacate Dudley's conviction. Both defense counsel and the government agreed that Dudley's death abated his prison sentence, the levy of a fine, and the addition of a special parole term. The court therefore remanded the case to the district court with directions to vacate the criminal proceedings. *Id.* at 176. Because the government and defense counsel could not agree upon the status of Dudley's restitu-
Circuit had suggested the opposite conclusion in *U.S. v. Oberlin* by stating that "[d]eath pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception." The totally penal nature of the abated sentence in *Oberlin*, however, allowed the Fourth Circuit to distinguish that case from *Dudley*. Penalties such as fines, forfeiture, and imprisonment represent the government's attempt to punish the defendant. Death forecloses the ability to punish. Restitution, on the other hand, compensates the victim of the crime and attempts to reduce the adverse impact of the crime on the victim. It follows then, that the justification for restitution continues after the defendant's death. Therefore, the Fourth Circuit concluded that the restitution order could continue beyond the defendant's demise.

4. **Maximum Length of Probation.**—Under article 27, section 641A of the Maryland Annotated Code, a trial court may impose "probation for a period longer than the [suspended] sentence but not in excess of five years. However, if the defendant consents in writing, the court may grant probation in excess of five years, but only for the purpose of making restitution." The proper interpretation of this statutory limitation has caused trial courts consider-
able problems. The following three cases illustrate some of these statutory construction issues.

(a) Multicount Indictments.—In State v. Oliver, the Court of Appeals determined the operation of the statute on multicount indictments. The trial court applied the five-year limitation to each count of several multicount indictments and ordered that the probation periods be served consecutively. As a result, each probationary sentence totaled more than five years. The Court of Appeals vacated the sentences and held that consecutive terms of probation may not exceed the five-year maximum, even when imposed pursuant to a multicount indictment. This five-year maximum period applies even when each count arose from acts that occurred in different places at different times.

The Court of Appeals found the language and legislative history of section 641A to be inconclusive. Thus, it examined other jurisdictions' treatment of similar statutes. First, the court looked at the judicial interpretation of a similar federal statute. In Fox v. United States, the Tenth Circuit interpreted that statute to prohibit total probation periods in excess of five years when a sentence is.

901. Id. at 597, 490 A.2d at 244.
902. Id. The appellants in Oliver had engaged in crime sprees covering two counties that resulted in multicount indictments in both Frederick and Carroll Counties. Id. at 598-99, 490 A.2d at 245. Following their convictions, the defendants each received prison terms of various lengths. The sentencing judge suspended a substantial portion of each sentence and ordered probation. The judge imposed probation for each count, however, and ordered the probation periods to run consecutively. As a result, each defendant received a probation sentence in excess of five years. Id. at 599, 490 A.2d at 245. The Court of Special Appeals vacated the trial court's sentences and remanded the cases for resentencing. Oliver v. State, 59 Md. App. 383, 475 A.2d 1230 (1984). The Court of Appeals then granted the State's petition for a writ of certiorari. 302 Md. at 585, 490 A.2d at 243.

903. 302 Md. at 600-03, 490 A.2d at 246-47. The State argued that legislative silence on multicount indictments indicated an intent not to subject them to the statutory limitation. Id. at 600-01, 490 A.2d at 246. The defense claimed that the court had expressly limited all periods of probation to five years in Kupfer v. State, 287 Md. 540, 414 A.2d 907 (1980). 302 Md. at 601-02, 490 A.2d at 246. The court concluded that neither the language nor the sparse legislative history of § 641A provided a clear determination of proper interpretation of the statute. Because the statute had been amended, presumably in response to Kupfer, Maryland case law was likewise not instructive. Id. at 602-03, 490 A.2d at 247. The court flatly rejected an opinion of the Attorney General, 61 Op. Att'y Gen. 694 (1974), that construed the statute to authorize consecutive probationary periods for each count or indictment. The court did not agree that the broad discretion granted sentencing judges could override the maximum limit imposed by the statute. 302 Md. at 609-11, 490 Md. at 251.

905. 354 F.2d 752 (10th Cir. 1965).
suspended on multiple counts. In *United States v. Albano*, the Second Circuit followed Fox and noted that other federal courts also "have held or assumed . . . that the statute limits the total period of probation, even for a multi-count indictment, to five years."

Not content to rely on federal authority, the Court of Appeals also looked to out-of-state case law. The fifteen states and one territory that have interpreted similar probation statutes have all held that the statute precludes consecutive periods of probation in excess of the prescribed maximum. The court could not find "a case in any jurisdiction which permits consecutive periods of probation as to a multi-count charging document if the aggregate of the probationary period exceeds a statutory limitation or which allows, except for expressly specified, narrow statutory exceptions, a probationary term in excess of the limitation."

Bowing to this widespread recognition of a maximum probationary period, the court concluded that section 641A does not permit consecutive periods of probation in excess of five years.

(b) Subsequent Extensions.—In *Christian v. State*, the Court of Special Appeals addressed the effect of the five-year limit of section 641A on subsequent extensions made to an original total probationary period. The court held that the total probationary period may not exceed five years in length.

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906. *Id.* at 753-54.
907. 698 F.2d 144 (2d Cir. 1983).
908. *Id.* at 146.
909. 302 Md. at 606-07, 490 A.2d at 249. Alabama, Alaska, Hawaii, Idaho, Iowa, Louisiana, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, South Carolina, West Virginia, and the Virgin Islands have similar statutes. *Id.* at 611-612 Appendix A, 490 A.2d at 252 Appendix A.
910. *Id.* at 607, 490 A.2d at 249 (emphasis in original).
911. *Id.* at 611, 490 A.2d at 251. In dicta, the court noted that a defendant may serve a period of probation that runs longer than five years if that defendant is convicted of a second crime prior to the expiration of the original probationary period. In such a case, the second probationary period must run concurrently with the former probationary period. The second probationary period may run consecutively only if the aggregate period is less than five years. The court noted that this result is in accord with its holding. *Id.* at 597-98, 490 A.2d at 244-45.
913. *Id.* at 299, 489 A.2d at 65. The court acknowledged the potentially harsh effect of this conclusion. A defendant might serve four years and eleven months of violation-free probation and then commit a violation in the twelfth month. Under the court's interpretation of § 641A, the sentencing judge could not extend the defendant's probation for a meaningful period of time and would therefore have to reimpose the suspended sentence. *Id.* at 308-09, 489 A.2d at 70. The court noted, however, that the sentencing judge has three other choices. The judge could 1) treat the violation as trivial and decide not to revoke the defendant's probation, 2) view the violation as outside
On May 24, 1978, Christian received a sentence of three years imprisonment that the trial court suspended in favor of three years of probation. Two subsequent probation violations resulted in extensions\textsuperscript{914} of this period.\textsuperscript{915} The original probation plus three extensions totaled nearly seven years. On June 5, 1984, as a result of still another probation violation, the sentencing court revoked Christian's probation and reimposed his 1978 prison sentence.\textsuperscript{916} Christian objected, claiming that section 641A limits the total allowable period of probation to five years. Because the five-year period expired in 1983, Christian argued that no probation existed for the court to revoke on June 5, 1984. The sentencing court disagreed, and Christian appealed.\textsuperscript{917}

The Court of Special Appeals reversed, holding that section 641A limits the court's authority under section 642\textsuperscript{918} to extend

 of the defendant's control and thus have no grounds to revoke, or 3) revoke the probation, but impose only a fraction of the original sentence. The court viewed these options as sufficient to blunt any impermissibly harsh effects of its holding. \textit{Id.}

\textsuperscript{914} The term "extension" as used here and by the courts is a misnomer. When the defendant violates the terms of probation, the sentencing judge, in accordance with Md. \textit{Ann. Code} § 642 (1982), revokes the original probation, strikes the suspension of the original sentence, reimposes that sentence, then suspends a portion or all of that sentence and places the defendant on further probation. \textit{See also supra} notes 74-81 and accompanying text (discussing constitutional challenge to "extension" of probation).

\textsuperscript{915} 62 Md. App. at 299-300, 489 A.2d at 65-66. Christian's first violation resulted from convictions for possession of marijuana and a minor traffic offense. At that time, the court revoked Christian's probation and reimposed the prison sentence. It then suspended that sentence in favor of three years of probation. The court ordered this extension to commence running when the original probation expired on May 23, 1981. \textit{Id.}

The second violation occurred in September 1982 and involved charges of contempt of court, a narcotics violation and telephone misuse. For this, the court extended the probation one year, which the Court of Special Appeals interpreted as meaning until April 1985. \textit{Id.} at 300, 489 A.2d at 66.

\textsuperscript{916} \textit{Id.} at 300, 489 A.2d at 65-66. This last violation involved a conviction for unauthorized use and arrests for grand theft and daytime breaking and entering. \textit{Id.}

\textsuperscript{917} \textit{Id.} 489 A.2d at 66.

\textsuperscript{918} Md. \textit{Ann. Code} art. 27, § 642 (1982) governs the procedure to be followed by the sentencing court when the conditions of probation are violated. It states, in relevant part:

\begin{quote}
Whenever any person is convicted of any offense in any of the courts of record of this State, having criminal jurisdiction, and the judge presiding . . . suspends sentence generally or for a definite time places the offender upon probation, . . . and that person at any time thereafter is brought before the court . . . for a violation of the terms and conditions of the order of probation in the case, the judge who then is presiding in that particular court, if he determines that the offender violated the terms and conditions of probation, may proceed to sentence the person to serve the period of imprisonment prescribed in the original sentence or any portion thereof, or if no sentence was imposed, any sentence provided for by law for the crime for which that person was originally convicted. The sentence may be suspended in whole or in part and the
probation. The last sentence of section 642 provides that "[t]he sentence may be suspended in whole or in part and the offender placed on further probation . . . but no term of probation may exceed the five year maximum prescribed by § 641A of this article." From this language, however, it is not clear whether the legislature intended for the five-year maximum to apply solely to the extended sentence or to the total period represented by both the extended and original sentences combined.

The court approached the question by looking to the "'subject matter of the statute[s], the purpose underlying [their] enactment and the object sought to be accomplished.' " One of the major goals of probation is rehabilitation. The court cited both studies and other cases that suggest that rehabilitation occurs, if at all, in a relatively short period of time. Since lengthy terms of probation do not necessarily achieve the goal of rehabilitation, the court held that the five-year maximum imposed in section 641A, and cited in section 642, must be construed as applying to the total probationary period: the original period and all extensions. Without this limitation, successive extensions could lead to "lifetime probation or probation of indefinite duration." The court concluded that the legislature would not allow under section 642 that

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offender may be placed on further probation on the terms and conditions the judge deems proper but no term of probation may exceed the maximum prescribed by § 641A of this article.

919. 62 Md. App. at 306, 489 A.2d at 69.
921. 62 Md. App. at 303, 489 A.2d at 67.
922. Id. (quoting State v. Berry, 287 Md. 491, 496, 413 A.2d 557, 560 (1980)).
923. Id. at 304, 489 A.2d at 68.
924. NATIONAL COMMISSION OF REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT, § 3015 comment at 282 (1971); ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3(b)(ii).
926. 62 Md. App. at 305, 489 A.2d at 68.
927. Id.
928. Id. at 306, 489 A.2d at 69. The court also found it significant that § 641A(b) allows a sentencing court to reduce the period of probation but "is silent as to any authority to increase that period." Id. In addition, § 641(A)(a) permits a period of probation to extend beyond five years only for restitution purposes if the defendant consents in writing. Id. To the extent that §§ 641A and 642 are in pari materia, id. at 303, 489 A.2d at 67, some significance may be drawn from the language of § 641A. No greater significance should be attached to the language in § 641A, especially in view of this court's holding in Brown v. State, 62 Md. App. 74, 488 A.2d 502 (1985), see infra notes 931-37. In Brown, the court expressly rejected the defendant's argument that the sentencing court could only reduce the terms under § 642 because it was limited to reducing terms of probation in § 641A(b). Id. at 77, 488 A.2d at 503.
which it has clearly forbidden under section 641A.\textsuperscript{930}

In Brown v. State,\textsuperscript{931} the appellant challenged the authority of the court to "extend" probation pursuant to section 642 for violations of the terms of probation. She argued that section 641A(b) only authorizes the court to reduce the period of probation\textsuperscript{932} because that section states in part that "[p]robation may be granted whether the offense is punishable by fine or imprisonment or both . . . . The court may revoke or modify any condition of probation or may reduce the period of probation."\textsuperscript{933} The Court of Special Appeals rejected this "novel" argument by distinguishing between sections 641A and 642.\textsuperscript{934} Section 641A confers power on the sentencing court to place a defendant on probation in lieu of serving part or all of the defendant's sentence.\textsuperscript{935} Section 642, in contrast, "delineates the trial court's power when a defendant is brought before the court upon a violation of probation."\textsuperscript{936} The court refused to read section 641A(b) as limiting the court's power to reimpose probation after the defendant violates the terms of the earlier probation order.\textsuperscript{937}

5. Enhanced Punishment Statute.—Maryland's enhanced punishment statute requires "the imposition of a mandatory sentence of not less than twenty-five years upon any person who, under specified conditions is convicted a third time of a crime of violence."\textsuperscript{938} At issue in Hawkins v. State\textsuperscript{939} was whether the defendant's two convictions for daytime housebreaking in 1977 would subject the defendant to enhanced punishment when convicted of a third crime, armed robbery, in 1983.\textsuperscript{940} At the time of the first two convictions, the statute did not include daytime housebreaking as a "crime of violence" for enhanced punishment purposes.\textsuperscript{941} One year prior to

\textsuperscript{930} Id., 489 A.2d at 69. The court noted that restitution compensates the victim of a crime rather than punishes the defendant. Therefore, extending probation for the purpose of making restitution makes sense. The court found it significant that the legislature clearly and narrowly provided an exception to the five-year maximum for restitution. 62 Md. App. at 306-07, 489 A.2d at 69.


\textsuperscript{932} Id. at 76-77, 488 A.2d at 503.

\textsuperscript{933} Md. Ann. Code art. 27, § 641A(b) (Supp. 1985).

\textsuperscript{934} 62 Md. App. at 77, 488 A.2d at 503.

\textsuperscript{935} Id.

\textsuperscript{936} Id.

\textsuperscript{937} Id.

\textsuperscript{938} Id. at 78, 488 A.2d at 504.


\textsuperscript{940} 302 Md. 143, 486 A.2d 179 (1985).

\textsuperscript{941} Id. at 145-46, 486 A.2d at 180-81.
Hawkins' third conviction in 1983, the statute was amended to include daytime housebreaking.\textsuperscript{942} The question, therefore, was whether the statute could be construed to embrace the former convictions as predicate offenses. The Court of Special Appeals held that Hawkins' two prior daytime housebreaking convictions qualified as "crimes of violence" for purposes of sentencing under the statute.\textsuperscript{943}

The Court of Appeals agreed. According to the court, the status of a predicate offense must be determined by the statutory definition in force when a qualifying subsequent offense is committed.\textsuperscript{944} The court rejected Hawkins' claim that the statute is ambiguous and therefore should be strictly construed.\textsuperscript{945} Rather, the court found the enhanced punishment statute to be plainly worded to effectuate the legislative intent. Because the statute is unambiguous, it "must be construed without forced or subtle interpretations designed to extend or limit the scope of its operation."\textsuperscript{946}

The court also rejected Hawkins' argument that the statute applied retroactively. Instead, the court found that the statute punishes only new crimes committed after the statute's effective date. It does not affect the sentence previously received for the predicate

\textsuperscript{942} Act of May 25, 1982, ch. 479, 1982 Md. Laws 3064 (codified at Md. Ann. Code art. 27, § 643B(a) (1982)). At the time of Hawkins' third conviction, § 643B(a) defined crime of violence as "abduction; arson; burglary; daytime housebreaking under § 30(b) of this article; . . . robbery, robbery with a deadly weapon; sexual offense in the first degree; sexual offense in the second degree; use of a handgun in the commission of a felony or crime of violence. . . ." Md. Ann. Code art. 27, § 643B(a) (1982).

\textsuperscript{943} 58 Md. App. 91, 95, 472 A.2d 482, 484 (1984). In affirming the decision of the trial court, the Court of Special Appeals held that the prior offenses qualified as predicate offenses as long as the prior offenses were included in the statute prior to the commission of the third offense. \textit{Id.}

\textsuperscript{944} 302 Md. at 147-49, 486 A.2d at 181-82.

\textsuperscript{945} \textit{Id.} at 147, 486 A.2d at 181. Hawkins argued that the statute did not clearly define how to determine a qualifying predicate offense. Specifically, the statute did not state whether the predicate offense is determined at the time the first crime is committed or when the defendant is convicted of the third crime. Because of this uncertainty, Hawkins proposed that the statute be construed in a manner which would avoid "retroactive application with all its adverse and deleterious consequences." \textit{Id.}

\textsuperscript{946} \textit{Id.} at 147-48, 486 A.2d at 181-82. The court noted that its construction advances the purpose of the statute while the construction suggested by Hawkins would not. The purpose of the statute "is to protect the public from assaults upon people and injury to property and to deter repeat offenders from perpetrating other criminal acts of violence under the threat of an extended period of confinement." \textit{Id.} at 148, 486 A.2d at 182. According to the court, the legislature made a conscious determination that persons convicted of or who have a history of daytime housebreaking present a serious threat to society. Such persons should therefore be subject to special, more severe treatment at sentencing. \textit{Id.} at 148-49, 486 A.2d at 182.
offense. The court also rejected Hawkins' claim that the enhanced punishment statute is invalid as an ex post facto law in violation of article 1, section 10 of the United States Constitution and article 17 of the Maryland Declaration of Rights. The punishment imposed "is not for the previous crimes; rather it is an incident of the subsequent offense for which the defendant is being tried, as well as a result of his persistent course of criminal conduct." The statute in no way affects the sentence of any offense committed prior to its enactment. It merely requires "courts to consider the persistence of the accused in pursuing a criminal course of conduct when imposing sentence." The court also noted that the United States Supreme Court as well as other state courts have upheld the constitutionality of recidivist statutes against ex post facto challenges.

In DiBartolomeo v. State, the State prosecutor attempted to use the defendant's 1972 Texas sodomy conviction as a predicate offense under Maryland's enhanced punishment statute. The Court of Special Appeals held that the conviction could not be used because sodomy is not within the list of crimes of violence for the purposes of the enhanced punishment statute. The court noted that both the United States Supreme Court and the Maryland Court of Appeals "have recognized that enhanced punishment statutes like § 643B may constitutionally include predicate offenses within their ambit without regard to when such offenses were committed." The Supreme Court has defined an ex post facto law as one which imposes additional punishment to that prescribed when a criminal act was committed. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

947. Id. at 149, 486 A.2d at 182-83. Hawkins argued that the court's construction may be unfair to a defendant who pleaded guilty to a crime that at the time was not included in the list of crimes of violence. A defendant might have pleaded guilty "in return for a limited sentence or probation in the absence of recidivist consequences where they would [have gone] to trial or plead[ed] to a different offense were they aware that such consequences existed." Id. at 147, 486 A.2d at 181. The court did not address this contention. The one fault in Hawkins' argument is that it assumes that the defendant who pleads guilty to a crime is consciously considering the impact of such a crime upon the sentencing for a later, yet-to-be-committed crime. Even absent an applicable recidivist statute, previous criminal convictions are routinely considered during sentencing.

The court did note that both the United States Supreme Court and the Maryland Court of Appeals "have recognized that enhanced punishment statutes like § 643B may constitutionally include predicate offenses within their ambit without regard to when such offenses were committed." Id. at 148, 486 A.2d at 182.

948. The Supreme Court has defined an ex post facto law as one which imposes additional punishment to that prescribed when a criminal act was committed. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

949. 302 Md. at 149, 486 A.2d at 182.

950. Id. at 150, 486 A.2d at 183.

951. Id.


954. 302 Md. at 151, 486 A.2d at 183-84.


957. 61 Md. App. at 312, 486 A.2d at 261. See supra note 942 (definition of crimes of violence).
reached this decision despite the fact that the list does include second degree sexual offenses, a classification that clearly includes the defendant's criminal conviction in Texas. At the time the defendant committed the criminal act in Texas, no second degree sexual offense existed in Maryland. Therefore, had defendant done in Maryland what he apparently did in Texas, he could only have been convicted of sodomy—not a crime of violence and therefore not a predicate offense.

In order to reach this conclusion, the court had to examine and distinguish between three criminal offenses in Maryland: common law sodomy, sodomy classified as a perverted practice, and sodomy classified as either a first or second degree sexual offense. The court found that the legislature consciously declined to repeal the perverted practices statute when it enacted the first and second degree sexual offenses statute and deliberately omit-

958. DiBartolomeo was convicted of sodomy in Texas for picking up a 13 year old boy and forcing him to undress and perform unnatural sex acts in DiBartolomeo's car. 61 Md. App. at 305, 486 A.2d at 257.

Article 27, § 464A(a)(1) makes it a second degree sexual offense for a person to engage "in a sexual act with another person ... by force or threat of force against the will and without the consent of the other person[.]" Article 27, § 464A(a)(3) provides that a person commits a second degree sexual offense by engaging "in a sexual act with another person ... under 14 years of age and the person performing the sexual act is four or more years older than the victim." Md. Ann. Code art. 27, §§ 464A(a)(1), (2) (1982).


960. 61 Md. App. at 312, 486 A.2d at 261. The defendant could also have been convicted of perverted practices under § 554, which is also not included in § 643B as a crime of violence. Id.

961. Id. at 310, 486 A.2d at 260. Although the three offenses overlap, "they are not identical and do not purport to proscribe precisely the same range of conduct." Id. First and second degree sexual offenses under §§ 464 and 464A require that the act be "by force or threat of force against the will and without the consent of the other person," Md. Ann. Code art. 27, §§ 464(a)(1), 464A(a)(1) (1982), unless the other person is mentally defective, mentally incapacitated, physically helpless, or under 14 years of age, id. § 464A(a)(2), (3). Neither perverted practices, id. § 554, nor common law sodomy require the use of force or lack of consent.

962. Common law sodomy includes "sexual intercourse by a human with an animal, anal intercourse by a man with another person, fellatio, cunnilingus and analingus." 61 Md. App. at 307, 486 A.2d at 258.


964. Id. § 464.

965. Id. § 464A.

966. 61 Md. App. at 309-10, 486 A.2d at 259. The bill which became the first and second degree sexual offenses statute, S.B. 358, originally included a clause repealing the perverted practices statute, Md. Ann. Code art. 27, § 554, as well as the penalty for
ted sodomy from the enhanced punishment statute. The court concluded that sodomy and perverted practice convictions are distinct from first or second degree sexual offense convictions; only the latter can serve as predicate offenses for enhanced punishment purposes.

At first glance, DiBartolomeo appears to be inconsistent with Hawkins. The cases, however, involved different issues. In Hawkins, the court focused on when an offense must be classified as a crime of violence to be considered a predicate offense for purposes of the enhanced punishment statute. The court held that the determination is made at the time of the third conviction. In DiBartolomeo, the court focused not on when the classification would be made, but rather, in what situations an out-of-state offense could be considered a predicate offense. The court held that the out-of-state offense may be considered a predicate offense in Maryland if the defendant's actions, when performed, would have subjected the defendant to a criminal conviction in Maryland. That "hypothetical" conviction may then be considered a predicate offense if it is classified as a crime of violence under the statute at the time of the defendant's third conviction. Therefore, "[s]o long as Maryland retains sodomy as an independent crime, separate from the offenses created in sections 464 and 464A [the first and second degree sexual offenses], [common law sodomy] and not those statutory offenses, must be the standard by which a foreign sodomy conviction is judged."

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common law sodomy, id. § 553. The legislature deleted the repealer, however. 61 Md. App. at 309-10, 486 A.2d at 259.

967. 61 Md. App. at 309-10, 486 A.2d at 259-60. The court noted that, when the legislature adopted the enhanced punishment statute, sodomy was included in the definition of crimes of violence in Md. Ann. Code art. 27, § 441(e), which regulates the sale of pistols. The court used this fact to infer that the legislature consciously decided to delete sodomy from the definition of crimes of violence for enhanced punishment purposes. 61 Md. App. at 311-12, 486 A.2d at 260-61.

968. 61 Md. App. at 312, 486 A.2d at 261.

969. Hawkins, 302 Md. at 147-49, 486 A.2d at 181-82.

970. DiBartolomeo, 61 Md. App. at 312, 486 A.2d at 261.

971. Id.

972. Id. at 313, 486 A.3d at 261. The court made it clear, however, that an out-of-state conviction can qualify as a predicate offense under the enhanced punishment statute if a counterpart Maryland offense existed at the time of the out-of-state conviction and the Maryland counterpart is a statutory crime of violence at the time of the third conviction. If it is, the State must also show that the foreign conviction rested on acts that would constitute its Maryland counterpart. Id. at 312-13, 486 A.2d at 261. See also Temoney v. State, 290 Md. 251, 429 A.2d 1018 (1981) (State did not demonstrate that defendant's District of Columbia robbery convictions were within Maryland's definition of robbery as a crime of violence).
6. *Consecutive vs. Concurrent Sentencing.*—In *DiPietrantonio v. State*, the Court of Special Appeals held that the judge who reimposes a suspended sentence has the authority to order it consecutive to or concurrent with any unsuspended sentence presently being served by the defendant. This decision expressly affirms in part and overrules in part the court's decision in *State v. White*.

On July 1, 1982, a circuit court judge sentenced DiPietrantonio to ten years in prison for assault and battery, but suspended eight and one-half years in favor of three years of probation. While on probation, the defendant pleaded guilty to charges of first degree rape and attempted first degree rape. For these crimes, another judge sentenced DiPietrantonio to two consecutive twenty-five year prison terms. Upon learning of this subsequent conviction, the first judge revoked the defendant’s probation and reimposed a five-year prison sentence to run consecutively to the fifty-year term. The defendant appealed the sentence, claiming that *State v. White* precluded a consecutive sentence.

In *White*, the court had focused on the sentencing sequence and concluded that a judge imposing a sentence must relate it to all other sentences, whether *actual* or *potential*, presently outstanding against the defendant. Thus, DiPietrantonio argued that only the second judge could determine the relationship between the suspended and unsuspended sentence. Although the court acknowledged the plausibility of the argument, it expressly overruled that portion of *White* on which DiPietrantonio relied. Thus, the actual

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974. Id. at 535, 487 A.2d at 679.
975. 41 Md. App. 514, 347 A.2d 299 (1979). In the first paragraph of the *DiPietrantonio* opinion, the court stated that the *DiPietrantonio* opinion should alleviate the confusion and inconsistencies created by *State v. White*.
976. 61 Md. App. at 529, 487 A.2d at 677.
977. Id. at 530, 487 A.2d at 677. The judge made no mention of the defendant’s earlier conviction and suspended sentence.
978. Id.
980. 61 Md. App. at 534, 487 A.2d at 679. DiPietrantonio argued that the judge who ordered the unsuspended sentence for the subsequent conviction had the sole authority to determine the consecutive or concurrent relationship between the suspended and the unsuspended sentences. The defendant reasoned that the judge’s failure to mention the suspended sentence automatically required that the suspended and unsuspended sentences run concurrently and not consecutively. Id.
981. Id. at 532, 487 A.2d at 678. The court used the term *in esse* to refer to sentences actually being served and *in posse* to refer to sentences in suspension. Id. n.1.
982. Id. at 534, 487 A.2d at 679.
983. Id. The defendant’s reliance on *White* was misplaced. Id. Shortly after the *White* decision, the Court of Appeals reached the opposite conclusion in *Kaylor v. State*, 285
or potential status of a sentence determines its position in the sequence.\textsuperscript{984} A suspended sentence represents only the uncertain potential for a future period of incarceration. This uncertainty fails to provide a basis upon which other judges may order a consecutive or concurrent prison sentence.\textsuperscript{985} An unsuspended sentence of incarceration presently being served does create a basis for imposing an additional sentence. Therefore, the unsuspended existing sentence must take its position at the beginning of the sequence. The judge imposing the additional sentence may then order that the sentence be served either concurrently or consecutively to the existing sentence.

Under this analysis, DiPietrantonio’s suspended sentence provided no basis upon which the second judge could have ordered a consecutive or concurrent prison term. The second sentencing did create a basis for reimposing the first sentence, however. Thus, the court upheld the judge’s authority to order a consecutive sentence.\textsuperscript{986}

7. Credit for Presentence Detention.—Under article 27, section 638C,\textsuperscript{987} defendants may receive credit against their sentences for any time served in presentence custody. Subsection (a) of section 638C describes two specific situations in which the sentencing court must award such credit. The first situation requires credit when the presentence custody and the eventual sentence both relate to the same crime(s). The second situation requires that:

[i]n any case where a person has been in custody due to a charge that culminated in a dismissal or acquittal, the amount of time that would have been credited against a

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\textsuperscript{984}Md. 66, 400 A.2d 419 (1979). In \textit{Kaylor}, the court ruled that the judge who revokes probation as a result of a subsequent conviction determines the consecutive or concurrent nature of the reimposed sentence. Confusion arose over the continued validity of \textit{White} because \textit{Kaylor} did not expressly overrule \textit{White} or explore consecutive sentencing in detail. The Court of Special Appeals, by its own admission, further confused the issue by attempting to reconcile the two cases in Hicks v. State, 61 Md. App. 183, 485 A.2d 1021 (1984). In \textit{DiPietrantonio}, the Court of Special Appeals expressly abandoned those provisions of \textit{White} which did not conform to \textit{Kaylor}. 61 Md. App. at 531, 487 A.2d at 677-78.

\textsuperscript{985}Id. at 532-33, 487 A.2d at 678-79.

\textsuperscript{986}Id. at 532, 487 A.2d at 678. The court used \textit{White} to define the basis on which a judge imposes a sentence: "'A judge must relate the sentence he imposes to the status quo of the moment of sentencing.'" Id. (quoting \textit{White}, 41 Md. App. at 515, 397 A.2d at 300-301). \textit{DiPietrantonio} made clear that status quo means whatever other unsuspended sentence of confinement exists at the time of sentencing. \textit{Id}.

\textsuperscript{987}Md. ANN. CODE art. 27, § 638C (1982).
sentence for the charge, had one been imposed, shall be credited against any sentence that is based upon a charge for which a warrant or commitment was lodged during the pendency of such custody.\textsuperscript{988}

In *Fleeger v. State*,\textsuperscript{989} the Court of Appeals held that a nolle prosequi constitutes a dismissal or acquittal for the purposes of section 638C(a).\textsuperscript{990}

On July 6, 1981, Robert Fleeger was arrested and jailed on a theft charge. Unable to post bail, he remained in jail until he escaped on December 25, 1981. Fleeger’s freedom lasted only one day; the police recaptured him and returned him to custody on December 26, 1981. On January 13, 1982, the State charged Fleeger with escape and the unauthorized use of a motor vehicle. In exchange for a guilty plea to the latter charges, the State nol prossed the original theft charge. The sentencing court awarded Fleeger credit against his sentence for his two and one-half months of post-escape custody, but denied credit for his four and one-half months of preescape custody.\textsuperscript{991}

The Court of Appeals reversed and held that Fleeger must receive credit for his entire presentence custody.\textsuperscript{992} Section 638C(a) required that Fleeger prove that (1) the original charge resulted in a

\textsuperscript{988} *Id.* § 638C(a).
\textsuperscript{989} 301 Md. 155, 482 A.2d 490 (1984).
\textsuperscript{990} *Id.* at 162, 482 A.2d at 494.
\textsuperscript{991} *Id.* at 158-59, 482 A.2d at 492. The Court of Special Appeals upheld the trial court in an unreported per curiam opinion filed on December 29, 1982. The court avoided any detailed interpretation of § 638C and focused instead on Md. Ann. Code art. 27, § 139 (1982), which addresses escapes from confinement. 301 Md. at 159, 482 A.2d at 492. Section 139(a)(1) provides in relevant part:

- If any offender or person legally detained and confined in the penitentiary or jail . . . in this State, escapes he shall be guilty of a felony and on conviction . . . be sentenced to confinement in the penitentiary, jail or house of correction for whatever additional period, not exceeding ten years, as the court may adjudge. The sentence so imposed shall be consecutive to the sentence under which the inmate was originally confined and may not be suspended.

Md. Ann. Code art. 27, § 139. The Court of Special Appeals held that § 638C does not make credit for preescape custody mandatory. The court then reasoned that the consecutive sentence requirement of § 139(a) effectively precluded any awarding of credit under § 638C. 301 Md. at 159, 482 A.2d at 492.

The Court of Appeals rejected this rationale: "*[T]he use of the word sentence [in § 139(a)] demonstrates that the General Assembly intended that this provision apply only when a defendant escapes while serving a sentence on a prior criminal conviction. In short, this provision presupposes a sentence based upon a valid criminal conviction." 301 Md. at 167, 482 A.2d at 96. For the purpose of applying this statute, the Court of Appeals refused to equate a validly imposed sentence with presentence custody. *Id.* at 166-67, 482 A.2d at 496.

\textsuperscript{992} 301 Md. at 168, 482 A.2d at 497.
dismissal or acquittal and (2) the sentence imposed resulted from a warrant or commitment lodged during his custody on the original charge. The court concluded that Fleeger satisfied both conditions.  

The court first determined that, for the purposes of applying section 638C(a), a nolle prosequi equals a dismissal or acquittal. The State argued that, unlike a nolle prosequi, a dismissal demonstrates a judicial belief that the charges should not have been brought. The court rejected this argument, noting that both a nolle prosequi and a dismissal have the same legal result. A nolle prosequi represents the

"'final disposition' of the charging document or count; 'there can be no further prosecution under' the nolle prosequi charging document or count; the matter is 'terminated' at that time; and the accused may be proceeded against for the same offense only under a new or different charging document or count."  

Once Fleeger satisfied the conditions of his plea agreement, the State could no longer prosecute him on the original charge. Thus, Fleeger satisfied the first condition of the statute. He also met the statute's second condition because the State lodged the escape warrant against him while he was in custody on the original theft charge. The court noted that the legislature specifically used the word "lodge" instead of "issue" in section 638C. The State may "issue" a warrant against anyone, but may only "lodge" a warrant against someone already in custody. When Fleeger escaped on December 25th, the State immediately issued a warrant against him. The State did not lodge the warrant against him until after his return to custody. The court concluded that Fleeger met the precise requirements of the second condition. Therefore, the court remanded the case for resentencing.  

Despite the State's argument to the contrary, the court concluded that its holding represented sound policy. The State argued that the court's decision allowed defendants to bank time against
The court reasoned that subsection 638C(a) effectively minimized the possibility of banked time by conditioning the crediting of presentence custody on the dismissal or acquittal of the charges. Most defendants attempting escape do not know if their original charges will result in a dismissal or acquittal. Therefore, at the time of escape, they cannot know whether they will be entitled to credit preescape custody against any postescape conviction. This uncertainty diminishes the incentive for defendants to attempt to bank time.

The court also noted that the legislative intent behind section 638C concerned dead time as much as it did banked time. The court reasoned that the language of section 638C(a) clearly reflects an attempt by the legislature to minimize any accumulation of dead time. The statute avoids dead time by mandating credit for any time spent in custody while awaiting trial on an offense for which the defendant is ultimately convicted. In contrast, the State's arguments would maximize the accumulation of dead time. Therefore, the court's holding in Fleeger successfully advances the perceived legislative purpose behind section 638C.

8. Release of Civil Rights Claims in Exchange for Criminal Sentencing Considerations.—In Bushnell v. Rossette, the United States Court of Appeals for the Fourth Circuit rejected the defendant's argument that any agreement to release a civil rights claim in exchange for criminal sentencing considerations is per se void. Rather, the court focused on the public policy considerations involved and held that such an agreement may be valid if the evidence does not demonstrate that prosecutorial powers could be or were abused in conjunction with obtaining the agreement. Thus, the court upheld the validity of the defendant's agreement with the police department to release his civil rights claims in exchange for postconviction

999. The court defined banked time as "a reserve of time established when a defendant spends time in custody that is not yet but may be credited against a valid sentence."

1000. Id. at 165, 482 A.2d at 495. The court noted that the issue of banked time was not necessary to its holding. Once the defendant satisfied the conditions imposed by the legislature, the defendant must receive credit even if the effect is to allow banked time.

1001. Id. at 164, 482 A.2d at 495.

1002. Dead time "is time spent in custody that will not be credited to any valid sentence." Id. at 165, 482 A.2d at 495.

1003. Id.

1004. 750 F.2d 298 (4th Cir. 1984).

1005. Id. at 301.
sentencing recommendations.  

Bushnell, an attorney, was arrested by police when he became agitated with what he perceived to be a lack of appropriate interest by the police in a crime he had just witnessed. Bushnell expressed his irritation by verbally abusing the police officers for their inaction. As a result, Bushnell was arrested and charged with disorderly conduct and resisting arrest. Bushnell responded to the incident by filing a federal civil rights action against the police officers and other city officials. As a basis for his suit, Bushnell claimed that the police subjected him to a variety of tortious conduct in violation of his right to due process.

Counsel for the civil defendants in Bushnell's federal civil rights suit attended Bushnell's criminal trial. When Bushnell was found guilty of disorderly conduct and resisting arrest, counsel for the civil defendants approached Bushnell and proposed a deal. If Bushnell would dismiss with prejudice his civil suit, the assistant state's attorney would recommend probation before judgment in his criminal suit. Bushnell agreed, and the trial court followed the recommendation.

Bushnell later refused to sign the order dismissing the federal civil rights action, arguing that the agreement was void as against public policy. The federal district court rejected the argument and granted the summary judgment for the defendants on the basis of the agreement.

On appeal, the Fourth Circuit upheld the validity of the agreement as well as the district court's dismissal of the civil rights action. In reaching its conclusion, the court distinguished three cases from other circuits that had stricken similar agreements as void. In each of those cases, the civil rights action was tried

1006. _Id._
1007. _Id._ at 299. Bushnell had walked into the police station to report a crime that he had just witnessed on a city sidewalk.
1008. _Id._ Bushnell brought his action against not only the police officers, but also against the Baltimore City Police Chief and the Mayor and City Council of Baltimore, pursuant to 42 U.S.C. § 1983 (1982).
1009. _Id._ Specifically, Bushnell charged the police with assault, battery, defamation, false imprisonment, and conversion of his property. _Id._
1010. _Id._ Bushnell was tried in the District Court of Maryland for Baltimore City. _Id._
1011. _Id._
1012. _Id._ at 302.
1013. _Id._ The court cited Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968) (banning prosecution for a traffic offense conducted in retaliation for citizen's refusal to honor an agreement not to file a racial harassment claim); MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970) (voluntary dismissal by prosecution cannot be conditioned
before the related criminal action against the defendant. In each case, the government that obtained the release pushed for a dismissal of the action on the basis of the release. The Fourth Circuit also noted that the various circuit courts had found that the government had used its prosecutorial power either to exact the release or to retaliate for the civil prosecution.

None of these elements was present in *Bushnell*. In *Bushnell*, the criminal prosecution of Bushnell was completed before the parties made the release agreement. Partly because Bushnell was an attorney, the court also found the release agreement to be completely voluntary and informed. In addition, counsel for the civil defendants in Bushnell's civil rights action approached Bushnell only after the determination of his guilt, so that the danger of a retaliation charge being brought against him was nonexistent.

The court warned, however, that prosecutorial retaliation would not be tolerated and emphasized that the holding applied only to cases in which guilt has been adjudicated. In *Bushnell*, the release did not involve dismissal of charges. It was voluntary, and the individual involved an attorney. On these facts, the court determined that the agreement did not violate public policy. It appears, however, that the court will scrutinize other such agreements with care. Two factors appear to be central to the *Bushnell* decision: First, inquiry into alleged police conduct had been conducted in the first trial, so a second adjudication would be duplica-

upon stipulation by defendant which removes his right to a civil action when the prosecution responded to the refusal by bringing additional charges against the defendant; Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975) (agreement to dismiss criminal charges in return for release of civil rights claim unenforceable as defense in civil rights action on the authority of *Dixon* and *McDonald*).

1015. 750 F.2d at 300-01. The significance of the order of the trials is that the police misconduct at issue (in *Dixon*, racial harrassment, and in *Boyd*, an illegal arrest and search) would never be open to public scrutiny if the releases were honored. The courts in each case cited the public interest in monitoring and insuring proper police conduct as an important interest to preserve. *Boyd*, 513 F.2d at 89; *Dixon*, 394 F.2d at 969.

1016. 750 F.2d at 301. In *Dixon* and *Boyd*, the courts suggested that the governments had used prosecutorial power to exact the releases. *Boyd*, 513 F.2d at 88; *Dixon*, 394 F.2d at 969. In *MacDonald*, because the charges against the defendant were increased after the defendant refused to honor the release, 425 F.2d at 375, the *Bushnell* court suggested that retaliation was the motive. 750 F.2d at 300.

1017. 750 F.2d at 299. Therefore, the police officers' alleged misconduct was subject to scrutiny in open court (because the defendant raised it as a defense). Id. at 301.

1018. Id. at 302. Also, Bushnell signed the agreement only after consulting his attorney. Id.

1019. Id. at 301.

1020. Id.

1021. Id. at 301-02.
tive, and second, the release executed by Bushnell was not obtained by threat or coercion.

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VI. EVIDENCE

A. Constitutional Issues

In *Thomas v. State*, the Court of Appeals considered the admissibility at a capital sentencing hearing of the testimony and report of the State's psychiatric expert in light of a claim by the appellant that use of this evidence violated his fifth, sixth, and fourteenth amendment rights. The court held that, when adequate *Miranda*-type warnings have been given to the defendant prior to the psychiatric examination and defense counsel has been given prior notice of the examination, no constitutional violation has occurred and the evidence is admissible.

Donald Thomas was convicted of first-degree murder, first-degree sexual offenses, and armed robbery and was sentenced to death. He appealed both the guilty verdict and the death sentence claiming, among other things, that the trial judge erred in admitting the testimony and report on the State's psychiatric expert at the sentencing hearing. Dr. Spodak, the psychiatrist whose testimony and report were at issue, had examined the appellant, Thomas, before the trial and again before the sentencing hearing. Prior to the first examination, the psychiatrist advised Thomas that any information he revealed would not be held in confidence and might be used at trial or a sentencing hearing. At the beginning of the second examination, Dr. Spodak notified Thomas that he had been retained by the State's Attorney's Office to evaluate Thomas on certain issues about the death penalty. During the sentencing hearing the psychiatrist testified that the capacity of the defendant to appreciate the criminality of his conduct had not been substantially impaired by mental incapacity, mental disorder, emotional disturbance, or intoxication. He further testified that it was not "'unlikely that the defendant [would] engage in further criminal activity that would

2. *Id.* at 322-29, 483 A.2d at 20-24.
3. *Id.* at 328-29, 483 A.2d at 24.
4. *Id.* at 301, 483 A.2d at 10.
5. *Id.* at 322, 483 A.2d at 20.
6. *Id.* at 322-23, 483 A.2d at 20-21.
7. *Id.* at 322, 483 A.2d at 20-21.
8. *Id.* at 323, 483 A.2d at 21.
9. *Id.* at 324, 483 A.2d at 21. *See Md. Code Ann. art. 27, § 413(g)(4) (1985).*

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constitute a continuing threat to society.' "10 The psychiatrist's testimony and report in effect negated two possible mitigating circumstances under the Maryland death penalty statute.11 The sentencing hearing resulted in imposition of the death penalty.12

On appeal, Thomas relied upon the Supreme Court's decision in *Estelle v. Smith.*13 *Estelle* held that the admission at a capital sentencing hearing of the results of a pretrial psychiatric examination submitted to without *Miranda*-type warnings and without advice of counsel violated the defendant's fifth, sixth, and fourteenth amendment rights.14 Thomas argued that his defense counsel would not have permitted the examination if he had known that the psychiatrist had been retained by the State's Attorney's Office prior to the second examination.15 According to Thomas, the State's failure to notify his defense counsel that the psychiatrist was no longer a neutral expert rendered ineffective Thomas' "consent" to the examination on the advice of counsel and, therefore, violated his fifth amendment privilege against compelled self-incrimination and his sixth amendment right to counsel.16

The majority found that the appellant's objection at trial was not constitutionally based.17 Nevertheless, it assumed a constitu-

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10. 301 Md. at 324, 483 A.2d at 21 (quoting Md. Code Ann. art. 27, § 413(g)(7) (1985)).
12. 301 Md. at 301, 483 A.2d at 10.
14. Id. at 466-71.
15. 301 Md. at 323, 483 A.2d at 21. Dr. Spodak was a member of the staff at Clifton T. Perkins State Hospital. Id. at 322, 483 A.2d at 20. When Dr. Spodak examined Thomas prior to trial, he did so as a staff member of the state hospital. Id. Under Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), Perkins' psychiatrists are deemed impartial experts, even though they are paid by the State. 301 Md. at 324, 483 A.2d at 21-22. At the time of the presentencing examination, however, Dr. Spodak had been retained by the State's Attorney's office. Id. at 323, 483 A.2d at 21. Apparently unaware of Dr. Spodak's status with the State's Attorney's Office, defense counsel believed that the doctor continued to act in his capacity as an impartial expert. Id.
16. Id. at 324, 483 A.2d at 22.
17. Id. at 327, 483 A.2d at 23.

We think it clear that appellant's objection . . . was predicated solely on a non-constitutional basis, i.e., that in conducting the post-trial evaluation, Dr. Spodak was not a neutral expert, as appellant's counsel thought when he consented to the interview, but was paid by the prosecution; and because the psychiatrist was biased against the appellant, the evidence was inadmissible. Id. The court held that appellant's nonconstitutional objection went to the weight rather than the admissibility of the evidence and, therefore, the sentencing court did not err by admitting it. Id. at 328, 483 A.2d at 23. Since the appellant did not preserve at trial a constitutional basis for his objection, the court ruled that it could not consider the constitutional basis on appeal. Id.
tional basis for the objection and distinguished Estelle.\textsuperscript{18} Significant factual differences between the two cases eliminated any possible constitutional violation in Thomas.\textsuperscript{19} Unlike the defendant in Estelle, Thomas was provided Miranda-type warnings prior to each psychiatric examination.\textsuperscript{20} Furthermore, defense counsel was fully advised of the purpose of each psychiatric examination.\textsuperscript{21}

While the factual distinctions may well resolve the fifth amendment issue, the sixth amendment right to counsel question cannot be answered as simply as the majority opinion would suggest.\textsuperscript{22} In Estelle, the Supreme Court acknowledged that the defendant should not be denied the "'guiding hand of counsel'"\textsuperscript{23} in making the difficult decision to submit to a psychiatric examination.\textsuperscript{24} Such a decision requires "'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] if possible alternative strategies at the sentencing hearing.'"\textsuperscript{25} If the State had a positive obligation to inform defense counsel of Dr. Spodak's changed status, its failure to do so seems to raise an issue about the validity of appellant's consent.

The dissent argued that appellant's consent to the psychiatric examination was "induced by the prosecution's deception" and that "'consent' induced by misrepresentation is not consent."\textsuperscript{26} Therefore, the dissenting opinion concluded that the appellant was "obviously denied the assistance of counsel" in making the decision to submit to the examination.\textsuperscript{27} To conclude summarily that the prosecution's silence on Dr. Spodak's status constituted deception sufficient to negate appellant's consent and thus to violate his sixth

\begin{itemize}
\item \textsuperscript{18} \textit{Id.} at 328-29, 483 A.2d at 23-24.
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.} at 328, 483 A.2d at 24.
\item \textsuperscript{21} \textit{Id.} The majority also noted that the Maryland death penalty statute differs from the Texas statute at issue in Estelle. Under Texas law the State bears the burden of proof on the critical issue of the future dangerousness of the defendant. According to the Maryland statute, lack of future dangerousness is a mitigating circumstance. The State bears no burden of proof with respect to the nonexistence of this mitigating circumstance. \textit{Id.}, 483 A.2d at 23-24.
\item \textsuperscript{22} \textit{Id.} at 328-29, 483 A.2d at 23-24. According to the majority, "even if appellant's counsel was honestly mistaken in the belief that Dr. Spodak would evaluate the appellant in his capacity as a Perkins' psychiatrist, that fact alone would not require reversal under the principles of Estelle." \textit{Id.} at 329, 483 A.2d at 24.
\item \textsuperscript{23} 451 U.S. at 471 (quoting \textit{Powell v. Alabama}, 287 U.S. 45, 69 (1932)).
\item \textsuperscript{24} \textit{Id.} (quoting \textit{Smith v. Estelle}, 602 F.2d 694, 708 (5th Cir., 1979)).
\item \textsuperscript{25} \textit{Id.} (quoting \textit{Smith v. Estelle}, 602 F.2d at 708 (emphasis added)).
\item \textsuperscript{26} 301 Md. at 350-51, 483 A.2d at 35 (Eldridge, J., concurring in part and dissenting in part).
\item \textsuperscript{27} \textit{Id.} at 350, 483 A.2d at 35 (Eldridge, J., concurring in part and dissenting in part).}

\end{itemize}
amendment right to counsel requires a leap in analytical reasoning not necessarily supported by the facts in the case. Nevertheless, the dissent raises a legitimate question. The omission of its answer weakens the majority opinion.

In *Thomas*, the Court of Appeals concluded that admission of the testimony and report at issue did not violate the accused's sixth amendment right to counsel. In *Moon v. State* (Moon II) the Court of Appeals considered a challenge to evidence premised on another sixth amendment guarantee. It held that the testimony of the laboratory technician who conducted a blood alcohol test is necessary to admit the record of the test results when the record on its face gives rise to a question of its reliability and the technician is available to testify. Admission of the test results absent the technician's testimony, the court held, violated the appellant's right of confrontation guaranteed by article 21 of the Maryland Declaration of Rights and the sixth amendment of the United States Constitution.

In 1979 Moon was involved in a fatal automobile accident. In the course of Moon's medical treatment at the hospital following the accident, the attending physician ordered a general drug screening test, which included a screening for alcohol. Moon was subsequently charged with several offenses stemming from the accident, including automobile manslaughter and homicide by motor vehicle while intoxicated. The trial court admitted over objection the lab report of the drug test results. Moon was convicted as charged.

Moon's counsel challenged the admission of the test results on

28. In support of its proposition that consent induced by misrepresentation is not consent, the dissenting opinion cited *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). 301 Md. at 350-51, 483 A.2d at 35. In *Bumper* the police had obtained "consent" for search of a private dwelling by claiming possession of a search warrant. 391 U.S. at 548. The Court said that acquiescence to a claim of lawful authority is not consent because "[t]he situation is instinct with coercion ... [and] [w]here there is coercion there cannot be consent." *Id.* at 548-50. It is difficult to equate the State's silence in *Thomas* with the flagrant deception in *Bumper*.
30. *Id.* at 370, 478 A.2d at 703.
31. *Id.* at 373, 478 A.2d at 704-05.
32. *Id.* at 356, 478 A.2d at 696.
33. *Id.* at 357, 478 A.2d at 696.
34. *Id.* at 356, 478 A.2d at 696.
35. *Id.* at 358, 478 A.2d at 697.
36. *Id.* at 356, 478 A.2d at 696. According to the test results, Moon's blood alcohol concentration was 0.165 percent. *Id.* at 357, 478 A.2d at 696. Md. Cts. & JUD. PROC. CODE ANN. § 10-307(e) (1984) provides that a blood alcohol level of 0.13 percent or more shall be prima facie evidence that the defendant was intoxicated.
both statutory and constitutional grounds. The court resolved the statutory issue in *State v. Moon* (Moon I). It held that the statute did not require exclusion of the results of a blood alcohol test conducted as part of normal medical treatment simply because the person tested did not expressly consent to the test. After the Court of Special Appeals affirmed Moon's conviction on remand, the Court of Appeals granted certiorari to consider the constitutional issue.

In *Moon II*, the court concluded that the confrontation clause secures for defendants the right to have witnesses against them produced in court unless the witness is "unavailable and has made an otherwise trustworthy out-of-court statement" or the evidence is "clothed with substantial indicia of reliability" and production of the witness would be pointless. Neither of these exceptions applied in *Moon II*. First, the technician was available and in the courtroom. Second, discrepancies in the lab report concerning, for example, the identification of the patient, the date and time of the test, and the kind of test administered made the report insufficiently reliable on its face to be admitted regardless of the witness's availability. Thus, admission of the lab report violated Moon's constitutional rights.

The court also found legislative support for its conclusion. The Maryland statute that governs the admissibility of blood alcohol test results if the test was conducted without the defendant's consent. The Court of Appeals held that the exclusionary provision of § 10-309 did not apply when the blood alcohol test was conducted for the purpose of medical treatment. The provision only applied when the State required the test in anticipation of filing criminal charges. The Court found that the test results were admissible as part of the hospital record under the business records exception to the hearsay rule in Md. Cts. & Jud. Proc. Code Ann. § 10-101 (1984).

37. 300 Md. at 356, 478 A.2d at 696.
40. 291 Md. at 477-78, 436 A.2d at 427-28.
41. 300 Md. at 356, 478 A.2d at 696. Md. Cts. & Jud. Proc. Code Ann. § 10-309(a) (1974), as written at the time of Moon's trial, precluded admission of blood alcohol test results if the test was conducted without the defendant's consent. 291 Md. at 470, 436 A.2d at 423. The Court of Special Appeals initially overturned Moon's conviction on that basis. 300 Md. at 356, 478 A.2d at 696. The Court of Appeals held that the exclusionary provision of § 10-309 did not apply when the blood alcohol test was conducted for the purpose of medical treatment. 291 Md. at 464, 436 A.2d at 420-21. The provision only applied when the State required the test in anticipation of filing criminal charges. The Court found that the test results were admissible as part of the hospital record under the business records exception to the hearsay rule in Md. Cts. & Jud. Proc. Code Ann. § 10-101 (1984).
42. 300 Md. at 353, 478 A.2d at 696.
43. Id. at 368-69, 478 A.2d at 702. In reaching its conclusion, the court reviewed relevant Supreme Court and Maryland decisions. *E.g.*, Ohio v. Evans, 448 U.S. 56 (1980); Pointer v. Texas, 380 U.S. 400 (1965); Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978); Johns v. State, 55 Md. 350 (1881).
44. 300 Md. at 369, 478 A.2d at 702.
45. Id.
46. Id. at 371, 478 A.2d at 703.
47. Id. at 371-73, 478 A.2d at 703-04.
reports allows the admission of test results without the testimony of the lab technician who performed the test if the defendant is notified in advance and given an opportunity to demand that the technician be present at the trial. According to the court, this provision indicated the legislature's intent "to subordinate the admissibility of alcohol test results to the timely assertion of the defendant's right of confrontation." While acknowledging that the statute did not apply in *Moon II*, the court noted that the legislative policy that accords blood alcohol tests less deference than other business records "buttressed" its own conclusion, which it reached through constitutional analysis.

**B. Relevance**

In a recent workers' compensation case, *Hall v. Willard Sand & Gravel Co.*, the Maryland Court of Special Appeals held preinjury earnings relevant when determining the degree of a claimant's permanent partial disability. Prior to *Hall*, Maryland law had only implicitly recognized the difference between preinjury and postinjury earnings as a factor in determining the amount of loss of industrial use when the employee had suffered permanent partial disability. *Hall* explicitly recognized that principle.

The legislature passed the Workers' Compensation Act to compensate workers for their loss of earning capacity because of work-related accidents. Absent a comparison of pre- and post-injury wages, determining loss of earning capacity would depend almost exclusively on a showing of anatomical loss. After considering pertinent sections of the Maryland Code, the Court of Special Ap-

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48. *Id.* at 369-70, 478 A.2d at 703.
50. 300 Md. at 370, 478 A.2d at 703.
52. *Id.* at 267, 482 A.2d at 163.
53. *Id.* at 264-65, 482 A.2d at 161-62 (citing 2 A. Larson, *The Law of Workers' Compensation* § 57.31 (rev. ed. 1976)).
54. *Id.* at 267, 482 A.2d at 163.
56. 60 Md. App. at 266, 482 A.2d at 162.

In all other cases of disability other than those specifically enumerated disabilities set forth in subsection (3) of this section, which disability is partial in character, but permanent in quality, the Commission shall determine the portion or percentage by which the industrial use of the employee's body was impaired as
peals found a showing of anatomical loss "too narrow a basis" to determine industrial loss.\textsuperscript{58} The court concluded that the determination of disability must involve a combination of factors including anatomical loss and inability to earn wages as evidenced by a reduction in earnings.\textsuperscript{59} Thus, the trial court had erred in refusing to admit the claimant's evidence.\textsuperscript{60}

\textbf{C. Subsequent Remedial Measures in Products Liability Cases}

In \textit{Troja v. Black & Decker Manufacturing Co.},\textsuperscript{61} the Court of Special Appeals held that revised safety warnings published after the plaintiff's accidental injury were inadmissible to prove the manufacturer's failure to warn adequately the users of its products.\textsuperscript{62} Troja sought damages for an injury that he had received while using an electric saw manufactured by Black & Decker.\textsuperscript{63} The injury occurred after the plaintiff had removed the 1976 model saw from its stand and safety guards.\textsuperscript{64} A revised instruction booklet included by the manufacturer with its 1984 model contained a more strongly worded warning "never to saw freehand."\textsuperscript{65} The plaintiff sought unsuccessfully to introduce evidence of the revised warning to prove that the 1976 warning was inadequate.\textsuperscript{66} The Court of Special Appeals upheld the decision of the trial court to exclude the evidence.\textsuperscript{67}

Almost all courts exclude evidence of subsequent remedial measures in negligence actions.\textsuperscript{68} This doctrine has been justified on two bases: relevancy and public policy. Some courts have argued that conduct after an accident is irrelevant to the determina-

\begin{itemize}
  \item a result of the injury and in determining such portion or percentage of impairment resulting in industrial loss, the Commission shall take into consideration, among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of injury . . . .
\end{itemize}

(Emphasis added.)

\textsuperscript{58} 60 Md. App. at 266, 482 A.2d at 162.
\textsuperscript{59} Id. at 266-67, 482 A.2d at 162-63.
\textsuperscript{60} Id. at 267, 482 A.2d at 163.
\textsuperscript{62} Id. at 113, 488 A.2d at 522.
\textsuperscript{63} Id. at 105, 488 A.2d at 517-18.
\textsuperscript{64} Id. at 106, 488 A.2d at 518.
\textsuperscript{65} Id. at 112, 488 A.2d at 521.
\textsuperscript{66} Id. at 112-13, 488 A.2d at 521.
\textsuperscript{67} Id. at 114, 488 A.2d at 522.
\textsuperscript{68} 2 J. WIGMORE, \textit{EVIDENCE IN TRIALS AT COMMON LAW} \S 283 (Chadbourne rev. 1979). \textit{See}, e.g., FED. R. EVID. 407, which provides that evidence of subsequent remedial measures, such as subsequent repairs, design changes, and new safety warnings, is not admissible to prove negligence or culpable conduct.
tion that conduct before the accident was negligent. Precautions for the future cannot be construed as an admission of responsibility in the past "since the conduct is equally consistent with injury by mere accident or through contributory negligence." Furthermore, even if the evidence has some relevancy, the danger of over-emphasis by the jury is so great that it should be excluded.

The public policy argument for exclusion of evidence of subsequent remedial measures is stronger. Defendants, or those who might expect to become defendants, would refrain from initiating needed repairs or improvements for fear that their actions would be used against them. This hesitancy to act would apply equally to those who had acted negligently and those who had exercised due care. To encourage repairs and safety improvements, evidence of those acts should not be treated as implied admissions of prior negligence or culpability.

Some courts, however, distinguish strict liability from negligence and refuse to exclude evidence of subsequent remedial measures in strict liability actions. In the leading case, Ault v. International Harvester Co., the California Supreme Court upheld the admission of evidence of a subsequent design change to prove liability in a products liability case. The court concluded that the subsequent remedies doctrine applied only to cases requiring affirmative fault. Such fault is not a necessary ingredient in an ac-

69. See, e.g., Columbia & P.S.R. Co. v. Hawthorne, 144 U.S. 202 (1892); Morse v. Minneapolis & St. Louis R.R., 30 Minn. 465, 16 N.W. 358 (1883).
70. FED. R. EVID. 407 advisory committee note.
71. 2 J. WIGMORE, supra note 68.
73. 62 Md. App. at 113-14, 488 A.2d at 522 (quoting Werner v. Upjohn Co., 628 F.2d 848, 857 (4th Cir. 1980)). See also 2 J. WIGMORE, supra note 68.
74. 2 J. WIGMORE, supra note 68.
77. Id. at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814. Ault involved the application CAL. EVID. CODE § 1151 (West 1966), which is substantively identical to FED. R. EVID. 407, to evidence of a subsequent design change in a product liability case. 13 Cal. 3d at 116-17, 528 P.2d at 1149-50, 117 Cal. Rptr. at 813-14. The plaintiff claimed that the accident in which he was injured had been caused by a defective aluminum gear box in a vehicle manufactured by the defendant. Id. at 117, 528 P.2d at 1150, 117 Cal. Rptr. at 814. To prove that the aluminum was an unsuitable material for the gear box, the plaintiff introduced evidence at trial that three years after the accident the defendant began to manufacture the gear box from malleable iron. Id.
78. 13 Cal. 3d at 117-18, 528 P.2d at 1150, 117 Cal. Rptr. at 814. The court rejected
tion based on strict liability, the character of the product, not the defendant's conduct, is at issue. Furthermore, the public policy rationale applicable to the typical negligence setting is not valid in the products liability field. For the typical products liability defendant, who "manufactures tens of thousands of units of goods," the court found it manifestly unrealistic to suggest that such a producer will [forgo] making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.

Economic self-interest dictates that the manufacturer make needed repairs or safety improvements. Application of the subsequent remedies doctrine would serve "merely as a shield against potential liability."

Other courts, however, reject the Ault analysis. In Werner v. Upjohn Co., the United States Court of Appeals for the Fourth Circuit found the public policy rationale for exclusion of evidence of subsequent remedial action equally applicable to negligence and strict liability cases. Whether the manufacturer is sued under a negligence theory or strict liability theory, the admissibility of subsequent remedies against it would inhibit remedial measures or improvements. The court further noted that the Ault analysis the defendant's argument that "culpable conduct" was a term broad enough to encompass strict liability. Id. at 118, 528 P.2d at 1150, 117 Cal. Rptr. at 814. Whereas negligence and culpable conduct imply some degree of affirmative fault, strict liability does not. Id.

79. Id.
80. Id.
81. Id. at 120, 528 P.2d at 1151-52, 117 Cal. Rptr. at 815-16.
82. Id., 528 P.2d at 1152, 117 Cal. Rptr. at 816.
83. Id.
84. Id.
86. Id. at 857-58. The plaintiff in Werner had suffered permanent injury as a result of his use of an unavoidably dangerous drug manufactured by the defendant pharmaceutical company. Id. at 851. At trial the plaintiff introduced evidence of a revised warning published by the defendant four months after the plaintiff began taking the drug. Id. at 853. Plaintiff offered the evidence to show that the defendant should have changed the warning earlier. Id. The Fourth Circuit held admission of the evidence was in error. Id.
87. Id.
assumes the product to be defective and, therefore, overlooks the situation when the product is not defective, but could be made better. Under Ault, the manufacturer who improves a nondefective product subjects itself to an increased risk of liability.

In Troja, the Court of Special Appeals chose to follow Werner because it found “its reasoning sounder than that of Ault.” The court agreed with the Fourth Circuit that the policy basis for exclusion is as applicable to strict liability cases as it is to negligence cases. “We stand beside Werner,” the court concluded, “and hold that in a strict liability case evidence of subsequent remedial measures is not admissible to prove culpable conduct.”

The court also noted that exclusion of the proffered evidence could be further justified on more traditional grounds: The evidence’s potential for prejudice outweighed its probative value. Because of the seven-year time lag between the manufacture of the allegedly defective saw and the issuance of the new warning, the limited probative value of the evidence would not outweigh its potential to confuse the jury. It has been suggested that this balancing test is the most desirable approach to determine the admissibility of evidence of subsequent remedial measures in product liability cases. In lieu of blanket adoption of either the Ault or Werner analysis, courts should decide on a case-by-case basis whether to admit such evidence. Nevertheless, Troja holds that in Maryland evi-

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88. Id. at 857.
89. Id.
90. 62 Md. App. at 113, 488 A.2d at 522. At least one court does not view Ault and Werner as incompatible decisions. Beginning with its decision in Robbins v. Farmers Union Grain Terminal Ass’n, 522 F.2d 788 (8th Cir. 1977), the Eighth Circuit has consistently followed the Ault analysis and held Rule 407 inapplicable to actions based on strict liability. Without overruling Robbins, the court reached the opposite result in DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983). It found the conclusion in Robbins—that the doctrine of strict liability by its nature does not include negligence or culpable conduct—inapplicable in failure to warn cases, when due care in giving an adequate warning is at issue. Id. at 228. The court expressly followed Werner in overturning the admissibility of evidence of the defendant’s subsequent revised warning for use of an unavoidably dangerous drug. Id. at 229.
91. 62 Md. App. at 113-14, 488 A.2d at 522 (quoting Werner, 628 F.2d at 857).
92. Id. at 114, 488 A.2d at 522. This holding is not a completely accurate characterization of the Fourth Circuit’s decision in Werner. The Fourth Circuit did not find strict liability embraced within the term “culpable conduct.” 628 F.2d at 856-57. If it had, no further analysis would have been needed since strict liability would then be encompassed by the express language of Rule 407.
94. Id. at 114, 488 A.2d at 522.
96. Id.
vidence of subsequent remedial measures is not admissible in strict liability cases unless it is introduced for one of the permissible purposes delineated in Rule 407 of the Federal Rules of Evidence.97

D. Character and Reputation — Prior Bad Acts

The Maryland Court of Appeals considered a number of cases dealing with the admissibility of evidence relating to the prior bad acts of a criminal defendant. Issues considered included whether questions implying prior bad acts by a defendant may be asked a defendant's character witnesses in order to test their knowledge of defendant's character, whether evidence of a defendant's prior bad acts is admissible to "rehabilitate" a witness in advance of an anticipated impeachment, and whether the nature of the plea leading to an impeaching conviction is admissible.

In Winters v. State,98 the Court of Appeals held that questions designed to test the witnesses' knowledge of a defendant's character may be asked on cross-examination of defendant's character witnesses even though such questions imply that the defendant had engaged in a prior bad act that did not result in a conviction.99 Richard Winters had been charged with conspiracy to violate state tax laws and filing fraudulent state income tax returns.100 At trial, three character witnesses tested on direct examination that Winters had a good reputation for honesty and integrity.101 During cross-examination the prosecutor asked two of the character witnesses if they had heard any information that would cause them to suspect Winters' reputation.102 He asked the third character witness, an official of the local police department, if he had received any information through search warrants that would cause him to suspect the defendant's reputation.103 The trial judge permitted this line of questioning over objection by defense counsel,104 and the Court of Appeals affirmed.105

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97. 62 Md. App. at 115, 488 A.2d at 523. In adopting the Werner analysis, the Court of Special Appeals also explicitly adopted the exceptions contained in Fed. R. Evid. 407, which allow admission of evidence of subsequent measures when offered to prove ownership, control, feasibility, to impeach. Id.
98. 301 Md. 214, 482 A.2d 886 (1984). For discussion of other aspects of Winters, see supra CRIMINAL LAW notes 662-75 and accompanying text.
99. 301 Md. at 233, 482 A.2d at 895.
100. Id. at 219, 482 A.2d at 888.
101. Id. at 231, 482 A.2d at 894.
102. Id.
103. Id., 482 A.2d at 895.
104. Id.
105. Id. at 233, 482 A.2d at 895.
The court’s ruling in *Winters* further clouds an already less than clear area of Maryland evidence law. In 1953 the Court of Appeals appeared to adopt the view of the United States Supreme Court, expressed in *Michelson v. United States*. In *Comi v. State*, the Court of Appeals noted that "[i]t is almost universally recognized that the State . . . may cross-examine to show public reports of acts inconsistent with the trait of character which the witness has asserted to be publicly attributed to the accused."[109]

In *Taylor v. State*, however, the Court of Appeals reversed a lower court decision that specifically relied on *Comi*. The court labelled its earlier discussion of the issue in *Comi* as dictum only.[112] Thus, reliance by the Court of Special Appeals on *Comi* was misplaced; questions containing accusations of prior criminal conduct should be permitted on cross-examination of character witnesses only to the extent that they are permitted on cross-examination of the defendant.[113] Since the defendant could not be questioned about mere accusations of criminal conduct because of the prejudicial impact, the defendant’s character witness could not be questioned about the same accusations.[114] The Court of Appeals in *Taylor* acknowledged that its decision did not follow *Michelson*.[115]

Before *Winters*, the existing law as stated in *Taylor*, seemed to support Winters’ contention “‘that accusations of crime or misconduct, [on the part of the accused,] as distinguished from convictions, may not be used to impeach the credibility of a character witness.’”[116] In *Winters*, the court did manage, however, to find the State’s line of questioning permissible without overruling *Taylor*. It

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found Taylor "factually inapposite." 117 Whereas the inquiry in Taylor was "specifically directed to a prior bad act," 118 in Winters, the State was "seeking to test the witnesses' knowledge." 119 The Winters decision makes an awkward distinction between means and purpose. The court acknowledged that questioning the third character witness about search warrants "could be viewed as [implying] that Winters had been engaged in a bad act." 120 Nevertheless, since the purpose of the question was "to probe the veracity of the opinions offered," 121 the question was permissible.

Courts and commentators generally acknowledge that using rumors of misconduct to test a character witness' knowledge creates the risk that the jury will misuse the information. 122 For this reason, some courts completely reject this type of questioning, as the Court of Appeals appeared to do in Taylor. It is difficult to see how Winters represents an improvement. The court seems to say that, while direct questions about prior bad acts are not permissible unless those acts resulted in convictions, questions that imply prior misconduct by the defendant are appropriate to test the witness' knowledge of the defendant's character. Such generalized innuendo may prove as difficult, if not more difficult, for the jury to use properly.

Other creative attempts by the State to reveal or imply prior bad acts on the part of criminal defendants have not fared as well as the approach selected in Winters. In State v. Werner, 123 the Court of Appeals held that evidence of the defendant's prior criminal activity is not admissible to "rehabilitate" a State's witness in advance of an anticipated impeachment. 124

Jerome Werner was charged with committing various sex offenses against his eldest stepdaughter, 125 who had waited five years...
to report the crimes. The State anticipated that defense counsel would use this delay to impeach the stepdaughter on cross-examination. The trial court allowed the State to "rehabilitate" the stepdaughter in advance by permitting her to testify on direct examination that she had decided to report her stepfather when she learned that he had also sexually assaulted her youngest sister. The case went to the jury, and Werner was convicted. The Court of Special Appeals reversed the conviction. Although the evidence of Werner's prior criminal activity was not introduced as substantive evidence, the court found that the prejudice to the defendant outweighed any usefulness to the State. The Court of Appeals affirmed.

Jurisdictions that have considered the admissibility of evidence of other crimes by the defendant to rehabilitate an impeached witness uniformly admit such evidence if sufficient need is shown. To determine admissibility, the trial court must weigh the severity of the impeachment versus the inflammatory nature of the rehabilitative evidence. The evidence must have a legitimate tendency to lessen the impeaching effect of the information brought out on cross-examination; it cannot be an excuse to "'load the record with extraneous matter to prejudice the defendant.'"

The Court of Appeals agreed that evidence of the defendant's

126. 302 Md. at 554, 489 A.2d at 1121.
127. Id. at 555, 489 A.2d at 1121-22.
128. Id. at 554-55, 489 A.2d at 1121. The trial court immediately gave the jury a limiting instruction on the permissible use of the testimony. Id. at 555, 489 A.2d at 1121.
129. Id.
131. Id. at 558, 464 A.2d at 1103.
132. 302 Md. at 556, 489 A.2d at 1122.
134. 302 Md. at 559, 489 A.2d at 1123. See, e.g., Stitely v. United States, 61 A.2d 491, 492 (D.C. 1948) (victim of sexual assault allowed to testify on redirect that she delayed reporting the incident until she saw the defendant assault another victim); People v. Burke, 52 Ill. App. 2d 159, 162, 201 N.E.2d 636, 638 (1964) (daughter allowed to testify that she hated her father prior to the incident at issue because he had previously sexually assaulted her); State v. Harman, 270 S.E.2d 146, 154-55 (W.Va. 1980) (State's witness allowed to testify that she was hostile toward the defendant because he told her he was having incestuous relations with his stepdaughter).
135. 302 Md. at 559-61, 489 A.2d at 1124 (quoting People v. Burke, 52 Ill. App. 2d 159, 162, 201 N.E.2d 636, 638 (1964)).
prior criminal acts is admissible to rehabilitate a witness who has been impeached in a substantial respect.\textsuperscript{136} The Court of Appeals refused, however, to admit the evidence in the instant case. The State had not introduced the questionable evidence on redirect examination after the witness had been impeached by the defense on cross-examination.\textsuperscript{137} It merely anticipated an impeachment and sought to rehabilitate the witness in advance.\textsuperscript{138} The State had argued that the witness' credibility was "automatically impeached" by the extended lapse of time.\textsuperscript{139} The court noted, however, that criminal trials are delayed for many reasons other than the victim's delay in reporting a crime, and that, here, the State created its own dilemma by introducing evidence of the delay.\textsuperscript{140} If defense counsel had significantly damaged the stepdaughter's credibility by introducing her delay in reporting on cross-examination, the court probably would have upheld admission of the witness' explanation. Since the State created the "alleged need" for the information, however, the evidence was not admissible.

In \textit{Turner v. State},\textsuperscript{141} the Court of Appeals considered a third evidentiary issue relating to prior bad acts on the part of a criminal defendant. In \textit{Turner}, the prior bad act had resulted in a conviction.\textsuperscript{142} When the defendant, Ernest Turner, was later tried for assault, the State used this robbery conviction to impeach Turner on cross-examination.\textsuperscript{143} The admissibility of that prior conviction was not disputed.\textsuperscript{144} Rather, the Court of Appeals had to decide

\begin{enumerate}
\item Id. at 560-61, 489 A.2d at 1124.
\item Id. at 561, 489 A.2d at 1125.
\item Id.
\item Id.
\item Id. at 562, 489 A.2d at 1125. The court also noted that, by introducing evidence of the five-year-old complaint, the State apparently violated another Maryland law of evidence. In sex offense cases, the prosecution may not introduce evidence of the victim's complaint in its case in chief if the complaint was not made at the time of the crime or shortly thereafter. \textit{Id.} at 563, 489 A.2d at 1125-26.
\item 301 Md. 180, 482 A.2d 869 (1984).
\item Id. at 183, 482 A.2d at 870.
\item Id.
whether the nature of the plea leading to the impeaching conviction was admissible. The defense counsel had attempted to bring out on redirect that Turner had pleaded guilty to the robbery. Defense counsel pursued this line of questioning in an attempt to bolster Turner's present credibility by demonstrating his earlier admission of guilt. The trial judge refused to admit the evidence, and the Court of Appeals agreed.

The Court of Appeals noted that a prior conviction may be useful to assist the fact-finder in measuring the present credibility of the witness. It is, however, the conviction per se that is relevant to the witness' credibility, not the plea leading to the conviction. Guilty pleas are entered for many reasons having little to do with truthfulness. Consequently, the court found that a guilty plea in a prior trial is neither relevant nor material to the issue of the witness' present truthfulness. Therefore, the character of the plea leading to an impeaching conviction may not be introduced at trial.

victed should not be believed under oath are generally admissible for impeachment purposes. Ricketts, 291 Md. at 708, 436 A.2d at 910.

145. 301 Md. at 183, 482 A.2d at 870.
146. Id.
147. Id.
148. Id.
149. Id. at 186, 482 A.2d at 871.
150. Id. at 184, 482 A.2d at 871.
151. Id. at 184-85, 482 A.2d at 871.
152. The court mentioned plea bargains, the prospect of facing overwhelming evidence of guilt, and the hope of leniency in sentencing. Id. at 184, 482 A.2d at 871.
153. Id. at 184-85, 482 A.2d at 871. Although the Court of Appeals cited with approval two similar cases from other jurisdictions, Commonwealth v. Washington, 274 Pa. Super. 560, 418 A.2d 548 (1980) and State v. Lee, 536 S.W.2d 198 (Mo. App. 1976), it only alluded to those courts' analysis of the issue. In Pennsylvania it was already well-settled law that evidence of prior conviction for impeachment is limited to name, time and place, and punishment received in order to minimize distraction by collateral issues. Therefore, the court decided, it reasonably follows that the plea evidence would also introduce collateral issues confusing to the jury. 274 Pa. Super. at 566, 418 A.2d at 551. In the Missouri case, the court noted that it is desirable for the trial court to forbear from retrial of the former case. If the defendant were allowed to explain the circumstance of the conviction, the state would be allowed to rebut. The entire matter would in effect be retried even though the prior conviction was legally conclusive. From a practical standpoint, the fact that the witness had pleaded guilty would serve no rehabilitative purpose. 536 S.W.2d at 199.
154. 301 Md. at 186, 482 A.2d at 871. In Donnelly v. Donnelly, 156 Md. 81, 86, 143 A. 648, 650 (1928), the Court of Appeals said in dictum that, to restore the credibility of a witness impeached by a prior conviction, the witness may be allowed to explain extenuating or mitigating circumstances of the conviction. No reported appellate decision since Donnelly has dealt with this issue. Following Turner, even if extenuating or mitigat-
E. Hearsay—Business and Public Records Exception

In *Scheer v. Motel Management Corp. of America*, the Court of Special Appeals ruled that police department computer print-outs, which list crimes reported to and investigated by the police, are not admissible under the business records or public records exceptions to the hearsay rule. Although police investigative reports are admissible as business records, they are admissible only to the extent that the information in the reports is within the personal observation of the investigating officer. Since the computer print-outs were not based on the personal observation of an investigating officer, they were not admissible as a business record. Under the Maryland public records exception, records that meet the statutory criteria for public records must still be “otherwise admissible” under the hearsay rule. Since the print-outs were based on hearsay and, therefore, failed to meet the “otherwise admissible” requirement, the court did not determine whether the print-outs were in fact public records.

*JANE A. WILSON*
VII. FAMILY LAW

A. Monetary Awards

1. Treatment of Debt.—In Schweizer v. Schweizer, the Court of Appeals held that the trial court may consider nonmarital debts when determining the amount and method of payment of a monetary award. The court rejected Mr. Schweizer’s argument that such debts should reduce the total value of marital property; only debts that can be traced to the acquisition of marital property can affect the valuation of that property.

Schweizer clarifies the proper treatment of debt in the calculation of a monetary award. Marital debt reduces the value of marital property; nonmarital debt may affect the economic circumstances of the parties and thus, the amount and method of payment of the monetary award. The court, however, did not discuss the weight

2. Id. at 637, 484 A.2d at 272. In a divorce proceeding, the court may grant a monetary award to adjust the rights and equities of the parties in the marital property. Md. Fam. Law Code Ann. § 8-205(a) (1984). First, the court must determine which property is marital, as defined by id. § 8-201(e). Id. § 8-203. Then, the court values the property. Id. § 8-204. If the court decides to grant a monetary award, it must consider the following factors:

   (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
   (2) the value of all property interests of each party;
   (3) the economic circumstances of each party at the time the award is to be made;
   (4) the circumstances that contributed to the estrangement of the parties;
   (5) the duration of the marriage;
   (6) the age of each party;
   (7) the physical and mental condition of each party;
   (8) how and when specific marital property was acquired, including the effort expended by each party in accumulating the marital property;
   (9) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
   (10) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

Id. § 8-205(a)(1)-(10).

3. 301 Md. at 637, 484 A.2d at 272. Mr. Schweizer had debts totaling $440,000. Although these were incurred during the parties’ marriage, the debts were not secured by marital property. Id. at 634, 484 A.2d at 271.

4. Id. at 636-37, 484 A.2d at 272. Whether the property was acquired during the marriage depends on “the source of each contribution as payments are made, rather than the time at which legal or equitable title to or possession of the property is obtained.” Harper v. Harper, 294 Md. 54, 80, 448 A.2d 916, 929 (1982).

5. 301 Md. at 637, 484 A.2d at 272.

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that a trial court should accord nonmarital debt.\(^6\)

2. Characterization of Property.—Wilen v. Wilen\(^7\) illustrates the complexity of applying Maryland’s Marital Property Act.\(^8\) Mr. Wilen had substantial assets prior to his marriage, some of which increased in value during marriage. The couple also acquired additional property during the marriage.\(^9\) The trial court properly identified property acquired prior to marriage as nonmarital;\(^10\) however, it erred in characterizing as marital Mr. Wilen’s partnership property and in valuing certain marital property.\(^11\)

The Maryland Uniform Partnership Act\(^12\) provides that all property brought into or subsequently acquired by the partnership and all property bought with partnership funds belongs to the partnership.\(^13\) A partner’s interest in and right to share profits of the partnership is personal property.\(^14\) Thus, specific property owned by a partnership cannot be marital property; Mr. Wilen’s interests in the various partnerships, however, may be marital property, depending on the source of funds for their acquisition.\(^15\)

\(^6\) MD. FAM. LAW CODE ANN. § 8-205(a) (1984) gives the trial court the discretion to make a monetary award. Although the court must consider 10 factors, see supra note 2, no specific weight is attached to any one. On remand, the trial court could determine that the nonmarital debt has no affect on Mr. Schweizer’s ability to pay any award. But the court could also conclude that Mr. Schweizer’s debt is so burdensome that no award should be granted. Schweizer does not preclude or mandate either result; neither seems particularly fair.


\(^9\) 61 Md. App. at 341-42, 486 A.2d at 777-78. Mr. Wilen sold his residence and applied the net proceeds toward purchase of the marital home. He acquired stock prior to marriage in three businesses that increased in value during the marriage. In addition, Mr. Wilen invested in several real estate partnerships and maintained I.R.A. and T. Rowe Price accounts during the marriage. Id.

\(^10\) Id. at 347-48, 486 A.2d at 780-81.

\(^11\) Id. at 351-53, 486 A.2d at 782-84. The Court of Special Appeals also held that the trial court abused its discretion in denying Ms. Wilen alimony because she failed to file a financial statement as required by the Maryland rules. Id. at 346, 486 A.2d at 780. Sufficient evidence of her financial needs was presented at trial for the court to determine an appropriate alimony award. Further, a support agreement signed only by Mr. Wilen and introduced at trial might have been found to satisfy the rule. Id. at 347, 486 A.2d at 780.

\(^12\) MD. CORPS. & ASS’NS CODE ANN. §§ 9-101 to -703 (1985).

\(^13\) Id. § 9-202(a),(b).

\(^14\) Id. § 9-503.

\(^15\) 61 Md. App. at 353, 486 A.2d at 783. Mr. Wilen’s partnership interests should be valued as any other property, using the source of funds theory described in Harper v. Harper, 294 Md. 54, 80, 448 A.2d 916, 929 (1982). 61 Md. App. at 353, 486 A.2d at 783.
The trial court also did not apply the source of funds theory to value the marital home.\textsuperscript{16} Since Mr. Wilen used nonmarital funds to purchase the marital home, \textit{Harper v. Harper}\textsuperscript{17} required that he receive an interest in the house equal to the ratio of nonmarital investment to the total investment in the property.\textsuperscript{18}

Finally, the trial court erred in valuing the T. Rowe Price account. On the date of the divorce, only $500 remained in the account; apparently the trial court valued it at the date it determined the marriage to be "factually dead."\textsuperscript{19} Maryland law requires, however, that marital property be valued as of the date of divorce.\textsuperscript{20}

In \textit{Harman v. Harman}\textsuperscript{21}, the Court of Special Appeals emphasized the discretion that a trial court has in determining whether to grant a monetary award and in deciding the amount of such an award.\textsuperscript{22} The court, however, rejected the trial court's characterization of certain property as marital.\textsuperscript{23} Ms. Harman's father gave several lots to her before her marriage. After marriage, she conveyed these lots to her husband and herself as tenants by the entireties.\textsuperscript{24} The trial court characterized this transaction as a gift;\textsuperscript{25} \textit{Grant v. Zich},\textsuperscript{26} however, rejected the presumption of gift arising from titling property as tenants by entireties. Only reliable evidence of an actual gift would justify designation of these lots as marital property.\textsuperscript{27}

\section*{B. Child Support}

\subsection*{1. Duty to Support Incapacitated Child.—In Sininger v. Sininger,\textsuperscript{28} the Court of Appeals held that a parent with the financial ability to}

\begin{enumerate}
\item \textsuperscript{16} 61 Md. App. at 350, 486 A.2d at 782.
\item \textsuperscript{17} 294 Md. 54, 448 A.2d 916 (1982).
\item \textsuperscript{18} 61 Md. App. at 350, 486 A.2d at 782 (quoting \textit{Harper}, 294 Md. at 80, 448 A.2d at 929).
\item \textsuperscript{19} \textit{Id.} at 353-54, 486 A.2d at 783-84.
\item \textsuperscript{21} 61 Md. App. 554, 487 A.2d 689 (1984).
\item \textsuperscript{22} \textit{Id.} at 572, 487 A.2d at 698. Mr. Harman challenged the court's method of valuing his pension based on its present value rather than his contributions to it. \textit{Id.} at 567, 487 A.2d at 696. \textit{Deering v. Deering}, 292 Md. 115, 130-31, 437 A.2d 883, 891-92 (1981), however, approves both methods and gives the trial court the power to choose the most appropriate method of valuation. For a more complete discussion of pension valuation, see \textit{Survey of Developments in Maryland Law, 1983-84—Family Law}, 44 Md. L. Rev. 536, 548-53 (1985).
\item \textsuperscript{23} 61 Md. App. at 563-65, 487 A.2d at 694-95.
\item \textsuperscript{24} \textit{Id.} at 564, 487 A.2d at 694.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} 300 Md. 256, 271-72, 477 A.2d 1163, 1171 (1984).
\item \textsuperscript{27} 61 Md. App. at 565, 487 A.2d at 695.
\item \textsuperscript{28} 300 Md. 604, 479 A.2d 1554 (1984).
\end{enumerate}
do so has a duty to support an adult child who becomes incapacitated after attaining majority. Section 13-102 of the Family Law Article imposes that obligation, and the court refused to interpret it as applying only to adult children who become incapacitated during minority.

The General Assembly enacted the legislation in 1947, apparently in reaction to the court's decision in *Borchert v. Borchert*, which found neither a common law nor a statutory duty for parents to support children over the age of majority. In *Smith v. Smith*, the court interpreted this statute as indicating a legislative intent to equate failure to support a minor child with failure to support an adult incapacitated child.

Mr. Sininger argued that *Smith* applied only when a child became disabled during minority. Since the incapacitated child could not become emancipated at the age of majority, the child would remain a minor, and the parents would have a continuing duty of support. The court, however, found no support for this theory in either *Smith* or the statute.

The dissent agreed with Mr. Sininger and characterized the majority's opinion as "a classic example of judicial legislation in the guise of judicial interpretation." Since *Borchert* involved a child disabled prior to emancipation, the dissent argued that the General Assembly intended only to impose a parental duty of support in that

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29. *Id.* at 611, 479 A.2d at 1358.
31. 300 Md. at 610, 479 A.2d at 1357.
33. 185 Md. 586, 45 A.2d 463 (1946).
34. *Id.* at 590-91, 45 A.2d at 465.
36. *Id.* at 360, 176 A.2d at 865.
37. 300 Md. at 608, 479 A.2d at 1356. The court referred to this argument as the emancipation rationale. *Id.*
38. *Id.* at 610, 479 A.2d at 1357. The court noted that adoption of this theory would create inequities if two children, ages 17 and 18, were both paralyzed in the same accident. The younger child would be entitled to parental support while the older one would not be. *Id.* at 616, 479 A.2d at 1360. The court also examined other statutes requiring parental support and found no clear indication that the General Assembly intended to limit a parent's obligation to support a disabled child. *Id.* at 611-617, 479 A.2d at 1358-61.
39. *Id.* at 623, 479 A.2d at 1365 (Orth, J., dissenting).
circumstance when it enacted the support statute. The dissent would also read Smith as holding only that a parent must support a child incapacitated before attaining the age of majority. The dissent then reviewed the statutes used by the majority to bolster its conclusion and reached the opposite conclusion: only adult children disabled during childhood had the right to support from their parents.

Both interpretations of the statute are defensible. The majority found no clear intent to restrict a parent's duty of support; the dissent found no clear intent to extend the obligation beyond emancipation. Both sides then relied on equitable considerations to reach opposite conclusions.

2. Modification of Child Support.—In Quarles v. Quarles, the Court of Special Appeals refused to allow the modification of a support agreement. The agreement awarded Ms. Quarles $800 per month, designated as both child support and alimony, and provided that the amount could not be changed. Despite this provision, Mr. Quarles decided to reduce his monthly payment when his older son reached the age of majority.

The Court of Special Appeals examined the divorce decree and determined that the monthly payment should be considered alimony. The agreement did not designate any terminal event for the payments, did not divide the award between child support and alimony, and specifically barred modification. According to the

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40. Id. at 631, 479 A.2d at 1369-70 (Orth, J., dissenting).
41. Id., 479 A.2d at 1369 (Orth, J., dissenting).
42. Id. at 636, 479 A.2d at 1372 (Orth, J., dissenting).
43. The majority seemed more concerned with the plight of destitute, disabled children, see id. at 616, 479 A.2d at 1360, while the dissent focused on the parents, see id. at 623-24, 479 A.2d at 1365-66 (Orth, J., dissenting).
45. Id. at 407-08, 489 A.2d at 566.
46. Id. at 407, 489 A.2d at 566. The decree obligated Mr. Quarles to pay Ms. Quarles "$800 per month as alimony and child support (with no fixed allocation)" and provided "that such amount shall not be modified or subject to further order of any court..." Id. at 404, 489 A.2d at 564.
47. Id. at 398, 489 A.2d at 561. Mr. Quarles' older son turned 18 less than two years after the divorce. His younger son had reached the age of majority by the time this case was heard. Id. at 398-99, 489 A.2d at 561-62.
48. Id. at 407, 489 A.2d at 566. The Court of Special Appeals stated that it was following the decision of the trial court. The trial court recognized the dual nature of the award, however. It ordered Mr. Quarles to continue paying the full amount because the original award had "no per child designation" and the original decree was not modifiable. Id. at 399, 489 A.2d at 562.
49. Id. at 407, 489 A.2d at 566.
court, such provisions made the payments resemble alimony more than child support. Thus, the court concluded that the parties intended the payments to be alimony. Since a court can modify alimony payments only if the decree allows, Mr. Quarles could not obtain a court order to reduce his payments. This decision demonstrates the importance of a carefully drafted support agreement. Without one, the court will not recognize and honor the intentions of the parties.

3. Legislative Development.—The 1985 General Assembly enacted legislation to provide for more effective enforcement of child and spousal support orders. The former process was both cumbersome and time-consuming. When an obligor had failed to make support payments, the procedures to obtain a wage lien could take several months. If the obligor was no longer in arrears at the time of the hearing, the court could not order a lien. The whole process would then have to be repeated if the obligor again failed to make payments.

The new statute streamlines this process. If an obligor accrues arrearages totaling more than thirty days of support, the recipient may request a wage withholding order. The obligor has fifteen days to request a stay of the order; if no request is made, the court will order the obligor’s employer to withhold support payments from the obligor’s paycheck and send the money to the recipient. The employer may also deduct an additional two dollars for each deduction made pursuant to the withholding order.

If the obligor contests the issuance of the wage lien, the court

50. Id.
51. Id.
52. Id. at 405, 489 A.2d at 566.
53. Id. at 407-08, 489 A.2d at 566. Mr. Quarles also had no right to reduce his payments unilaterally. Strong public policy prohibits changes without court approval. Id. at 403, 489 A.2d at 564.
55. Telephone interview with Cathy Calimer, Field Supervisor, Child Enforcement Division, Maryland Dep’t of Human Resources (Oct. 1, 1985) [hereinafter cited as Telephone interview].
57. The necessity of initiating the process over and over arose frequently. Telephone interview, supra note 55.
59. Id. §§ 10-124, -125.
60. Id. § 10-126(b).
must schedule a hearing within fifteen days. The statute limits the issues that can be adjudicated in this hearing to the existence and amount of arrearages, the identity of the obligor, and the amount to be withheld. In addition, the obligor cannot defeat the issuance of a withholding order by paying the arrearages.

The General Assembly passed this legislation in the wake of extensive publicity about the virtual nonenforcement of support orders. The federal government has also pressured states to provide more effective enforcement by threatening to withdraw federal funds for child welfare services. In 1984 the legislature rejected a proposal that would have made earnings withholding automatic whenever a court entered a support order. Chapter 329 thus represents a compromise: obligors have the opportunity to demonstrate compliance with court orders, but the recipients have access to a speedy remedy when arrearages occur.

The new statute does not affect support orders issued in either paternity or criminal nonsupport proceedings. The statutes governing these proceedings do not include comparable enforcement mechanisms. Also, the Attorney General has noted that some revisions may be necessary to resolve technical problems and make the process consistent with recent federal legislation.

C. "Best Interests of the Child"

1. Visitation.—In Evans v. Evans, the Court of Appeals held that the best interests of the child control in any determination of visitation rights during a divorce proceeding. Thus, the stepmother of a minor child could be awarded visiting rights if it were in the child's best interests.

In an unreported opinion, the Court of Special Appeals had

61. Id. § 10-130(a), (d).
62. Id. § 10-130(e).
63. Id. § 13-130(f).
64. See, e.g., Balt. Sun, Jan. 1, 1985, at B1, col. 1.
68. Id. § 10-206.
69. Letter from Attorney General Sachs to Governor Hughes (May 9, 1985).
71. Id. at 343-44, 488 A.2d at 162. Jason Evans was eighteen months old when Cheryl began taking care of him, six months before her marriage to Donald Evans. The parties lived together for 4 1/2 years; Jason remained in Cheryl's care for 7 months after their separation. Id. at 335, 488 A.2d at 157.
concluded that sections 1-201 and 9-102 of the Family Law Article limited child visitation rights to "biological parents, adoptive parents, and grandparents." The Court of Appeals reviewed the legislative history of sections 1-201 and 9-102 and determined that the General Assembly did not intend to limit visitation rights to a child's parents and grandparents. Prior to the enactment of section 9-102, Maryland law did not limit the court's authority in determining who should have visitation rights to a child. The legislative history indicated that the statute's amendment in 1981 was intended as a policy statement: a court has the authority to consider visitation rights for grandparents, and thus it should do so.

The court also rejected Mr. Evans' argument that a stepparent must prove in loco parentis status in order to obtain visitation rights. While in loco parentis status may be a consideration, it is not a prerequisite to granting visitation rights.

In another case involving visitation rights, the Court of Special Appeals held that section 9-102 did not prohibit the grant of visitation rights to grandparents of a child whose parents had never married. The Skeenses argued that the trial court's grant of liberal

72. Md. Fam. Law Code Ann. § 1-201(a)(6) (1984) provides that "[a]n equity court has jurisdiction over visitation of a child." Id. § 1-201(b)(2) provides that "an equity court may determine who shall have visitation rights to a child."

   At any time after the termination of a marriage, an equity court may:
   (1) consider a petition for reasonable visitation by a grandparent of a natural or adopted child of the parties whose marriage has been terminated; and
   (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent.

74. 302 Md. at 335, 488 A.2d at 157.


76. 302 Md. at 339, 488 A.2d at 159.

77. Id.

78. See supra note 75.

79. 302 Md. at 341, 488 A.2d at 160. "There is no indication that this authority [as granted in § 1-201] was intended, in any manner, to be narrower than the court's authority, as previously exercised over child custody." Id. at 339, 488 A.2d at 159.

80. Id. at 343-44, 488 A.2d at 161-62.

81. Id. at 343, 488 A.2d at 162. The court noted that in loco parentis status may be a factor in determining the best interests of the child. Id.

82. Skeens v. Paterno, 60 Md. App. 48, 61-62, 480 A.2d 820, 826 (1984). The suit was originally brought by the child's paternal grandparents against the child's mother.
visitation rights for the child's paternal grandparents was unauthorized by law; they claimed that the court had neither authority nor jurisdiction to decide the case.  

The court conceded that section 9-102 could be construed in the manner asserted by the Skeenses. The court determined, however, that the General Assembly did not intend to limit visiting rights to only those grandparents of children whose parents had been married at some point. Finally, the court found that the trial court had the discretion to award liberal visiting rights to grandparents in "exceptional cases," if it were in the best interests of the child.

Finally, in Arnold v. Naughton, the Court of Special Appeals affirmed the lower court's order granting supervised visiting rights to a father accused of sexually abusing his daughters. Ms. Arnold claimed that Mr. Naughton should be denied visiting rights because of the "extraordinary circumstances" of the situation. The court held that section 9-101 of the Family Law Article did not preclude a court from granting visiting rights to an errant parent as a matter of law. Thus, the court concluded that the trial court did not

and maternal grandparents to enjoin them from placing the child for adoption. The adoption issue was eventually dropped. Id. at 53, 480 A.2d at 822.

83. Id. at 58, 480 A.2d at 825.
84. Id. at 60-61, 480 A.2d at 826. See supra notes 75-79 and accompanying text (discussing legislative history of § 9-102).

85. Mr. Paterno was in the Navy and frequently away for long periods of time. The court reasoned that, in order to maintain contact with his child, Mr. Paterno's parents could be granted the same visiting privileges as Mr. Paterno, during his absences. 60 Md. App. at 60, 480 A.2d at 826.
86. Id.

88. Using the "clear and convincing" evidence standard, the trial court did determine that Mr. Naughton had sexually abused his children. Id. at 432, 486 A.2d at 1207. Ms. Arnold contended that "child abuse is an 'extraordinary circumstance' that required the trial judge to deny visitation." Id. at 433, 486 A.2d at 1207 (citing Radford v. Matczuk, 223 Md. 483, 164 A.2d 904 (1960)).
89. MD. FAM. LAW CODE ANN. § 9-101 (1984) provided that:
(a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
(b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety of the child.

The 1985 General Assembly amended § 9-101(b) to require visitation arrangements to assure "the physiological, psychological, and emotional well-being" as well as the safety of the child. Act of May 28, 1985, ch. 659, 1985 Md. Laws 3046 (codified at MD. FAM. LAW CODE ANN. § 9-101(b) (Supp. 1985)).
90. 61 Md. App. at 433-34, 486 A.2d at 1207-1208.
abuse its discretion in allowing Mr. Naughton supervised, structured visitation rights that adequately protected the children.\(^9\)

2. Name.—In Lassiter-Geers v. Reichenbach,\(^9\) the Court of Appeals was faced with the question of giving the child of divorced parents a surname. The father contended that the child should have his surname.\(^9\) The mother had given the child her maiden name,\(^9\) Lassiter, even though she had remarried and assumed a new surname. There had been no joint agreement as to the child’s last name when the couple’s divorce was finalized.\(^9\)

The trial judge determined that it would be in the best interests of the child if she assumed the father’s surname.\(^9\) The Court of Appeals held that the trial judge applied the correct test and had not abused its discretion in reaching its decision.\(^9\)

3. Custody.—In Elza v. Elza,\(^9\) the Court of Appeals vacated the trial court’s grant of custody of a minor child to her mother because the court based its decision on the maternal preference doctrine.\(^9\) Maryland law was amended in 1974 to prohibit the use of this doctrine.\(^10\) The court also noted that McAndrew v. McAndrew\(^10\) "rejected the notion that the maternal preference doctrine should be used as ‘tiebreaker’ when the chancellor is confronted with two fit and proper parents."\(^10\)

D. Paternity

In Frick v. Maldonado,\(^10\) the Court of Appeals held that Mary-
land's two-year limitations period on paternity actions brought on behalf of illegitimate children was unconstitutional. The court based its decision on two recent Supreme Court decisions that invalidated both a one-year and a two-year statute of limitations on two grounds. First, neither statute provided illegitimate children with an adequate opportunity to obtain support. Second, the time periods did not have a substantial relationship to the legitimate state interest of preventing the litigation of stale or fraudulent claims.

In response to Frick, the 1985 Maryland General Assembly repealed the statutory limitations period. The new statute removes all time limitations. It only requires that a paternity suit be commenced during the mother's pregnancy or at any time thereafter. In addition, the suit is not barred if the child was "conceived or born outside the state."

The new statute fails to make clear what statute of limitations, if any, applies to paternity proceedings. The legislative history demonstrates that the General Assembly believed that Maryland's general three-year statute of limitations would now apply. If it does, section 5-201(a) of the Courts and Judicial Proceedings Article...

104. The statute that the court referred to was Md. Fam. Law Code Ann. § 5-1006(a), (b) (1984). The relevant portion of the statute stated:
(a) A paternity proceeding under this subtitle shall be begun within two years after the last to occur of the following events:
(1) the child's birth;
(2) the mother's 18th birthday, if the mother was a minor when the child was born; or
(3) when the alleged father:
(i) acknowledged the paternity of the child in writing; or
(ii) made payment or otherwise provided for the support of the child.
109. Md. Fam. Law Code Ann. § 5-1006(a), (b) (Supp. 1985). The new statute simply states that:
(a) A paternity proceeding may be begun during pregnancy.
(b) A complaint under this subtitle is not barred because the child born out of wedlock was conceived or born outside the state.
110. Id. § 5-1006(a).
111. Id. § 5-1006(b).
would toll the statute until the child reached the age of majority.\textsuperscript{113} Some supporters of the bill, however, believed that no limitations period would apply to paternity action.\textsuperscript{114}

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\begin{quote}
(a) Extension of Time — When a cause of action subsequent to a limitation under Subtitle 1 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.
\end{quote}

\textsuperscript{114} Ms. Carmen Oler of the Montgomery County Commission for Women testified at the hearings on H.B. 1518 that this bill would eliminate the statute of limitations altogether. Ms. Ann C. Helton of the Maryland Dep't of Human Resources supported the bill in the belief that it would permit establishment of paternity at any time prior to the child's eighteenth birthday.

In Payne v. Prince George's County Dep't of Social Services, 67 Md. App. 327, 507 A.2d 641 (1986), the Court of Special Appeals held that the general three-year statute of limitations applied to paternity actions. \textit{Id.} at 335, 507 A.2d at 646. Md. Cts & Jud. Proc. Code Ann. § 5-201(a) (1984), however, tolls the statute because a paternity action accrues to the benefit of a minor. 67 Md. App. at 336-37, 507 A.2d at 646.
VIII. HEALTH CARE

A. Cost Containment

The escalating cost of health care has been of growing concern in Maryland and the nation. In particular, it has been recognized that those most in need of health care services—the elderly and the poor—often cannot afford to pay these higher costs. The General Assembly addressed these problems in 1971 by establishing the Health Services Cost Review Commission (HSCRC). By statute, hospital rates must first be approved by the Commission. In addition, the Health Resources Planning Commission (HRPC) was created to administer a certificate of need program for proposed health care projects, in order to ensure that they serve a real public need. If not, a project will not be approved, thereby preventing unnecessary expenditures from being made.

Two recent cases addressed the scope of judicial review available to challenge the decisions of these commissions. *Prince George's Doctors' Hospital v. Health Services Cost Review Commission* involved a hospital challenge to the jurisdiction and authority of the HSCRC.

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4. Id. § 19-216(b) (Supp. 1985) provides as follows:
   (b) Rate approval power.—(1) To carry out its powers under subsection (a) of this section, the Commission may review and approve or disapprove the reasonableness of any rate that a facility sets or requests.
   (2) A facility shall charge for services only at a rate set in accordance with this subtitle.
   See also Holy Cross Hosp. v. Health Servs. Cost Review Comm'n, 283 Md. 677, 682-83, 393 A.2d 181, 184 (1978) (addressing similar authority under the previous enactment, Md. Ann. Code art. 43, § 568U (1980)). The statute targets hospitals in particular because their costs make up nearly one-half of all personal health expenditures. Report, supra note 1, at 6.
5. Md. Health-Gen. Code Ann. § 19-101(b) (Supp. 1985) defines “certificate of need” as “a certification of public need issued by the [State Health Planning] Commission . . . for a health care project.” See generally id. § 19-115 (describing projects that require certificates of need). The cost of a proposed project is assessed against total health care costs and approved only if there is an actual need for it.
over its final order in a rate-setting proceeding. The hospital asserted that the prescribed rates were too low and would cause it to go bankrupt. Group Hospitalization, Inc., intervened as an interested party when the Commission issued its final order; predictably, it maintained that the allowance was too generous. The Court of Appeals deferred to the HSCRC judgment and upheld the rates. Rather than making its own determination of the reasonableness of the rates, the court followed the general rules applicable to review of administrative decisions. Thus, the court's analysis considered whether substantial evidence supported the HSCRC's decision. Both the circuit court and the Court of Appeals gave great weight to the presumption of validity of administrative decisions and thereby clearly established limited judicial review in rate-setting cases.

The hospital argued that the HSCRC's decision should be overturned on a number of grounds; in each instance, however, the application of the substantial evidence standard of review defeated the hospital's position. In determining that the HSCRC had acted within the scope of its authority, the Court of Appeals upheld both the Guaranteed Inpatient Review System (GIR) for approving hos-

7. The hospital is a proprietary, acute care hospital owned and operated by the doctors, who are also principal owners of the building. The hospital contested an HSCRC order approving rates that would generate $35.1 million in gross revenue instead of the $45.1 million requested by the hospital. Id. at 197, 486 A.2d at 746.

8. Group Hospitalization, Inc., the Blue Cross plan for the suburban District of Columbia area, insures approximately 35% of the patients admitted to the hospital. Id.

9. The case was first brought before the Circuit Court for Baltimore City, which affirmed with modification the HSCRC's decision. The petition for certiorari was granted immediately by the Court of Appeals because of the allegedly precarious financial position of the hospital, resulting from the imposed rates. Id. at 198, 486 A.2d at 746.


Whichever of the recognized tests the court uses—substantiality of the evidence on the record as a whole, clearly erroneous, fairly debatable or against the weight or preponderance of the evidence on the entire report—its appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence.

hospial costs and the HSCRC’s power to regulate the technical components of ancillary services, in particular, radiology and pathology. In addition, the “market basket” method for determining appropriate rates was affirmed as within the HSCRC’s statutory power. The court found substantial evidence to support the HSCRC’s method of determining net equity and rate of return by basing valuation on net original cost. Finally, the court rejected the hospital’s argument that the HSCRC should have adjusted the rates to take inflation into account: First, the hospital failed to exhaust its administrative remedies after the denial of its rate applications, and second, the approved rates were comparable to rates adjusted for inflation.


13. 302 Md. at 207-10, 486 A.2d at 751-53. The “market basket” methodology for determining rates compares the particular hospital’s rates with rates charged at other comparable hospitals in the state, replacing the cost-based reimbursement system in which rates are determined on a price per unit of service basis. See Health Servs. Cost Review Comm’n v. Lutheran Hosp., 298 Md. 651, 657 n.2, 472 A.2d 55, 58 n.2. The method is now called the Inter-Hospital Cost Comparison System. The costs incurred and anticipated by Prince George’s Hospital were found to be much higher than those of similar facilities. The court below found that the use of the market basket approach was within the HSCRC’s authority as established by Md. HEALTH-GEN. CODE ANN. § 19-216(c) (1982 & Supp. 1985). 302 Md. at 208, 486 A.2d at 752. Accord Health Servs. Cost Review Comm’n v. Franklin Square Hosp., 280 Md. 233, 372 A.2d 1051 (1977); Blue Cross v. Franklin Square Hosp., 277 Md. 93, 352 A.2d 798 (1976); Harford Memorial Hosp. v. Health Servs. Cost Review Comm’n, 44 Md. App. 489, 410 A.2d 22 (1980).

14. 302 Md. at 214-19, 486 A.2d at 755-57. The court construed Md. HEALTH-GEN. CODE ANN. § 19-217(d)(2)(ii) (Supp. 1985) to find that the valuation method used by the HSCRC was acceptable. 302 Md. at 218-19, 486 A.2d at 757. Section 19-217(d)(2)(ii) requires the HSCRC to allow proprietary hospitals to set rates that, “[b]ased on the fair value of the property and investments that are related directly to the facility, include enough allowance for and provide a fair return to the owner of the facility.” Md. HEALTH-GEN. CODE ANN. § 19-217 (d)(2)(ii) (Supp. 1985).

15. 302 Md. at 220-21, 486 A.2d at 758-59. The hospital maintained that the HSCRC wrongfully disallowed an inflation adjustment that it was due for 1979-1981. 302 Md. at 220, 486 A.2d at 758.

16. Id. at 220-21, 486 A.2d at 758-59.
The court further demonstrated its deference toward agency determinations by dismissing two points involving clear error. While it conceded that the HSCRC had erred in these findings, the court determined that the overall effect was de minimus and therefore, not ground for reversal.

The insurer's only claim against the HSCRC concerned the implementation order. Group Hospitalization objected to certain allowances in the HSCRC's prospective, no-interest repayment schedule for overcharges by the hospital. The hospital, however, contended that the repayment schedule was confiscatory. Once again, the court affirmed on the grounds that the rates were reasonable and that substantial evidence supported the HSCRC's decision in light of the hospital's precarious financial position.

In sum, Doctors' Hospital demonstrates the continuing application of the substantial evidence test to HSCRC rate-setting decisions, as well as the difficult burden that the standard places on hospitals challenging such decisions. The deference given by the courts to HSCRC determinations is also reflected in the following case, decided less than two months later.

The Court of Appeals characterized its decision in Johns Hopkins Hospital v. Insurance Commissioner as "simply one involving review of the action of an administrative agency." Like Doctors' Hospital, Johns Hopkins Hospital also involved the Health Services Cost Review Commission, although this time the review concerned a finding by the Insurance Commissioner. On its face, the decision appears to

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17. Id. at 212, 219-20, 486 A.2d at 754, 757. First, the hospital asserted that the HSCRC failed to take into account real estate taxes on the hospital building. Id. at 212, 486 A.2d at 754. Second, the hospital alleged error in the HSCRC's omission of interest on a loan necessitated when the lower rates were approved. Id. at 219-20, 486 A.2d at 757. These errors added up to approximately $283,000.

18. Id. at 212, 220, 486 A.2d at 754, 758. The court compared the total revenue allowed to the errors and found the errors too minor to require reversal. Id.

19. Id. at 222-27, 486 A.2d at 759-762. The HSCRC required the hospital to return the excess charged from October 1982 to November 1983 over 20 months. In addition, the HSCRC exempted the hospital from repayment of interest earned on excess rates charged from October 1982 to June 1985; allowed the hospital to continue with its then current rates until June 1985; and, finally, permitted the hospital to forego repayment of any excess charged from December 1980 to September 1982. The insurer objected to each of these allowances. Id.

20. Id. at 223, 486 A.2d at 760. In addition, the hospital asserted that the order was retroactive rate setting and that it was denied procedural protections. Id. at 223-24, 486 A.2d at 760.

21. Id. at 228, 486 A.2d at 762.


23. Id. at 420, 488 A.2d at 946.
be innocuous. The suit arose over the Insurance Commissioner's approval of a new insurance contract proposed by Blue Cross known as SelectCare. The SelectCare plan provides incentives to encourage subscribers to use designated low-cost hospitals and thus reduce insurance costs. As an earlier decision of the Court of Appeals made clear, private insurance companies may decide for themselves which hospitals to include as members.

Blue Cross followed the proper administrative procedures necessary to secure approval of its plan. As required by statute, the proposal was first submitted to the Insurance Commissioner, who approved the plan. Seven of the "high-cost" hospitals and the Mayor and City Council of Baltimore appealed. They contended that the Health Services Cost Review Commission and the Health Services Planning Commission, rather than the Insurance Commissioner, had jurisdiction over approval of the proposal; thus, they argued that the Commissioner had infringed upon the duties and exclusive jurisdiction of the two agencies. Finding this argument unpersuasive, the court upheld the lower court decision that the approval did not exceed the Insurance Commissioner's authority because the action involved approval of neither health care facility rates nor applications for a certificate of need—both of which would

24. The trial judge explained the criteria for determining whether a hospital is low-cost: "The Blue Cross provider agreement allows any hospital with case-mix adjusted average charges per admission to Blue Cross patients less than 110% of the state-wide average to qualify as a low-cost hospital and thus be eligible for the SelectCare program." Id. at 414, 488 A.2d at 943.

Under the plan, if the insured went to a low-cost hospital for routine, nonemergency inpatient care, Blue Cross would pay the bill in full. But if the subscriber chose a high-cost hospital for the same services, then the subscriber would have to pay a large deductible. Id. at 415, 488 A.2d at 944.


26. 302 Md. at 413-14, 488 A.2d at 943. Nonprofit health services are required to submit proposals to the Insurance Commissioner for approval. The Commissioner must "disapprove or modify the proposed changes if the table of rates appears by ... reasonable assumptions to be excessive in relation to benefits, or if the form contains provisions which are unjust, unfair, inequitable, inadequate, misleading, deceptive, or encourage misrepresentation of the coverage." Md. Ann. Code art. 48A, § 356(a) (Supp. 1985). Accordingly, the Commissioner must approve the proposed plan unless any of these deficiencies are present.

27. The Mayor and the City Council joined in the appeal because of their concern for the preponderance of high-cost hospitals located in the city and the adverse effect the ruling might have on the poor people living there. 302 Md. at 414 n.1, 488 A.2d at 943 n.1. As provided by statute, appeal was first made to the Circuit Court for Baltimore City, which affirmed the decision. See Md. Ann. Code art. 48A, § 361B (Supp. 1985). Certiorari was granted prior to consideration by the Court of Special Appeals.

302 Md. at 414, 488 A.2d at 943.
have been exercises of authority delegated to the other agencies.\textsuperscript{28}

Although the court considered the case to involve only the approval of an insurance plan,\textsuperscript{29} the decision could have far reaching effects. SelectCare may affect the availability of adequate health care to a large segment of Maryland's poor\textsuperscript{30} and thus frustrate the State's goal of promoting access to health care.\textsuperscript{31} Most of the high-cost hospitals excluded from the SelectCare plan are located in low-income areas of the city,\textsuperscript{32} and access to those facilities might be impaired due to the plan's restrictions. The Insurance Commissioner, bound by his statutory duty, could not effectively block the proposal; similarly, the Health Services Cost Review Commission and the Health Services Planning Commission were constrained by their limited jurisdiction. Thus, by asserting the limited role of courts in reviewing administrative decisions\textsuperscript{33} and affirming the Commissioner's approval of the SelectCare plan, the Court of Appeals may have inadvertently undermined the State's ability to meet this "fundamental social need."\textsuperscript{34}

B. Medical Malpractice

1. Statute of Limitations.—In Lutheran Hospital v. Levy\textsuperscript{35} the Court of Special Appeals discussed the application of the discovery rule\textsuperscript{36} in determining when a cause of action accrues.\textsuperscript{37} Although

\begin{itemize}
\item \textsuperscript{28} 302 Md. at 419-20, 488 A.2d at 946.
\item \textsuperscript{29} The court stated that the case "was nothing more or less than the approval by the Commissioner . . . of a form of insurance contract." \textit{Id.} at 420, 488 A.2d at 946.
\item \textsuperscript{30} The majority of the affected hospitals are located in areas of Baltimore City "populated by minorities and the economically disadvantaged." \textit{Id.} at 414 n.1, 488 A.2d at 943 n.1.
\item \textsuperscript{31} Section 19-102(a)(1) states: "The General Assembly finds that it is a priority of this State to promote the development of a health care system that provides, for all citizens, financial and geographic access to quality health care at a reasonable cost." \textit{Md. HEALTH-GEN. CODE ANN.} § 19-102(a)(1) (Supp. 1985). Governor Hughes expressed concern that the economically disadvantaged were especially vulnerable and in need of protection. \textit{Report, supra} note 1, at 1.
\item \textsuperscript{32} 302 Md. at 414 n.1, 488 A.2d at 943, n.1.
\item \textsuperscript{33} The court cited with approval the lower court's statement: "In light of the limited judicial role, coordination of the efforts of separate state agencies in seeking to achieve common goals is beyond the responsibility, authority and power of the Court." \textit{Id.} at 420, 488 A.2d at 946. The court also cited Judge Hammond's enunciation of the scope of judicial review of administrative decisions in Insurance Comm'r v. National Bureau of Casualty Underwriters, 248 Md. 292, 309-10, 236 A.2d 282, 291 (1967). 302 Md. at 418, 488 A.2d at 945.
\item \textsuperscript{34} "Health care is a fundamental social need, and it is society's responsibility to assure access to quality care at a reasonable price for all those in need." \textit{Report, supra} note 1, at 4.
\item \textsuperscript{36} The common law basis for the discovery rule was set out by the Court of Appeals
\end{itemize}
the court dealt with a number of issues in Levy, the major import of the decision is its reaffirmation that a cause of action accrues on the date that the party knew or should reasonably have known that a wrong had been committed. The court also held that the accrual date is not postponed pending a reasonable investigation period. Finally, the court discussed guidelines for the tolling of limitations based on fraud or estoppel.

Levy involved a malpractice claim filed on June 15, 1978, arising from Lutheran Hospital’s treatment of the plaintiff’s broken ankle on October 25, 1973. Complications arose resulting in her visit to another doctor in April 1974. By the plaintiff’s own admission “she first formed the belief that there was a problem” at this later date. The trial court found that the plaintiff first became suspicious in early 1975 when she visited a lawyer and that the statute of limitations did not begin running until six months later. This finding was based on the lower court’s conclusion that the plaintiff would have discovered a viable claim within six months of the date she became suspicious if she acted diligently with respect to the injury. Proceeding under this assumption, the trial judge found that the statute of limitations began to run in mid-1975, and thus the action, which was filed on June 15, 1978, was not barred by the three-year limitation period.

in Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917), in which it decided that the statute of limitations begins to run upon discovery of an injury. The Court of Appeals extended the discovery rule to all tort cases in 1981 in Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981). In Poffenberger, the court also held that “the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong.” Id. at 636, 432 A.2d at 680.


An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider . . . shall be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is shorter.

The statute did not apply to the present case because it applies only to those injuries occurring on or after July 1, 1976. 60 Md. App. at 232-33 n.1, 482 A.2d at 25 n.1.

It should be noted that the rule as codified is more restrictive than that originally adopted by the Court of Appeals in Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981) because it requires all claims to be filed no later than five years after the injury occurs, regardless of when the injury is first discovered.

38. 60 Md. App. at 233, 482 A.2d at 25.
39. Id. at 237, 482 A.2d at 27-28.
40. Id. at 240-43, 482 A.2d at 29-31.
41. Id. at 233, 482 A.2d at 26.
42. Id. at 235, 482 A.2d at 26.
43. The applicable statute of limitations read: “A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code pro-
The Court of Special Appeals applied the discovery rule in quite a different manner. It rejected both the trial court's analysis and the plaintiff's contention that she discovered the cause of action in July 1977, when she first obtained an expert's opinion that malpractice had occurred.\(^4\) Rather, the critical date was that of her examination in April 1974, when she first suspected that "something wrong had been done."\(^4\)\(^5\) By that time, the court concluded, the plaintiff knew all the facts necessary to put a reasonable person on inquiry.\(^4\)\(^6\) Furthermore, the court held that knowledge giving rise to a duty of inquiry does not toll the statute for "an additional period deemed reasonable for making the investigation."\(^4\)\(^7\) The court made clear that the statute of limitations begins to run as soon as a person has sufficient knowledge to be put on inquiry, without any postponement for investigation,\(^4\)\(^8\) because "the statute itself allows sufficient time . . . for reasonably diligent inquiry and for making a decision as to whether to file suit."\(^4\)\(^9\) Therefore, the court concluded that the statute of limitations barred the plaintiff's action.\(^5\)\(^0\)

The court then rejected plaintiff's argument that the hospital fraudulently concealed the malpractice.\(^5\)\(^1\) To toll the statute of limitations, the plaintiff must demonstrate intentional fraud by clear and convincing evidence.\(^5\)\(^2\) Although the hospital failed to produce the x-rays when first asked in May 1975,\(^5\)\(^3\) it responded promptly when


\(^4\) 60 Md. App. at 235, 482 A.2d at 26-27. The plaintiff based this argument on an interpretation of the following language in James v. Weisheit, 279 Md. 41, 44, 367 A.2d 482 (1977): "It is clear that the test to be utilized in fixing the accrual date of a cause of action 'is to ascertain the time when plaintiff could have first maintained his action to a successful result.'" (quoting Washington, B. & A. Elec. R.R. v. Moss, 130 Md. 198, 205, 100 A. 86, 89 (1917)). The court, however, read James and W., B. & A. R.R. to mean simply that a cause of action does not accrue until all the facts necessary to establish a cause of action have occurred. 60 Md. App. at 239, 482 A.2d at 28-89.

\(^5\) 60 Md. App. at 236, 239, 482 A.2d at 27, 29.

\(^6\) Id. at 237, 482 A.2d at 27.

\(^7\) Id.

\(^8\) Id.

\(^9\) Id. at 238, 482 A.2d at 28.

\(^10\) Id.

\(^5\)\(^1\) Id. at 241, 482 A.2d at 29-30. The fraudulent concealment exception to the statute of limitations is set out in Md. Cts. & Jud. Proc. Code Ann. § 5-203 (1984), which states: "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."

\(^5\)\(^2\) 60 Md. App. at 241, 482 A.2d at 30.

\(^5\)\(^3\) Id. at 241, 482 A.2d at 29-30.
plaintiff finally renewed her request in January 1977.\textsuperscript{54} Thus, the court concluded that, at most, the hospital was negligent.\textsuperscript{55} Furthermore, the court noted that plaintiff did not exercise the ordinary diligence to protect her rights necessary to a claim of fraudulent concealment.\textsuperscript{56} For these same reasons, the court also rejected plaintiff’s contention that the hospital should be estopped from asserting the statute of limitations.\textsuperscript{57}

2. Arbitration Proceedings.—(a) Procedure.—In Stifler v. Weiner,\textsuperscript{58} the Court of Special Appeals clarified the power of an arbitration panel chairperson in a medical malpractice proceeding. After a claim had been filed with the Health Claims Arbitration Office\textsuperscript{59} and an arbitration panel assembled pursuant to statutory provisions,\textsuperscript{60} but before any action could be taken by the panel, the panel chairperson, acting unilaterally, granted the defendant’s motion for summary judgment.\textsuperscript{61} When the plaintiffs sought to have the arbitration award nullified, the circuit court also granted summary judgment for the defendant.\textsuperscript{62} Although the Court of Special Appeals affirmed on the grounds that the statute of limitations had run prior to the filing of the claim,\textsuperscript{63} the court also addressed the appropriateness of the chairperson’s unilateral action.\textsuperscript{64}

The court found that a panel chairperson acting alone does not possess authority to dispose of a claim on motion for summary judg-

\textsuperscript{54} Id. at 234, 482 A.2d at 26.
\textsuperscript{55} Id. at 241, 482 A.2d at 30.
\textsuperscript{56} Id. at 242, 482 A.2d at 30.
\textsuperscript{57} Id. at 242-43, 482 A.2d at 30-31.
\textsuperscript{59} MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03 (1984).
\textsuperscript{60} Id. § 3-2A-04 (1984).
\textsuperscript{61} 62 Md. App. at 22, 488 A.2d at 193. The panel chairperson granted the motion based on the statutory definition of the attorney member’s responsibilities: “The attorney member of the panel shall be chairman and he shall decide all prehearing procedures including issues related to discovery.” MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(c) (1984).
\textsuperscript{62} 62 Md. App. at 22-23, 488 A.2d at 194.
\textsuperscript{63} Id. at 23, 488 A.2d at 194. The plaintiff’s claim arose from radiotherapy on his upper lip that allegedly damaged his tongue. He acknowledged that he was aware damage had occurred on November 20, 1978; however, he did not file his claim with the Health Claim Arbitration Office until November 25, 1981. The statute of limitations for medical malpractice is three years from the discovery of the injury. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984). Thus, the statute of limitations expired five days before the plaintiff filed his claim.
\textsuperscript{64} 62 Md. App. at 24-25, 488 A.2d at 194-95. The applicable code section has since been amended by the General Assembly. See infra notes 302-06 and accompanying text.
Based on the applicable statutory language, the court held that all claims submitted to arbitration must be decided by the panel as a whole. Furthermore, the court described the special statutory powers of the panel chairpersons as “basic housekeeping matters . . . not the power to usurp the statutory responsibility of the panel.” In doing so, the court demonstrated its concern that the arbitration panel remain a “balanced decision-making tribunal.”

(b) Evidence.—In Bailey v. Woel, the Court of Appeals held that the mere filing of a malpractice claim with the Health Claims Arbitration Office does not satisfy the statutory requirement that malpractice claims be submitted to arbitration before filing a court action. Plaintiffs filed a claim with the Director of the Health Claims Arbitration Office, but subsequently refused to present evidence to the arbitration panel assembled pursuant to the Health Care Malpractice Claims Act. When the panel dismissed the claim, the plaintiffs appealed to the circuit court, which granted the defendant’s ne recipiatur motion, effectively putting both parties out of court. The plaintiffs’ claim reached the Court of Appeals after the Court of Special Appeals affirmed the circuit court’s decision.

The Court of Appeals held that a party must present evidence to the arbitration panel to satisfy the condition precedent to filing a suit in circuit court. The court based its decision on the following:

65. 62 Md. App. at 24, 488 A.2d at 194-95.
66. “All issues of fact and law raised by the claim and response shall be referred by the Director to the arbitration panel.” Md. Cts. & Jud. Proc. Code Ann. § 3-2A-05(a) (1984) (emphasis added). “The arbitration panel shall first determine the issue of liability with respect to a claim referred to it.” Id. § 3-2A 05(d) (emphasis added).
68. See supra note 61.
69. 62 Md. App. at 24, 488 A.2d at 195.
73. 302 Md. at 45, 485 A.2d at 268.
74. Id. at 40, 485 A.2d at 265-66.
76. 302 Md. at 40, 485 A.2d at 266. The circuit court also granted the defendant’s motion raising preliminary objection, but considered the ne recipiatur motion to be the final appealable order since it had the effect of putting the parties out of court. 302 Md. at 41 n.1, 485 A.2d at 266 n.1.
78. 302 Md. at 45, 482 A.2d at 268.
factors: First, the General Assembly established the arbitration system to reduce the number of medical malpractice court suits. Second, the court had previously interpreted the Act as requiring "a thorough dispute resolution process" before an arbitration panel prior to filing a court suit. Third, the statute explicitly states that an "arbitration panel shall first determine the issue of liability with respect to a claim. . . . " Finally, it would be illogical and inconsistent with the Act's elaborate arbitration scheme to find that the General Assembly intended to give malpractice claimants the option of participating in arbitration. By refusing to allow claimants to bypass the Act's otherwise mandatory procedures, the court reaffirmed the importance of the health claims arbitration system in Maryland.

(c) Assessment of Costs.—The central issue in Tabler v. Medical Mutual Liability Insurance Society was the assessment of costs against the prevailing party in medical malpractice arbitration proceedings. The plaintiff insurance company sought a declaratory judgment and other relief that would, in effect, prevent the assessment or collections of costs against the prevailing party in a health claims arbitration proceeding. In a complicated opinion, the court ultimately

79. Id. at 42, 482 A.2d at 266.
81. 302 Md. at 42, 485 A.2d at 267.
83. 302 Md. at 43, 485 A.2d at 267.
84. 301 Md. 189, 482 A.2d 873 (1984).
86. The Medical Mutual Liability Insurance Society of Maryland was created by the Maryland General Assembly in 1975 when the major malpractice insurer in the state decided to stop issuing malpractice insurance. The insurance company is controlled by physicians and is the underwriter for a majority of the physicians practicing in the state today. 301 Md. at 191-92, 482 A.2d at 874.
87. Id. at 193-95, 482 A.2d at 875-76. The plaintiff also requested the issuance of a writ of mandamus and permanent and interlocutory decrees. Id. at 194, 482 A.2d at 875-76. The court reversed the circuit court's issuance of a writ of mandamus, which ordered the defendant to instruct all arbitration panels to stop assessing arbitration costs against a prevailing party. Id. at 204, 482 A.2d at 881. Furthermore, in light of its holding that arbitration costs could be assessed against a prevailing party, the court affirmed (1) the denial by the circuit court of an interlocutory and permanent decree enjoining the defendant from pursuing any further collection of costs that had already been assessed against a prevailing party and (2) the denial of any award for damages as a result of any unlawfully collected arbitration costs. Id. at 203, 482 A.2d at 880. Finally, the court declined to consider either the validity of a regulation allowing determination of arbitration costs prior to settlement, Md. Admin. Code tit. 01, § 03.01.12F(5) (1985),

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held that costs may be assessed against a prevailing party.\textsuperscript{88}

The insurance company claimed that the regulations allowing apportionment of costs among the parties were invalid\textsuperscript{89} and extended beyond the scope of the statutory provision directing the arbitration panel to assess costs as part of its award.\textsuperscript{90} The court declined to decide the validity of the regulation because that issue had never been presented to the trial court.\textsuperscript{91} The court then found the regulation consistent with the statutory provision empowering an arbitration panel to assess costs as part of a damages award.\textsuperscript{92} Under the court's analysis, "costs are not considered to be an element of damages,"\textsuperscript{93} and the statute itself "contains no prohibition against assessing the costs against the party on whose favor the award is made."\textsuperscript{94} Thus, the regulation allowing apportionment of costs does not conflict with the statutory power to include costs as part of an award. Moreover, the court emphasized that the assessments of costs is a matter within the discretion of the arbitration panel.\textsuperscript{95} As a result of this decision, arbitration panels in future malpractice cases may assess costs against a party who prevails on the issue of liability.

\textbf{C. Disciplinary Actions}

In \textit{McDonnell v. Commission on Medical Discipline},\textsuperscript{96} the Court of

\begin{itemize}
\item or the validity of any regulations issued by the defendant prior to express statutory authority. 301 Md. at 196-98, 482 A.2d at 877-78.
\item 88. 301 Md. at 200, 482 A.2d at 879.
\item 89. 301 Md. at 196, 482 A.2d at 877. \textit{Md. Admin. Code} tit. 01, § 03.01.12D(1) (1985) provides that "[a]n arbitration panel shall determine the arbitration costs, including arbitrators' fees, and may apportion the costs among parties."
\item 90. 301 Md. at 196, 482 A.2d at 877. \textit{Md. Cts. & Jud. Proc. Code Ann.} § 3-2A-05(e) (1984) provides that "[t]he award shall include an assessment of costs, including the arbitrator's fees."
\item 91. 301 Md. at 196-97, 482 A.2d at 877. The issue was raised for the first time on cross-appeal by the insurance company. \textit{Id.}
\item 92. \textit{Id.} at 200, 482 A.2d at 879.
\item 93. \textit{Id.}
\item 94. \textit{Id.}
\item 95. \textit{Id.} The insurance company also contended that the Director of the Health Claims Arbitration Office had improperly encouraged arbitration panels "to assess part or all of the costs of health claims against health care providers." \textit{Id.} at 198-99, 482 A.2d at 878. Although the court acknowledged that the Director had no authority to interfere with the determinations of a panel, it concluded that the allegation was not a factor to be considered and that the proper remedy for any such impropriety was provided by statutory procedures "whereby an award may be vacated if come by 'undue means.'" \textit{Id.} at 199, 482 A.2d at 878. \textit{See Md. Cts. & Jud. Proc. Code Ann.} § 3-2A-06(c) (1984).
\item 96. 301 Md. 426, 483 A.2d 76 (1984).
\end{itemize}
Appeals held that a physician's attempt to intimidate adverse witnesses testifying against him at a medical malpractice trial did not constitute "immoral conduct" for the purposes of disciplinary action. The disciplinary code defines the specific offenses for which the Commission on Medical Discipline may sanction physicians. The particular charge levied against Dr. McDonnell was "[i]mmoral conduct of a physician in his practice as a physician." The Commission concluded, as a matter of law, that Dr. McDonnell had violated section 130(h)(8) and reprimanded him. The circuit court reversed. First, it found that Dr. McDonnell's conduct was not immoral; it then determined that Dr. McDonnell's behavior "was clearly not a decision made by [a physician] in his practice as a physician." The Court of Special Appeals reversed and held that a physician's misconduct is not limited to actions in diagnosing or treating patients, but may also include actions "directly related to some aspect of the practice of medicine."

While the Court of Appeals agreed that Dr. McDonnell's behavior was improper, it did not decide whether such conduct was "immoral" for purposes of the disciplinary code. Rather, the court concentrated on whether Dr. McDonnell's actions were those of "a physician in his practice as a physician." The court held

97. Id. at 434, 483 A.2d at 80. Dr. Edmond McDonnell, a Maryland orthopedic surgeon, was sued by a former patient, Alvin Meyer. The jury found for McDonnell. On appeal, the judgment was reversed for error in the jury instructions regarding McDonnell's attempt to intimidate two expert witnesses. Meyer v. McDonnell, 40 Md. App. 524, 392 A.2d 1129 (1978). Dr. McDonnell was concerned about the qualifications of the two adverse witnesses, Drs. Robert Nystrom and Frank Pizzi, and after consultation with his attorney, decided to inform the witnesses through third parties that transcripts of their depositions would be sent to their local and national medical societies. The trial judge chastised Dr. McDonnell after learning about the conduct, but found no improper intent. Dr. McDonnell stated that he only wanted to insure the honesty, reasonableness, and medical accuracy of the witnesses' testimony. 301 Md. at 428-429, 483 A.2d at 76-77. The Court of Special Appeals referred to the physician's actions as "outrageous" and "tampering" with witnesses. 40 Md. App. at 525, 392 A.2d at 1130.

98. MD. ANN. CODE art. 43, § 130(h)(1)-(19) (1980) (now codified at MD. HEALTH OCC. CODE ANN. § 14-504(1)-(26) (1986)).

99. Id. § 130(h)(8) (now codified at MD. HEALTH OCC. CODE ANN. § 14-504(3) (1986)).

100. 301 Md. at 431, 483 A.2d at 78.

101. Id.


103. 301 Md. at 433, 483 A.2d at 79.

104. Id. n.3.

105. Id. at 433, 483 A.2d at 79.
that the statutory definition of "practice of medicine" controls the meaning of "practice as a physician" in section 130(h)(8), thereby limiting it to matters related to the diagnosis, care, or treatment of patients. The court stressed that only two types of misconduct are explicitly limited to actions taken as a physician: immoral conduct and willfully making and filing false reports or records. The court concluded that section 130(h)(8) was clearly not intended by the legislature to permit sanction of a physician's general moral character or misconduct that has only a general relationship to the practice of medicine.

The decision in McDonnell is consistent with the principle that statutes authorizing sanctions against licensed professionals should be strictly construed against the disciplinary agency. Moreover, the case may have been fairly decided in view of Dr. McDonnell's assertion that he contacted the witnesses only after discussion with counsel and with no improper intent. The result suggests, however, that even malicious intimidation of adverse witnesses in a malpractice trial would not subject a physician to disciplinary action by the Commission. The only apparent solution to the latter problem would be amendment of the statute to include such conduct among its prohibitions.

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1. Operating on, professing to heal, prescribing for or otherwise diagnosing or treating any physical, mental or emotional or supposed ailment of another.
2. Undertaking by appliance, test, operation, or treatment to diagnose, prevent, cure, heal, prescribe for, or treat any bodily, mental or emotional ailment or supposed ailment of another.
3. Undertaking to treat, heal, cure or remove any physical, emotional or mental ailment or supposed ailment of another by mental, emotional or other process exercised or invoked on the part of either the physician, the patient, or both.
4. Assisting, attempting, inducing, or causing by any means whatsoever the termination of a human pregnancy.
5. Performing acupuncture.

107. 301 Md. at 435-36, 483 A.2d at 80. A classic example of immoral conduct of a physician in his practice as a physician is the commission of a sex act on a patient who is under the physician's care. Id. at 436 n.5, 483 A.2d at 80 n.5.


109. 301 Md. at 436, 483 A.2d at 81.

110. Id.

D. Environmental Law

In *Thomas v. Department of Health and Mental Hygiene*, the Court of Special Appeals adopted a hard line regarding violations of dumping and hazardous waste and substance control laws. Thomas had been dumping refuse, including hazardous waste, on his land for twenty-seven years. Despite four complaints filed by the Department of Health and Mental Hygiene, the dumping continued until an *ex parte* injunction was issued on May 24, 1983, followed by a final injunction on March 14, 1984. Thomas appealed from this final order that required him to cease refuse disposal on his property, remove any hazardous wastes or substances that may have been buried there, and install monitoring procedures at the site of the unlicensed landfill.

The appellant first argued that the trial court erred in requiring the removal of controlled hazardous substances without preliminary laboratory analysis of their chemical composition. Although

113. Appellant was in violation of Md. Health-Envtl. Code Ann. § 9-210(a)(1) (1982), which states: "The State, a county, a municipality, a district, or a person may not install a system of water supply, sewerage, or refuse disposal for public use... without a permit to do so, issued by the Secretary." The appellant was also in violation of Md. Health-Envtl. Code Ann. § 7-232(a) (Supp. 1985), which states: "A person shall hold a facility permit before the person may own, establish, operate, or maintain a controlled hazardous substance facility in this State." Finally, the appellant was in violation of Md. Health-Envtl. Code Ann. § 9-322 (1982), which provides: "[A] person may not discharge any pollutant into the waters of this State."
114. The appellant was issued three "Site Complaints" and "a formal Complaint and Order requiring the appellant to cease and desist operation of the facility." 62 Md. App. at 169-170, 488 A.2d at 984-85.
115. Id. at 170, 488 A.2d at 985.
116. The trial court's use of the term "controlled hazardous substance" was incorrect. Articles being dumped in the appellant's facility were "hazardous substances" defined as follows in Md. Health-Envtl. Code Ann. § 7-201(k) (1982):

(k) Hazardous substance.—(1) "Hazardous substance" means any substance that:
   (i) Conveys toxic, lethal, or other injurious effects or which causes sublethal alterations to plant, animal, or aquatic life;
   (ii) May be injurious to human beings; or
   (iii) Persists in the environment.

"Controlled hazardous substance" is defined in Md. Health-Envtl. Code Ann. § 7-201(b) (1982) as follows:

(b) Controlled hazardous substance.—"Controlled hazardous substance" means:
   (1) Any hazardous substance that the Department identifies as a controlled hazardous substance under this subtitle; or
   (2) Low-level nuclear waste.
117. 62 Md. App. at 172, 488 A.2d at 986. The Court of Special Appeals noted the following distinction:
the court acknowledged that "the trial court in its oral opinion mistakenly classified items which persist in the environment as 'controlled hazardous substances' . . . rather than properly labeling those items as 'hazardous substances,'" it dismissed this argument because the final order used the correct terminology.

The court also disagreed with the appellant's second contention that "the trial court erred in requiring him to excavate twenty-seven years of landfill to whatever depth necessary to determine whether hazardous substances" were present. The court ruled that the trial court could exercise its discretion and order removal of all hazardous wastes and substances rather than the closing of the dump. Moreover, the mere fact that the expense of carrying out the excavation would be exorbitant did not make the decision clearly erroneous. The court noted, first, that the appellant had realized a profit on the unauthorized landfill for twenty-seven years, and second, that cost considerations were secondary to the primary concern for environmental safety.

Finally, the court dismissed appellant's contention that the doctrine of comparative hardship required a less drastic remedy than complete excavation. Although recognized in Maryland, the doctrine is usually applied to cases in which an innocent mistake could lead to an award of damages clearly excessive in comparison to the injury involved. Application of the doctrine enables a court to avoid the inequitable results that might otherwise occur. In this case, however, the appellant's repeated violations could not be characterized as innocent behavior; thus, the doctrine did not apply.

Under COMAR 10.51.01.03B(26) the term "controlled hazardous substance" is synonymous with the term "hazardous waste." The latter was the term used by the chancellor in his final injunction. The extensive regulatory scheme set forth in COMAR 10.51, including the requirements of laboratory analysis, applies only to "controlled hazardous substances"; not to the broader category of hazardous substances.

118. Id. at 173, 488 A.2d at 986.
119. Id.
120. Id.
121. Id. at 174, 488 A.2d at 987.
122. Id. at 174 & n.2, 488 A.2d at 987 & n.2.
123. Id. at 174-76, 488 A.2d at 987-88.
125. 62 Md. App. at 175, 488 A.2d at 987.
126. Id. at 175-76, 488 A.2d at 988.
Thomas should serve as public notice that deliberate violations of Maryland environmental law will result in severe sanctions. Moreover, the broad discretion allowed the trial court in fashioning a remedy is especially significant in view of the paucity of caselaw in this area.

E. Legislative Developments

1. Cost Containment.—Recent legislation\(^{127}\) increases the regulation of Maryland's health care providers in a continuing effort by the General Assembly to control health care costs. In the summer of 1984, Governor Hughes convened a task force to study and make recommendations on the Maryland health care system. A motivating force behind the move was a fear that Maryland could lose its federal Medicare waiver. This waiver\(^{128}\) permits the Health Services Cost Review Commission (HSCRC),\(^{129}\) the agency responsible for regulating hospital rates, to set its own Medicare reimbursement rates as long as these rates are not higher than those imposed by the federal government. In response to the task force's recommendations, the General Assembly enacted seven pieces of legislation discussed below. The new laws cover the licensing of major medical equipment, hospital mergers and consolidations, the authority of the HSCRC and the Health Resources Planning Commission (HRPC),\(^{130}\) excess bed capacity and health insurance; they represent a major commitment to cost containment.\(^{131}\)

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\(^{128}\) The Medicare waiver is part of an all-payer system in which all reimbursement plans pay the same rate for each hospital service. Maryland has been entitled to this waiver since 1977, and until recently has been able to include bad debt and charity care costs in rate-setting while at the same time holding the costs below the federal standard without much trouble. But with the upsurge in unoccupied hospital beds in the state, coupled with the federal government's adoption of a more cost-effective Medicare reimbursement program in 1983, Maryland is having difficulty meeting the standard necessary to keep the waiver. For additional information on the Medicare waiver, see REPORT OF THE GOVERNOR'S TASK FORCE ON HEALTH CARE COST CONTAINMENT, at 15-20 (Dec. 14, 1984).

\(^{129}\) The Health Services Cost Review Commission (HSCRC), which sets the rates for health care, was established pursuant to Md. HEALTH-GEN. CODE ANN. §§ 19-201 to -222 (1982 & Supp. 1985).

\(^{130}\) The Health Resources Planning Commission (HRPC) has jurisdiction over all of Maryland's health care system. Its responsibilities include developing a State Health Plan and administering the Certificate of Need (CON) program. Md. HEALTH-GEN. CODE ANN. §§ 19-101 to -118 (Supp. 1985). See also infra note 133 (definition of a CON).

\(^{131}\) Maryland has traditionally supported extensive regulation of health care because
(a) Licensing of Major Medical Equipment.\textsuperscript{132}—The purchase and use of expensive medical equipment contributes to increases in health care costs. Previously, only hospitals had to obtain a certificate of need (CON) before acquiring medical equipment costing more than $400,000.\textsuperscript{133} Because the CON process is very time-consuming and expensive, it added to the cost of the equipment. Furthermore, the process is basically anti-competitive.

The new statute replaces the CON requirement for major medical equipment with a licensing procedure aimed at the long-term reduction of health care costs. Under the new procedure, both hospitals and private physicians must obtain a license before leasing, acquiring, or otherwise using major medical equipment.\textsuperscript{134} Licenses will be easier and less expensive to secure than the CONs; thus, the marketplace should determine the allocation of medical equipment with the State maintaining some degree of control through its licensing decisions. Furthermore, licensure is seen as more equitable because it affects both doctors and hospitals.\textsuperscript{135}

The licensing system exempts health maintenance organizations (HMOs), however.\textsuperscript{136} The prepaid health care programs are considered effective in reducing health care costs and were previously exempted from the CON requirements. This statute also requires the Department of Health and Mental Hygiene and the HRPC to report periodically to the General Assembly and the Joint Committee on Health Care Cost Containment on the effects of this legislation.\textsuperscript{137} Finally, if the licensing requirements threaten the uncontrolled growth created problems such as high costs, excess capacity, and maldistribution of services.

\textsuperscript{132} Health Care Cost Containment Act, ch. 107, 1985 Md. Laws 1496 (codified at Md. Health-Gen. Code Ann. §§ 19-1001 to -1008 (Supp. 1985). "Major medical equipment" is defined in Md. Health-Gen. Code Ann. § 19-1001(c) as "medical equipment that is used to provide health care services and for which the total cost of the equipment exceeds $600,000 . . . ."

\textsuperscript{133} A "certificate of need" is defined as "a certificate of public need issued by the Commission . . . for a health care project." Md. Health-Gen. Code Ann. § 19-101 (Supp. 1985). The Commission referred to in the definition is the State HRPC. Under the prior provision, Md. Health-Gen. Code Ann. § 19-115(l) (1982) only hospitals were required to obtain a CON before acquiring major medical equipment.


\textsuperscript{135} The underlying premise behind the new statute is that there is a competitive marketplace for the equipment, which will control utilization. Thus, this piece of legislation is seen as an effective compromise—on the one hand, abandoning the more stringent CON requirements in favor of licensure, and on the other hand, expanding the scope of the coverage to include physicians along with hospitals.


\textsuperscript{137} The Health Care Cost Containment Act, ch. 107, § 2(5), 1985 Md. Laws 1504, requires periodic reports on the effect of the new licensing provisions for major medical
tention of the Medicare waiver, the enactment will be void.138

(b) Hospital Mergers and Consolidations.—Excess bed capacity in hospitals has become a major problem in Maryland as the utilization of hospital services has decreased. Mergers, consolidations, conversions, and closures of hospitals are all seen as effective solutions to this problem.139 A hospital reduction plan will result in more efficient and less expensive operations by reducing the number of unused beds generating fixed costs. Therefore, this legislation140 provides incentives for hospitals voluntarily to reduce capacity. Such efforts are viewed as absolutely necessary in order to ensure the future economic viability of Maryland's hospitals.

First, the statute insulates merging hospitals from state antitrust charges if HRPC approves the merger or consolidation.141 Second, such hospitals will receive special exemptions from the CON requirements generally applicable to changes in bed capacity or services. The exemption will also apply if a hospital converts to a nonhealth-related facility.142 Third, the HRPC must develop an institution-specific plan to identify excess bed capacity and services and provide a guide for future reduction efforts.143 The plan will be incorporated into the State health plan and be used to review CON applications. Finally, to mitigate the adverse effects of closing a hospital, the statute establishes programs to help refinance the public equipment. The preliminary report proved to be inconclusive, presumably because of the short time span between implementation and assessment. Although no significant changes were noticed, the health care system did not have enough time to react to the new provisions. Telephone interview with Karl Aro of the Joint Committee on Health Care Cost Containment (Jan. 23, 1986).

138. Health Care Cost Containment Act, ch. 107, § 4, 1985 Md. Laws 1505. Because one of the motivating forces behind this legislative package was to assure retention of the Medicare waiver, any effect jeopardizing the waiver will nullify the legislation.


143. The Institution Specific Plan required by Md. Health-Gen. Code Ann. § 19-114.1 (Supp. 1985) will identify excess bed capacity and determine a reduction plan for each hospital. The plan is now called the Hospital Capacity Plan.
bonds of these hospitals and to retrain those employees displaced by a hospital's closure. If these voluntary efforts do not succeed, the State can revoke a hospital's license as a last resort.

The legislature also imposed a temporary moratorium on review of new CON applications. This emergency measure allowed the HRPC time to develop the institution-specific plan. If deferral of a CON application would cause hardship, the HRPC could act despite the moratorium. The HRPC was also charged with developing ways to streamline the CON process. Finally, the Commission was required to report its findings to the General Assembly. The moratorium expired October 1, 1985.

(c) Utilization Review Program.—Unnecessary and inefficient hospital use also increases health care costs. To identify and thus reduce nonessential and inappropriate care, hospitals must establish an internal utilization review program as a prerequisite for licensure, with penalties for noncompliance. This program will review all admissions and selected procedures to ensure appropriateness of care. If a hospital patient is insured by a company that has a utilization review program, then the hospital need not undertake an-

146. The Secretary of Health and Mental Hygiene may delicense a hospital on the recommendation of the HRPC and the HSCRC, Md. Health-Gen. Code Ann. § 19-325(a) (Supp. 1985), unless it is the sole provider of services in the community, id. § 19-325(b)(3). Prior to the passage of this legislation, no state agency had the authority to delicense a hospital based on need.
148. Id. § 1, 1985 Md. Laws at 1242-43. The HRPC could act on CON applications that were deemed to be essential to public health, such as sole providers, kidney dialysis facilities whose applications had previously been submitted, and applications to replace necessary equipment. Id.
149. As of January 1986, this report had not been made. Telephone interview with Karl Aro, supra note 137.
150. See generally Preamble, ch. 111, 1985 Md. Laws at 1543-44.
152. Under Md. Health-Gen. Code Ann. § 19-319(d)(3) (Supp. 1985), the minimum standards must include concurrent or retrospective review of all admissions, including preadmission review of elective admissions and postadmission review of emergency admissions, preauthorization for certain inpatient procedures, second opinions for non-emergency surgery, and continued stay and discharge planning review.
other review. 153 Because the required review must include mandatory second opinions before certain elective surgery is performed, insurance policies must also cover second opinions and outpatient service. 154 Furthermore, a patient usually cannot be charged for extra days found not to be necessary after postadmission evaluation. 155 Finally, the statute established a Joint Oversight Committee on Health Care Cost Containment to review the regulations covering the Utilization Review Program and the other regulations and issues initiated by the new legislation. 156

(d) The Health Services Cost Review Commission (HSCRC) 157 and the Health Resources Planning Commission (HRPC). 158—The General Assembly expanded the jurisdiction and power of the HSCRC to enable it to control more effectively escalating health care costs and thereby protect the Medicare waiver. 159 Specifically, the statute now provides that the HSCRC has jurisdiction over “hospital services offered by or through all facilities.” 160 Furthermore, the legislation authorizes the HSCRC to gather data from all hospitals about physician practice patterns in order to identify any divergent ones. 161 Finally, the Commission is authorized to employ objective standards of efficiency and effectiveness in its determinations of reasonable

153. Id. § 19-319(d)(5). The review plan of the insurance company must meet the minimum standards set out in the statute.


155. Md. Health-Gen. Code Ann. § 19-319(4) (Supp. 1985). If the patient refuses to leave the hospital, however, the patient may have to pay for any disallowed days. Id. § 19-319(4)(i), (ii).

156. The Joint Oversight Committee established under the Health Care Cost Containment Act, ch. 111, § 3, 1985 Md. Laws 1541, will oversee the programs initiated under the new health care legislation.


161. Id. § 19-213(4). The names of individual physicians must be kept confidential and are not available through discovery or for use in criminal or civil proceedings. Id.
The new legislation also strengthens the HRPC's enforcement power. The HRPC can now impose penalties on health care providers that do not submit information needed by the HRPC to perform its duties. In addition, the HRPC may request the Court of Appeals to review adverse decisions.

(e) Health Insurance.—Certain health insurance plans provide incentives for using "low-cost" hospitals. To protect hospitals that would otherwise be designated as "high-cost," but which perform valuable services for the community, the statute requires insurers to exclude expenses associated with medical education, uncompensated care, nursing education, and shock-trauma facilities from calculations to determine which hospitals are low cost. In addition, hospitals that are the sole providers of health care in a community cannot be designated as "high-cost" hospitals.

(f) Conclusion.—The legislation discussed above represents a major effort to reverse the current trend of increasing health care costs. Previously, expansion and the utilization of all available beds were encouraged as ways to generate more revenues. Now the statute favors bed reductions and the consolidation of services. The overall goal is to reduce the size of the health care system to make it more efficient and effective. This rational downsizing through regulation should counteract the uncontrolled growth of the past. In this way, unnecessary services will be trimmed; costs will be cut, and

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162. Id. § 19-216(b)(3) grants the Commission statutory authority to compare similar hospitals on the basis of objective, quantitative criteria.

163. Id. § 19-107(d)(2) authorizes the HRPC to impose a fine of not more than $100 per day, issue an order compelling compliance with a request to provide information, or seek the aid of the circuit court for legal relief, if the requested information is not forthcoming.

164. Id. § 19-120(e). The HRPC may petition for a writ of certiorari to resolve inconsistent interpretations of the same statute or to protect the public interest. Id.

165. See supra notes 22-34 and accompanying text discussing Johns Hopkins Hospital v. Insurance Comm'r, 302 Md. 411, 488 A.2d 942 (1985). This legislation addresses the concern expressed by appellants in that case that minority groups and the poor in Baltimore City who live near certain "high-cost" hospitals will be deprived of access to health care.

the Medicare waiver will be preserved while Maryland’s consumers benefit from less expensive, quality health care.

2. Licensing and Certification Requirements.—The General Assembly passed a number of bills imposing licensing, certification, and other regulatory requirements on a variety of health practitioners and health organizations.

(a) General.—Chapter 256 is an omnibus statute designed to provide uniformity among fourteen professional boards with regard to licensing and disciplinary functions. The statutes of six boards were modified to provide procedures for reinstating health professionals who fail to renew their license within five years. These provisions prevent former licensees from resuming practice until they demonstrate current knowledge in their field.

The second major provision added “acts of unprofessional conduct” as grounds for disciplinary action by seven of the boards; the change brings these seven boards in line with the other health occupations. Finally, chapter 256 allows the fourteen boards to retain disciplinary jurisdiction over licensees under investigation or with charges pending against them. Prior to the enactment of these statutes, health professionals could escape disciplinary action by surrendering their licenses or allowing them to expire and then obtaining a license in another state without having to disclose any

167. Act of May 21, 1985, ch. 256, 1985 Md. Laws 2042 (codified at Md. HEALTH OCC. CODE ANN. §§ 2-312.1, 3-308.2, 3-309.1, 3-310(19), (20), (21), 4-313.1, 5-310(b), (c), 5-310.1, 5-311(a)(20), (21), (22), 6-314, 6-315(a)(24), (25), (26), 7-311.1, 8-312, 8-312.1, 8-313(b)(9), (10), (11), 9-313.1, 10-311.1, 10-312(21), (22), (23), 12-310.1, 13-314.1, 13-315(18), (19), (20), 15-309(b), (c), 15-310.1, 16-310(b), (c), 16-311.1, 16-312(15), (16), (17), 18-309.1, 19-312.1 (Supp. 1985)).

168. Id. at 2043. The fourteen boards affected by chapter 256 are Audiology, Chiropractic, Dental, Electrology, Mortuary, Nursing Home Administration, Occupational Therapy, Optometry, Pharmacy, Physical Therapy, Podiatry, Psychology, Social Work, and Speech Pathology.

169. Md. HEALTH OCC. CODE ANN. §§ 3-308.2 (chiropractic), 5-310 (electrology), 6-314 (mortuary), 8-312 (nursing home administration), 15-309 (podiatry), 16-310 (psychology) (Supp. 1985).

170. Id.

171. Id. §§ 3-310 (chiropractic), 5-311 (electrology), 6-315 (mortuary), 8-313 (nursing home administration), 10-312 (optometry), 13-315 (physical therapy), 16-312 (psychology).

172. Id. §§ 2-312.1 (audiology), 8-309.1 (chiropractic), 4-313.1 (dental), 5-310.1 (electrology), 7-311.1 (nursing), 8-312.1 (nursing home administration), 9-313.1 (occupational therapy), 10-311.1 (optometry), 12-310.1 (pharmacy), 13-314.1 (physical therapy), 15-310.1 (podiatry), 16-311.1 (psychology), 18-309.1 (social work), 19-312.1 (speech pathology).
disciplinary action.173 Chapter 256 permits the boards to deny the surrender of a license while the licensee is under investigation or has charges pending and thus, thwarts any attempt to avoid the effects of disciplinary action on ability to practice in another state.

(b) Freestanding Birthing Centers.—Chapter 730174 defines175 and provides for the mandatory licensing and regulation of freestanding birthing centers.176 Two birthing centers were operating in Maryland prior to the enactment of this legislation.177 Without mandatory licensing, health officials were concerned that birthing centers would be established indiscriminately and quality control would be impossible.178 In addition, licensing permits patients to be reimbursed by insurers for the "facility fee" of approximately $350179 and thus provides an economical alternative to traditional hospital obstetrical care.

(c) Freestanding Medical Facilities.—In recent years, freestanding medical facilities (FMFs) have become increasingly popular alternatives to the traditional physician’s office. Of the 54 FMFs in Maryland, nine use words in their names that imply that they may substitute for hospital emergency rooms.180 Unfortunately, many of


175. A freestanding birthing center is defined as a public or private home or facility, not the mother's residence or a hospital, that provides nurse midwifery services, or normal maternity services by a physician. MD. HEALTH-GEN. CODE ANN. § 19-1101(b) (Supp. 1985).

176. Id. § 19-1105(a). This legislation requires the director of a licensed birthing center to be a licensed nurse midwife or physician. Id. § 19-1104(a). Furthermore, a physician must be on call whenever the center is providing services. Id. § 19-1104(b). Additional requirements include expiration of licenses after three years, id. § 19-1107(A), and denial, suspension, or revocation if the applicant or licensee fails to meet the requirements of this subtitle or the regulations adopted by the Department of Health and Mental Hygiene (DHMH). Id. § 19-1108(a). Furthermore, violation of any provision of chapter 730 or the DHMH regulations is a misdemeanor punishable by a fine up to $1,000 or one year imprisonment, or both. Each day a violation continues after the first conviction constitutes a separate offense. Id. § 19-1109.

177. ENVIRONMENTAL MATTERS COMMITTEE, MARYLAND HOUSE OF DELEGATES, 1985 REGULAR SESS., COMMITTEE REPORT ON S.B. 344 (Mar. 21, 1985).

178. Id.

179. The facility fee covers the operating expenses of the freestanding birthing center. Id. Prior to the enactment of this legislation, insurers would reimburse patients only for the nurse midwifery services.

these facilities are ill equipped to deal with critically ill patients, who may lose valuable treatment time when they are turned away by FMFs and redirected to hospital emergency rooms. This danger exists because many FMFs have inadequate professional staff and insufficient emergency care equipment, and are open fewer than twenty-four hours a day.

Chapter 178 was enacted to regulate these FMFs. FMFs are broadly defined as facilities providing health and medical services that are physically separate from a hospital or hospital grounds. While any FMF meeting the requirements may be certified, those facilities using the words "emergency," "urgent care," parts of these words, or other language in their title or advertising indicating that treatment for immediately life-threatening medical conditions is available at the facility, must be certified before they can operate.

To protect the public, chapter 178 now requires "emergency" or "urgent care" FMFs to remain open twenty-four hours a day, seven days a week. They must be staffed at all times by at least one physician trained in emergency medicine, sufficient numbers of nurses and other health professionals to provide advanced life support, a radiology technician, and a laboratory technician. These "emergency" FMFs must possess basic x-ray and laboratory facilities, as well as specific resuscitation equipment for cardiac and respiratory emergencies.

Both the Department of Health and Mental Hygiene (DHMH) and the Maryland Institute for Emergency Medical

181. Id.
182. Id.
185. Id. § 19-3A-03(a).
186. Id. § 19-3A-03(b). In addition, the statute allows county governments to adopt more stringent regulations. Id. § 19-3A-04.
187. Id. § 19-3A-02(1).
188. Id. § 19-3A-02(2).
189. Id. § 19-3A-02(3).
190. Id. § 19-3A-02(4).
191. Id.
192. Id.
193. Id. § 19-3A-02(5). This equipment includes monitor, defibrillator, cardiac medications, intubation equipment, and intravenous line equipment.
Services Systems (MIEMSS)\(^{195}\) supported this legislation as a means to protect public health by requiring truth in advertising and certification of compliance with minimum standards.\(^{196}\) Violation of any provision of the freestanding medical facilities subtitle is a misdemeanor punishable by a fine of up to $5,000, imprisonment up to one year, or both.\(^{197}\) Furthermore, the circuit court of the county where an FMF is operated in violation of this subtitle may enjoin further operation of the facility.\(^{198}\)

\((d)\) Professional Counselors.—Chapter 734\(^{199}\) creates a voluntary certification program for professional counselors.\(^{200}\) Prior to the enactment of this statute, professional counselors were the only mental health professionals not registered by the State.\(^{201}\) Consumers were the victims of this oversight by being subjected to a market including some poorly trained individuals.\(^{202}\) Chapter 734 creates a

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\(^{195}\) MARYLAND INST. FOR EMERGENCY MEDICAL SERVS. SYS. (MIEMSS), S.B. 343 POSITION STATEMENT TO THE HOUSE ENVIRONMENTAL MATTERS COMMITTEE, MARYLAND HOUSE OF DELEGATES, 1985 REGULAR SESS. (1985). MIEMSS proposed six amendments to S.B. 343 that were ultimately incorporated and passed. When patients need hospitalization or more definitive care, FMFs must conform to the State Emergency Services Plan for immediate transport. Md. HEALTH-GEN. CODE ANN. § 19-3A-02(6) (Supp. 1985). Furthermore, FMFs must have appropriate telephone communication with MIEMSS. Id. § 19-3A-02(7). Finally, emergency services must be provided to all persons regardless of their ability to pay. Id. § 19-3A-02(8).

196. It is anticipated that the vast majority of freestanding medical facilities will voluntarily modify their advertising practices. Those who do not will be required to satisfy the specific criteria outlined in the Bill. Compliance with these standards will assure the public of the facility's ability to provide true emergency services.

DHMH Statement, supra note 194 (emphasis in original).


198. Id. § 19-3A-06.


200. Professional counselors are persons who engage for compensation in counseling and appraisal activities and represent themselves as professional counselors. Md. HEALTH OCC. CODE ANN. § 15.5-101(g), (h) (Supp. 1985). “Counseling” and “appraisal” are also defined in this subtitle. Id. § 15.5-101(b), (f).


202. See letter from Rev. Francis M. Sweeney, Pastor, Catholic Community at Relay, Md., to Delegate Larry Young, Chairperson, Environmental Matters Committee, Maryland House of Delegates (Mar. 25, 1985); letter from R.M. Pender, Chairperson, Charles
State Board of Examiners of Professional Counselors\textsuperscript{203} that approves and administers the certification examination.\textsuperscript{204} Applicants for certification also must have received a doctoral or master's degree in a professional counseling field from an approved institution\textsuperscript{205} and completed a period of two or three years of supervised counseling experience.\textsuperscript{206}

Individuals certified by the board may use the title "certified professional counselor" and the initials "C.P.C." after their names.\textsuperscript{207} They may represent to the public that they are certified as professional counselors.\textsuperscript{208} Use of this title, abbreviation, or representation by a noncertified person is prohibited\textsuperscript{209} and is a misdemeanor.\textsuperscript{210} The statute also provides for discipline of certified professional counselors\textsuperscript{211} and adoption of a code of ethics.\textsuperscript{212} Certified professional counselors are also required to conspicuously post or furnish to clients a copy of a professional disclosure statement before charging them.\textsuperscript{213} The Maryland Professional Counselors Act\textsuperscript{214} does not prohibit the practice of professional counseling by noncertified individuals, however; it protects only the title of certified professional counselor. Furthermore, the Act does not require insurers to reimburse clients of certified professional counselors unless the policy expressly provides such coverage.\textsuperscript{215}

\textit{(e) Nutrition Counselors.}—In response to the perceived need to protect consumers from the physical and financial harm caused by untrained “nutrition counselors” and to provide for state regulation

\textsuperscript{203} MD. HEALTH OCC. CODE ANN. §§ 15.5-201, -202 (1986). The Board consists of five certified professional counselors and one consumer. \textit{id.} at § 15.5-202(a)(2).

\textsuperscript{204} \textit{id.} §§ 15.5-302(e), 304(b). The examination may be waived for those licensed or certified in other states or countries under reciprocity agreements, \textit{id.} § 15.5-305(a)(1), or if the applicant has passed another approved examination, \textit{id.} § 15.5-305(a)(2). A grandparent clause permits certification of individuals under somewhat less restrictive conditions until July 1, 1988. \textit{id.} § 15.5-306.

\textsuperscript{205} \textit{id.} § 15.5-302(d)(1).

\textsuperscript{206} \textit{id.} § 15.5-302(d)(2)(ii), (3)(ii).

\textsuperscript{207} \textit{id.} § 15.5-308(1), (2).

\textsuperscript{208} \textit{id.} § 15.5-308(3).

\textsuperscript{209} \textit{id.} § 15.5-401.

\textsuperscript{210} \textit{id.} § 15.5-402.

\textsuperscript{211} \textit{id.} § 15.5-313.

\textsuperscript{212} \textit{id.} § 15.5-205(b)(4).

\textsuperscript{213} \textit{id.} § 15.5-312.

\textsuperscript{214} This is the short title for §§ 15.5-101 to -502. \textit{id.} § 15.5-501.

\textsuperscript{215} MD. ANN. CODE art. 48A, §§ 354Z(c), 470U(c), 477AA(c) (Supp. 1985).
of trained dietitians, the General Assembly enacted chapter 773, which establishes a State Board of Dietetic Practice. In addition to prescribing the general standards for licensure, the Maryland Dietitians Act delineates exceptions to the licensure requirements. No individual or group is limited in providing services or information related to nonmedical nutrition while (1) employed by or operating a health, weight loss, or fitness program; a health food store; or a business that sells health products including dietary supplements or food, provides nonmedical nutritional information, or distributes nutritional literature; or (2) conducting classes or disseminating information related to nonmedical nutrition. The Act does not affect individuals who provide services related only to purchasing, preparing, or serving food to groups of people, nor does it limit an individual’s right to provide nonmedical nutrition information or distribute nutritional literature. These exceptions are contingent upon the services and information relating only to nonmedical nutrition: preventive and restorative dietetic counseling is restricted to licensed dietitians and others who may practice dietetics without a license.

(f) Preferred Provider Organizations.—Chapter 726 defines and minimally regulates preferred provider organizations (PPOs). PPO plans administered by health insurance companies typically provide insureds with a list of designated physicians, hospitals, and

218. MD. HEALTH OCC. CODE ANN. § 4.5-201 (1986). The Board consists of five licensed dieticians and two consumers. Id. § 4.5-202(a).
221. Id. § 4.5-103(b)(2).
222. Id. § 4.5-103(b)(3).
223. Id. § 4.5-103(b)(4).
224. Id. § 4.5-103(c).
225. Id. § 4.5-103(d).
226. Id. § 4.5-101(e)(2)(ii).
227. Id. § 4.5-301(a).
228. Id. § 4.5-301(b).
230. MD. ANN. CODE art. 48A, §§ 354EE (nonprofit insurers), 470X (individual policies), 477FF (group and blanket insurers).
other health care professionals (preferred providers)\textsuperscript{231} from which insureds can choose their personal care providers. Preferred providers contract with the insurance company to meet the terms and conditions of the preferred provider contract,\textsuperscript{232} which usually include reduced fees in exchange for the insurer’s promise to direct patients there. The insurance company determines the terms and conditions for qualifying as a preferred provider\textsuperscript{233} and, with the approval of the Insurance Commissioner, may offer or administer PPO plans that limit the numbers and types of providers eligible for preferred status.\textsuperscript{234}

The legislation mandates that PPOs must reimburse nonpreferred providers\textsuperscript{235} at eighty-percent of the preferred provider amount unless they can demonstrate to the Insurance Commissioner that another level of reimbursement is appropriate.\textsuperscript{236} This particular provision gives insureds some choice of providers as long as they are willing to pay the difference. Such choice is beneficial if preferred providers are not conveniently located, fail to provide necessary services, or are otherwise inappropriate for the insured. Chapter 726 also permits PPOs to vary reimbursement levels paid to hospitals and other institutional providers if the rates are based on individual negotiations, geographic differences, or market conditions and are approved by the Health Services Cost Review Commission.\textsuperscript{237}

Finally, PPOs regulated by federal law are exempt from the provisions of chapter 726.\textsuperscript{238} This provision was added in response to organized labor’s arguments that these PPOs are distinct from commercial providers and that the federal law preempts such state

\textsuperscript{231} Preferred providers include physicians, hospitals, and other licensed or authorized health care providers. \textit{Id.} §§ 354EE(a)(4), 470X(a)(4), 477FF(a)(4). A PPO is similar to a health maintenance organization (HMO), except that HMO physicians practice in centralized facilities, while preferred providers under PPOs continue to practice at their private offices.

\textsuperscript{232} \textit{Id.} §§ 354EE(a)(3), 470X(a)(3), 477FF(a)(3).

\textsuperscript{233} \textit{Id.} §§ 354EE(b)(2), 470X(b)(2), 477FF(b)(2).

\textsuperscript{234} \textit{Id.} §§ 354EE(b)(1), 470X(b)(1), 477FF(b)(1).

\textsuperscript{235} Nonpreferred providers are those eligible for payment under the plan, but who have not contracted with the insurance company. \textit{Id.} §§ 354EE(a)(5), 470X(a)(5), 477FF(a)(5).

\textsuperscript{236} \textit{Id.} §§ 354EE(b)(4), 470X(b)(4), 477FF(b)(4).

\textsuperscript{237} \textit{Id.} §§ 354EE(c), 470X(c), 477FF(c). Such approved rate variation may not serve as the basis for an unfair discrimination charge. \textit{Id.}

3. Environmental Matters.—The 1985 General Assembly passed a variety of bills intended to improve the environment in Maryland.

(a) Hazardous Chemicals.—Following up on last year's legislation that required compilation of information about hazardous chemicals, the 1985 General Assembly expanded the number of people having access to this information. The new subtitle allows certain classes of organizations and individuals access to a central repository that contains all available information on the use and storage of hazardous or toxic chemicals. All environmental and civic or consumer organizations will now have, upon written request, access to the central repository established by this law. Further, any individual who lives in a community, or the next nearest community, in which a business stores, produces, or locates hazardous or toxic chemicals, has access to the repository. The Act also authorizes the Department of Health and Mental Hygiene to promulgate regulations, in cooperation with the Division of Labor and Industry of the Department of Licensing and Regulation.

This legislation also amends article 89 of the Annotated Code of Maryland. State law mandates the compilation of chemical information lists at places of employment that involve work with hazardous chemicals. Prior to the enactment of chapters 530 and 631, access to information on the chemical information lists was re-
stricted by statute.\textsuperscript{247} The amendments to article 89 make the information on those lists available to those individuals who qualify under the new statute.

(b) Chesapeake Bay.—The General Assembly passed three new laws affecting the Chesapeake Bay. The first creates a monitoring program for the bay. The act requires the Secretaries of Health and Mental Hygiene and Natural Resources to develop and implement a plan to monitor the quality of Chesapeake Bay waters. In addition to the plan's development and implementation, a report on the status of the bay and its resources is required every two years.\textsuperscript{248} The second bill made the State of Pennsylvania a full partner on the Chesapeake Bay Commission,\textsuperscript{249} allowing it to join Maryland and Virginia. The bill also changed the commission's operating procedures.\textsuperscript{250} The final bill banned chlorine discharge into the Chesapeake Bay or its tributaries at levels greater than those applicable to public or private sewage treatment plants.\textsuperscript{251} This ban is in effect only during April and May, when striped bass spawn, and is part of an ongoing effort to increase the population of striped bass in the Chesapeake Bay.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{247} Individuals who had access to information from the lists included the following as outlined by Md. Ann. Code art. 89, § 32H(b)(2)(i) - (v) (1985):
\begin{itemize}
\item (i) Persons providing fire, ambulance, or rescue services for the appropriate geographic area;
\item (ii) Treating physicians, nurses, or physicians' assistants in medical emergency situations;
\item (iii) Former employees of inactive employers;
\item (iv) The Commissioner; and
\item (v) An independent contractor or employer as provided in § 32K of this subtitle.
\end{itemize}
\item \textsuperscript{249} Act of May 21, 1985, ch. 300, 1985 Md. Laws 2137 (codified at Md. Nat. Res. Code Ann. § 8-302 (Supp. 1985)). The preamble to the bill points out that the commission was formed in 1980 by Maryland and Virginia "to evaluate and respond to problems of Bay-wide concern." \textit{Id.} at 2137.
\item \textsuperscript{252} Telephone interview with Tom Lewis, Counsel for the House Environmental Matters Committee, Maryland General Assembly (Oct. 30, 1985).
\end{itemize}
(c) Phosphate Ban.—Chapter 526 enacts a phosphate ban prohibiting the use, sale, or manufacture of cleaning agents containing more than 0.5 percent phosphorus. The statute allows an exception for dishwashing detergent and gives the Secretary of Health and Mental Hygiene the power to declare certain substances exempt from the new law. Substances may be exempted if their regulation creates a significant hardship or the lack of a suitable substitute makes the law unreasonable. The law also requires a review of other jurisdictions that have enacted phosphate bans and a report to the General Assembly on any hardships created by the ban. The legislation does not prohibit the manufacture of phosphate products that will be used outside the state. In essence, the law thus creates an exception for the manufacturers, which was necessary for the passage of the bill. Finally, the statute defines noncompliance as a misdemeanor and imposes criminal penalties.

(d) State Hazardous Substance Control Fund.—Chapter 203 was enacted to clarify certain provisions of the State Hazardous Substance Control Fund. The fund is used to pay for activities related to identifying, monitoring, and controlling the proper

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254. "Cleaning agent" is defined as "a laundry detergent, dishwashing compound, household cleaner, metal cleaner, degreasing compound, commercial cleaner, industrial cleaner, phosphate compound, or other substance that is intended to be used for cleaning purposes." Md. Health-Envtl. Code Ann. § 9-1501 (Supp. 1985).

255. The law allows cleaning agents to contain 0.5 percent phosphorus by weight if the phosphorus is incidental to the manufacturing processes. Id. § 9-1503(a).

256. Dishwashing detergent may contain up to 8.7 percent phosphorus by weight. Id. § 9-1503(b)(1).

257. Other jurisdictions that have enacted phosphate bans include New York, Wisconsin, Michigan, Indiana, Vermont, Minnesota, Dade County, Florida, Akron, Ohio, and Chicago, Illinois. Telephone interview with Tom Lewis, Counsel for the House Environmental Matters Committee, Maryland General Assembly (Nov. 15, 1985).


259. Id. § 9-1502(5).

260. Telephone interview with Tom Lewis, Counsel for the House Environmental Matters Committee, Maryland General Assembly (Nov. 14, 1985).

261. Any person using a cleaning agent prohibited by this law is subject to a fine not exceeding $100. Md. Health-Envtl. Code Ann. § 9-1505(a)(1) (Supp. 1985). Any person selling, distributing, or manufacturing a cleaning agent prohibited by this law is subject to a fine not exceeding $100. Id. § 9-1505(a)(2).


disposal, storage, transportation or treatment of controlled hazardous substances. 264 The new law mandates that the Fund be reimbursed, by the responsible party, for money expended not only for actual releases, but also for threatened releases of a controlled hazardous substance. Further, the state may collect litigation costs incurred through efforts to obtain reimbursement. The General Assembly also made clear that the law applied retroactively. The State may recover any costs resulting from releases or threatened releases of a controlled hazardous substance whether the substance was placed at the site, released, or threatened to be released before July 1, 1985.265

(e) Ambient Air Quality Control Act.—Chapter 279266 authorizes the imposition of administrative civil penalties for violations of the Ambient Air Quality Control Act (AAQCA).267 Prior to any administrative penalties, however, the alleged violator must be given written notice of any proposed action and an opportunity to meet and discuss the violation(s). After a hearing at which a violation is found, civil penalties as high as $1000 per day may be imposed to a maximum of $20,000. The state is empowered to collect any fines in any manner available at law. Finally, this legislation provides a number of factors to be assessed in determining the amount of a penalty to be imposed.268

Essentially, the statute gives state officials more flexibility in correcting repeated violations of the AAQCA. Prior to this bill’s passage, the state could prosecute AAQCA violators, but resources did not allow prosecutions for minor, repeated violations. By creating administrative remedies, the bill makes the AAQCA more enforceable and encourages settlements by violators faced with

264. Id. § 7-220(a).
265. Id. § 7-221(c).
268. The factors used to assess the severity of the penalty include:
   A) The willfullness of the violation;
   B) The actual harm to human health and the environment;
   C) The cost of control;
   D) The nature and degree of the injury;
   E) The proximity of the violation to populated areas;
   F) The available technology to clean up or stop hazardous effects due to the violation;
   G) Any prior violations of the rules and regulations.
possible civil penalties.  

4. Miscellaneous.—(a) Hearing-Impaired Infants.—Chapter 402 mandates that the Secretary of Health and Mental Hygiene establish a program for the early identification and follow-up of hearing-impaired infants and other infants at risk of developing a hearing impairment. This program will attempt to mitigate the serious long-term effects of undetected hearing impairments in infants through screening and services to minimize the disability, improve language skills, and increase self-sufficiency in the children's later years. Under the statute, hospitals and persons attending nonhospital births must report to the Secretary all infants born with a risk factor for hearing impairment. In addition to data gathering, the Secretary must develop methods of contacting the parents or guardians of hearing impaired and at-risk infants and referring them to support services.

269. Telephone interview with Tom Lewis, Counsel for Environmental Matters Committee, Maryland General Assembly (Oct. 30, 1985).


271. Md. Health-Gen. Code Ann. § 13-602(a) (Supp. 1985). The Department of Health and Mental Hygiene (DHMH) will develop the program with the advice of a 10-member council appointed by the Secretary. Id. §§ 13-602(b), -604(b)(4). The advisory council is composed of a physician, three persons from the field of education, a DHMH representative, a mental health professional who is an expert on deafness, two parents of hearing-impaired children, a member of the Maryland Association of the Deaf, and an audiologist. Id. § 13-603(b)(2). A sunset clause terminates the advisory council after two years. Id. § 13-603(g).


274. Id. § 13-605(a), (c).

275. Id. § 13-604(b)(1).

276. Id. § 13-604(b)(2). A telephone hotline will also be established to provide information about hearing impairment and the services available for hearing impaired infants. Id. § 13-604(b)(3).
(b) Living Will.—In the twelfth year\(^277\) of proposed “living will” legislation, the legislature finally passed chapter 620,\(^278\) which permits persons to declare in writing their wishes that life-sustaining procedures be withheld or withdrawn if they become terminally ill and unable to communicate their wishes. This statute extends the common law right to refuse treatment\(^279\) to individuals making a written declaration who later become unable to direct their care.\(^280\) It also permits individuals to execute a declaration indicating their affirmative wish to have life-sustaining procedures initiated or continued according to standard medical practice.\(^281\) Chapter 620 “enables all persons to exercise their right to accept or refuse life-sustaining procedures as they see fit,”\(^282\) regardless of their inability to communicate their desires at a later time.

A declarant who desires that life-sustaining procedures be withheld or initiated must be qualified to make a will.\(^283\) In addition, the written declaration must be voluntary, dated, signed by the declarant or by another individual on the declarant’s behalf, and witnessed by at least two adult witnesses who will not benefit financially by the

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277. ENVIRONMENTAL MATTERS COMMITTEE, MARYLAND HOUSE OF DELEGATES, 1985 REGULAR SESS. REPORT ON H.B. 453, at 2 (Feb. 19, 1985). The original version of this bill was identical to the third reader version of H.B. 148 proposed in 1984; that bill was opposed by the Maryland Catholic Conference. DEPARTMENT OF LEGISLATURE REFERENCE-RESEARCH DIVISION, 1985 REGULAR SESS., RESEARCH ANALYSIS ON H.B. 453 (1985) [hereinafter REPORT ON H.B. 453]. Seven of the amendments to H.B. 453 were attributed to requests by the Catholic Conference, REPORT ON H.B. 453, at 3-5, which ultimately gave its full support for the amended bill, stating that it “is very likely the strongest, most responsible bill of its kind in the nation.” Letter from Richard J. Dowling to Delegate Larry Young, Chairperson of the House Environmental Matters Committee (Mar. 14, 1985).


281. Id. § 5-611.

282. REPORT ON H.B. 453, supra note 277, at 1.

declarant's death.\textsuperscript{284} The legislation also codifies a model declaration and requires that any declaration substantially comply with that form.\textsuperscript{285} Declarants are responsible for notifying their attending physicians of the existence of the declaration, which is then incorporated into their medical record.\textsuperscript{286}

An unrevoked declaration does not become effective until the declarant is certified as terminally ill\textsuperscript{287} by at least two physicians and is unable to direct the use of life-sustaining procedures.\textsuperscript{288} The attending physician must place in the declarant's medical record the evidentiary basis for the conclusion that a valid declaration exists or has been or may have been revoked.\textsuperscript{289} Any declaration that facially satisfies the requirements of section 5-602 or section 5-611 is presumed to be valid.\textsuperscript{290} If more than one declaration has been validly executed, only the most recent one is effective.\textsuperscript{291}

Chapter 620 has many safeguards to protect the declarant, the physician, and other parties that may be affected by the declaration. The declaration may be revoked in several ways, all of which are simpler than making the original declaration, including executing a

\textsuperscript{284} Md. Health-Gen. Code Ann. § 5-602(a) (Supp. 1985). A person who signs at the direction and on behalf of the declarant cannot also be a witness. Id. § 5-602(a)(4)(i). Witnesses cannot be (1) related to the declarant by blood or marriage, (2) entitled to any portion of the declarant's estate, (3) financially or otherwise responsible for the declarant's medical care or employed by such person or institution, or (4) owed money by the declarant. Id. § 5-602(a)(4)(ii)-(iv).

\textsuperscript{285} Id. § 5-602(c). The Maryland Catholic Conference proposed the form of the declaration. Letter from Richard J. Dowling to Delegate Larry Young, Chairperson of the House Environmental Matters Committee (Feb. 25, 1985), p.3. If the declarant includes additional provisions that are later declared invalid, the declaration and other valid provisions are severable and can be given effect. Md. Health-Gen. Code Ann. § 5-602(c)(2).

\textsuperscript{286} Md. Health-Gen. Code Ann. § 5-602(b)(1), (3) (Supp. 1985). Notice may be given by delivering the declaration or a copy to the attending physician. Id. § 5-602(b)(2).

\textsuperscript{287} A terminal condition is defined as "an incurable condition of a patient caused by injury, disease, or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." Id. § 5-601(g).

\textsuperscript{288} Id. § 5-604(a). A life-sustaining procedure is defined as:

any medical procedure, treatment, or intervention which uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition and which, when applied to a patient in a terminal condition, would serve to secure only a precarious and burdensome prolongation of life.

Id. § 5-601(e).

\textsuperscript{289} Id. § 5-604(d).

\textsuperscript{290} Id. § 5-606.

\textsuperscript{291} Id. § 5-612(a).
written revocation, expressing a desire to revoke, and destroying the declaration.\textsuperscript{292} Withdrawing or withholding life-sustaining procedures does not include denying food, water, drugs, or medical procedures necessary to provide comfort and alleviate pain.\textsuperscript{293} Failure to execute a declaration creates no presumption of the intent of a terminally ill patient regarding the use or nonuse of life-sustaining procedures.\textsuperscript{294} In addition, execution of a declaration cannot be a condition for providing shelter, health care benefits or services, or insurance coverage.\textsuperscript{295}

In general, a person who knowingly fails to comply with the certification process and implementation of a declaration may be held civilly liable.\textsuperscript{296} An attending physician who does not proceed with the certification and implementation must make every reasonable effort to transfer the declarant to another physician.\textsuperscript{297} Any person who participates in good faith in the withholding or withdrawing of life-sustaining procedures from a declarant certified as terminally ill is relieved of civil and criminal liability and cannot be found to have committed professional misconduct.\textsuperscript{298} Forging a declaration or revocation, revoking a declaration without the consent of the declarant, or willfully concealing or withholding personal knowledge of a revocation is a misdemeanor punishable by a fine up to $1,000.\textsuperscript{299} Chapter 620 provides a special exception that the declaration of a certified terminally ill patient may not be implemented if that patient is pregnant.\textsuperscript{300} The legislation also provides that out-of-state

\textsuperscript{292} Id. § 5-603. The declaration may also be revoked by marking, burning, tearing, or otherwise altering it in a manner that indicates an intent to revoke. Id. § 5-603(4).

\textsuperscript{293} Id. § 5-605(1). Furthermore, the declaration may not be construed to permit any deliberate act or omission to end life, other than withholding or withdrawing life-sustaining procedures. Id. § 5-610(3).

\textsuperscript{294} Id. § 5-610(2).

\textsuperscript{295} Id. § 5-608. Furthermore, life insurers, because of the declaration, cannot deny new or continued coverage to declarants, consider the terms of the policy to have been breached or modified, or invoke a suicide exemption or exclusion. Id. § 5-609.

\textsuperscript{296} Id. § 5-607(a). Emergency rescue personnel are exempt from criminal and civil liability for care given in good faith and under reasonable standards to a certified terminally ill patient, even if such care is contrary to the patient’s declaration. Id. § 5-607(b).

\textsuperscript{297} Id. § 5-604(b). Otherwise, attending physicians must comply with the certification process and implement the declaration unless they know or reasonably believe that the declaration has been revoked. Id. § 5-604(a),(c). Evidence of revocation must be placed in the patient’s file. Id. § 5-604(d)(2).

\textsuperscript{298} Id. § 5-607(c)(1). This exemption does not apply to any actions or omissions before the declarant was certified terminally ill, nor does it exempt a person from liability for willful or wanton misconduct or negligence. Id. § 5-607(c)(2).

\textsuperscript{299} Id. § 5-614.

\textsuperscript{300} Id. § 5-605(2). This provision, adopted by over half of the states with living will laws, may be unconstitutional in light of Roe v. Wade, 410 U.S. 113, 162-65 (1973).
declarations will be effective in Maryland if they comply with the provisions of this subtitle.\textsuperscript{301}

\textit{(c) Arbitration Procedures}.—Chapter \textsuperscript{302} alters and clarifies the powers of the Director of the Health Claims Arbitration Office and the arbitration panel members. Under present law, all medical malpractice claims seeking more than \$5,000 in damages must be filed with the Director of the Health Claims Arbitration Office for consideration by a three-member panel.\textsuperscript{303} Prior to the enactment of chapter 104, all issues of fact and law raised by the claim and response were referred to the full panel.\textsuperscript{304} This statute requires the Director to refer all issues of law to the panel chairperson, an attorney, and all issues of fact to the full panel.\textsuperscript{305} This provision expedites the handling of medical malpractice claims that involve no factual disputes by avoiding the administrative delay of appointing the two nonlawyer panel members.\textsuperscript{306}

Since states do not have a sufficiently compelling interest to proscribe abortion until the fetus is viable, it is difficult to justify \$ 5-605(2)'s sweeping denial of a pregnant woman's right to refuse treatment. While the provision is probably valid in the case of a woman who becomes certified as terminally ill during the third trimester of her pregnancy, \$ 5-605(2) presents constitutional problems when terminal illness is discovered early in pregnancy, at a time when the patient, if competent, would be permitted to abort the fetus. If the pregnant patient is very unlikely to survive to the third trimester of her pregnancy, denying effect to her declaration needlessly and pointlessly thwarts her wishes. The model proposed by the Society for the Right to Die does not include this provision. \textit{Society for the Right to Die, Handbook of Living Will Laws 1981-1984}, at 13, 15-16, 24 (1984).
(d) Insurance for In Vitro Fertilization.—Chapter 237\textsuperscript{307} mandates that all insurers providing pregnancy-related health benefits include benefits for outpatient \textit{in vitro} fertilization expenses incurred by the subscriber or the subscriber's spouse.\textsuperscript{308} Maryland is the first state to pass legislation mandating insurance coverage for this procedure.\textsuperscript{309} Benefits must be paid only if the woman has certain medical problems\textsuperscript{310} or at least a five-year history of infertility\textsuperscript{311} and has been unable to become pregnant through less costly treatment for which coverage is available.\textsuperscript{312} Furthermore, to be eligible for coverage, \textit{in vitro} fertilization procedures must be performed in medical facilities conforming to certain guidelines.\textsuperscript{313} This statute also requires that the wife's oocyte be fertilized by her husband's sperm.\textsuperscript{314} This significant limitation allows the insurer to deny benefits to a couple if the husband is also infertile and the couple wishes to use donor sperm. Similarly, a wife who produces no viable oocytes or who has had a bilateral ovariectomy would be ineligible for such benefits if a donor oocyte were fertilized with her husband's sperm.

Chapter 237 effectively removes \textit{in vitro} fertilization from its previous experimental status, which allowed insurers to exclude benefits. \textit{In vitro} fertilization facilities operating for over a year have achieved a success rate comparable to fertile couples who achieve pregnancy through sexual intercourse.\textsuperscript{315} This legislation allows all


\textsuperscript{308} Telephone interview with Pam Kelch, Media and Consumer Relations Specialist of the Blue Cross and Blue Shield Association (Nov. 8, 1985).

\textsuperscript{309} Id. According to Ms. Kelch, no such legislation is even under consideration by any other state legislature. An estimated 800 Maryland women will undergo \textit{in vitro} fertilization procedures in 1986. Data provided by Blue Cross/Blue Shield of Maryland, \textit{reprinted in the Committee Report on H.B. 1660: INSURANCE - IN VITRO FERTILIZATION, HOUSE ECONOMIC MATTERS COMMITTEE, MARYLAND HOUSE OF DELEGATES, 1985 REGULAR SESS.} Six Baltimore/Washington hospitals perform \textit{in vitro} fertilization: Johns Hopkins Hospital, Greater Baltimore Medical Center, Union Memorial Hospital, Columbia Hospital for Women, Georgetown University Hospital, and George Washington University Hospital. \textit{BACKGROUND STATEMENT, H.B. 1660: INSURANCE - IN VITRO FERTILIZATION, supra, at 2 (Mar. 11, 1985)}.

\textsuperscript{310} These medical conditions are endometriosis, \textit{in utero} exposure to diethylstilbestrol (DES), and blockage or removal of one or both Fallopian tubes. \textit{Md. ANN. CODE art. 48A, §§ 354DD(4)(ii), 470W(4)(ii), 477EE(4)(ii) (Supp. 1985)}.

\textsuperscript{311} Id. §§ 354DD(4)(i), 470W(4)(i), 477EE(4)(i).

\textsuperscript{312} Id. §§ 354DD(5), 470W(5), 477EE(5).

\textsuperscript{313} Id. §§ 354DD(6), 470W(6), 477EE(6). The \textit{in vitro} procedures must conform to guidelines issued by either the American College of Obstetrics and Gynecology or the American Fertility Society. \textit{Id}.

\textsuperscript{314} Id. §§ 354DD(3), 470W(3), 477EE(3).

\textsuperscript{315} \textit{BACKGROUND STATEMENT, H.B. 1660: INSURANCE - IN VITRO FERTILIZATION, supra note 309, at 1 (Mar. 11, 1985)}. Many \textit{in vitro} fertilization clinics inflate their success rates
married women whose insurance covers pregnancy to utilize in vitro fertilization as a last resort to have a child biologically their own.

(e) Hospital Privileges.—Many physicians have admitting privileges at only one hospital. Hospital mergers and consolidations, encouraged by the legislature, may have an adverse impact on these physicians and their patients. Therefore, the General Assembly requested the Medical and Chirurgical Faculty of Maryland (Med-Chi) and the Maryland Hospital Association (MHA) to determine the effects of mergers and consolidations on physician hospital privileges. Med-Chi and MHA submitted their report in July 1985.

The report anticipates that the gradual implementation of mergers, consolidations, and closures will not create a crisis if the affected physicians, hospitals, the MHA, and Med-Chi act prudently in the medical staff appointment process. While the report proposed no substantive changes in the application process, it encouraged expeditious handling of applications and exchange of relevant data between hospitals, with facilitation by the MHA and Med-Chi. No guarantees of appointments or privileges at any particular hospital can be given, since a lack of facilities or services may result in denial of privileges even for qualified physi-
Nevertheless, most physicians currently in practice will be assured of hospital privileges despite mergers, consolidations, or closures. 

\( f \) Medicare Participation.—Since many elderly persons mistakenly assume that Medicare provides full medical coverage, the legislature enacted chapter 325 to require private physicians to display notices in their offices stating whether the physician participates in the Medicare program and accepts assignment for all Medicare claims, accepts assignment on a case-by-case basis, or never accepts Medicare assignment. The provisions of this legislation do not apply to physicians who have exclusive contracts with health maintenance organizations (HMOs), treat only HMO patients, or accept full assignment for covered services rendered.

\( g \) Oral Competency English.—House Bill 573, vetoed by Governor Harry Hughes, would have required the boards of examiners in medicine, nursing, physical therapy, and podiatry to test future license applicants for oral competency in English. Since graduation from a recognized English-speaking professional school would have been acceptable proof of oral competency, the legislation would have applied only to graduates of non-English speaking schools. While Attorney General Stephen H. Sachs concluded that the bill was facially constitutional, he suggested that the lack of statutory standards gave the licensing boards such broad discretion that discrimination against the speech-disabled and foreign-born would be almost inevitable. In light of these concerns and his own reservations, Governor Hughes vetoed the bill; however, he also re-

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325. The basic requirements for any medical staff appointment are current licensure, relevant training and experience, current competence, and satisfactory physical and mental health. \( \text{Id. at 2}. \)
326. \( \text{Id. at 3, citing S.P. Schwartz, Political Impact on Employment of a Hospital Closure in Baltimore City—Final Report (Oct. 15, 1984) (prepared for use by the Governor's Task Force on Health Care Cost Containment).} \)
329. \( \text{Id. § 14-705(a)(1)-(3).} \)
333. \( \text{Id. at 3990.} \)
quested that the extent of the oral competency problem be evaluated and that appropriate statutory guidelines to minimize the possibility of uneven application be drafted and introduced in the 1986 session.\textsuperscript{335}

\begin{flushright}
\textsc{Carolyn H. Fleming}
\textsc{Mary D. McCauley}
\textsc{John D. Wilson}
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\textsuperscript{335} Letter, \textit{supra} note 331, reprinted in 1985 Md. Laws at 3984.
IX. Property

A. Property Rights

1. Right to Trial Transcripts.—In Levene v. Antone,¹ the Court of Appeals held that criminal defendants have no property right in transcripts of their trials.² Two convicted criminals, both former clients of the Maryland Public Defender, requested free copies of their transcripts, and the Public Defender refused.³ The two then sued the Public Defender's Office in federal court, claiming the refusal violated their civil rights.⁴ The district court certified the following question to the Maryland Court of Appeals: "Does a client represented by one or more attorneys employed by the Office of the Public Defender of the State of Maryland have a property right under the laws of the State of Maryland to the transcript of his or her trial which is in the custody of the Maryland Public Defender?"⁵

The Public Defender refused to provide the transcripts because office policy prohibited lending transcripts⁶ and the office had insufficient funds to supply transcripts to clients.⁷ The plaintiffs first argued that the Public Defender was their agent and, as principals, they had a property right in a transcript coming into the possession of the Public Defender. The court, however, reasoned that the Public Defender did not acquire the transcripts as the plaintiffs' agent; instead, the transcripts were acquired as part of the ongoing duty of

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¹. 301 Md. 610, 484 A.2d 259 (1984).
². Id. at 625, 484 A.2d at 266.
³. Id. at 611-12, 484 A.2d at 259-60.
⁴. Id. at 613, 484 A.2d at 260.
⁵. Id. at 611, 484 A.2d at 259. Md. CTS. & JUD. PROC. CODE ANN. § 12-601 (1984) authorizes the Court of Appeals to answer questions of law certified to it from federal and state appellate courts if the questions would determine the case in the certifying court.

In its certification, the district court stated that plaintiffs would be entitled to their transcripts if they demonstrated a particularized need or established a property right under Maryland law. Since the court concluded that the plaintiffs had shown no particularized need as required by Jones v. Superintendent, 460 F.2d 150, aff'd on rehearing, 465 F.2d 1091 (4th Cir. 1972), cert. denied, 410 U.S. 944 (1973), the question of Maryland law would determine the plaintiffs' action under 42 U.S.C. § 1983 (1982). 301 Md. at 613-14, 484 A.2d at 260-61.

⁶. 301 Md. at 615, 484 A.2d at 261. According to the Public Defender, loaning transcripts in the past had resulted in mutilation, destruction, or loss; thus, a single copy is kept on file for use in appeals. Clients may only obtain copies by purchasing them. Id. at 614-15, 484 A.2d at 261.

⁷. Id. at 615, 484 A.2d at 261. The budget of the Office of Public Defender allocated no funds for copying transcripts, and the Public Defender was prohibited by law from expending unapproved funds. Id.
the Public Defender's office in which the trial level attorney-client relationship was but a single segment. Thus, the court concluded that the Public Defender was discharging its statutory responsibilities to the clients, but not acting as their agent, when it acquired the transcripts.

Alternatively, plaintiffs claimed that the Public Defender Act created a benefit or entitlement to the transcript. The court rejected this theory as well. In Board of Regents v. Roth, the Supreme Court distinguished between unilateral expectations and legitimate claims of entitlement; only the latter establish a property interest. Without analysis, the Court of Appeals found that plaintiffs had no legitimate claim of entitlement to their trial transcripts; the Public Defender Statute entitled them only to representation of counsel.

The court's treatment of this case is too simplistic. First, it resolved the agency issue by separating the Public Defender's recordkeeping functions from the duties of its attorneys to represent clients. The court ignored two important considerations, however: The recordkeeping would not exist without the central attorney-client relationship, and the transcript is indispensable to the proper conduct of the case. In addition, the court seemed to view acquisition of a single transcript to defend a single client as a part of

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8. Id. at 622-23, 484 A.2d at 265.
12. 301 Md. at 623, 484 A.2d at 265.
13. Id. at 625, 484 A.2d at 627.
15. Id. at 577.
16. 301 Md. at 625, 484 A.2d at 266.
17. The Attorney General took a slightly more expansive view when queried about the same issue. Although finding no property right in a trial transcript, the Attorney General noted that the trial transcript is a public record under Maryland law. Thus, the Public Information Act, Md. Ann. Code art. 76A, §§ 1-5 (1980 & Supp. 1983) (now codified at Md. State Gov't Code Ann. §§ 10-611 to -628 (1984 & Supp. 1985)), allows any member of the public access to the record and a copy for a reasonable fee. Further-
an ongoing duty of the Public Defender rather than a specific obligation owed to each client.

Second, in resolving the benefit or entitlement claim, the court seemed more concerned about the Public Defender's housekeeping problems than solid legal analysis. The court read the Public Defender Law narrowly and found no specific mention of either a right to a trial transcript or of a legitimate claim of entitlement vesting in defendants. The court apparently failed to recognize that the Public Defender may refuse to petition for certiorari\textsuperscript{18} or that the defendant may want to appeal pro se. In either case, the defendant would need the transcript to pursue postsentencing review.

Furthermore, the court declined to address the broader question of what would, in fact, constitute a legitimate claim of entitlement under Maryland law.\textsuperscript{19} In Roth, the Supreme Court looked to "existing rules or understandings that stem from an independent source such as state law"\textsuperscript{20} to define property interests. This phrase suggests a broader approach than the Court of Appeals has been willing to take.

2. Implied Easements.—In Boucher v. Boyer,\textsuperscript{21} the Court of Appeals held that appellants had an implied easement in a street owned by appellees.\textsuperscript{22} The original owners subdivided their land and recorded a plat that depicted the street as a right-of-way extending the length of lots 1 and 2. After selling these lots, the original owners sold the remainder of their land to the Bouchers, who created lot 3. All of the deeds referred to the previously recorded subdivision plat. In 1982 the owners of lots 1 and 2 filed a declar...
tory judgment action to have themselves declared fee simple owners of the street and enjoin the Bouchers from using the street.\textsuperscript{23}

First, the court found that the owners of lots 1 and 2 had fee simple title to the street.\textsuperscript{24} Section 2-114 of the Real Property Article provides that deeds conveying land bounded by a street also convey fee simple title to the center line of the street.\textsuperscript{25} Since lots 1 and 2 bounded the street, the owners of those lots also had title to the street.\textsuperscript{26}

The court rejected the Bouchers' argument that they owned the street.\textsuperscript{27} At the time of the third lot's conveyance, the original owners no longer held title to any portion of the street; the deed did not expressly reserve title to the street, and lot 3 abutted on, but did not bind the street.\textsuperscript{28} Thus, the original owners could not convey title to the Bouchers.\textsuperscript{29}

The court did conclude, however, that the owners of lot 3 had an implied easement in the street.\textsuperscript{30} At common law, a deed reference to a plat incorporates that plat as part of the deed.\textsuperscript{31} The deed conveying lot 3 referred to the original subdivision plat of lots 1 and 2, which showed the street as a right-of-way, and thus vested an implied easement in the street in the owners of lot 3.\textsuperscript{32}

The owners of lots 1 and 2 argued that an implied easement could not exist because section 2-114 conveyed all interest in the street to the landowners on each side.\textsuperscript{33} To resolve this apparent conflict, the court examined the purpose and effect of the two rules. The rule establishing title to a street that bounds a landowner's property assures a landowner's access to a street while allowing for an easement in the other half.\textsuperscript{34} An implied easement by plat reference has the same purpose, although it gives an easement in the

\textsuperscript{23} Id. at 683-85, 484 A.2d at 633-34.
\textsuperscript{24} Id. at 687, 484 A.2d at 635.
\textsuperscript{25} Md. Real Prop. Code § 2-114 (Supp. 1985). At the time the transfer of lots 1 and 2 occurred, this provision was codified at Md. Ann. Code art. 21, § 107 (1966). This statute, which the court has applied to both private and public streets, Grunwell v. Henderson, 220 Md. 240, 247, 151 A.2d 920, 924 (1959), extends the common law presumption that title to the center of a binding street passes to the grantee, Callahan v. Clemens, 184 Md. 520, 526, 41 A.2d 473, 476 (1945).
\textsuperscript{26} 301 Md. at 687, 484 A.2d at 635.
\textsuperscript{27} Id. at 686, 484 A.2d at 634.
\textsuperscript{28} Id. at 687, 484 A.2d at 635.
\textsuperscript{29} Id.
\textsuperscript{30} Id. at 694, 484 A.2d at 638.
\textsuperscript{32} 301 Md. at 691, 484 A.2d at 636.
\textsuperscript{33} Id. at 693, 484 A.2d at 637.
\textsuperscript{34} Id. at 693, 484 A.2d at 638.
whole street rather than granting fee simple title to part. Each rule assures access to a contiguous right-of-way, permitting full use and enjoyment of the property; thus, the two are not inconsistent. The court concluded that "absent an express provision to the contrary in the deed, those who purchase a lot with reference to a plat depicting an abutting street acquire a private easement in that street . . . ."

3. Adverse Possession.—In Costello v. Staubitz, the Court of Appeals held that a fence erected by the record owner's predecessor in interest did not constitute evidence of a claimant's adverse possession. Staubitz acquired property from his father in 1955. In 1979 the Costellos acquired adjacent property, surveyed it, and discovered that a barbed wire fence encompassed a portion of their land to the benefit of Staubitz. Staubitz filed suit to quiet title, asserting acquisition of title by adverse possession. The Costellos contended that they were the record owners. Staubitz claimed that both he and some of his neighbors considered the fence a boundary and that he had made use of the land in various ways. Both the trial court and the Court of Special Appeals agreed with Staubitz, reasoning that a visible boundary line vests title to all land delineated by the boundary if the claimant also proffers evidence of unequivocal acts of ownership.

The Court of Appeals, however, distinguished between an enclosure erected by the claimant and one erected by a prior owner. A fence supports a claim of ownership only if it was built as an affirmative assertion of ownership. Thus, the appropriate inference to be drawn from the existence of a fence depends upon who built the fence and why it was built.

A fence built in ignorance of or mistake about the true boundary cannot establish adverse possession because the possession of

35. Id.
36. Id. at 693-94, 484 A.2d at 638.
37. Id. at 694, 484 A.2d at 638.
39. Id. at 74, 475 A.2d at 1192.
40. Id. at 63, 475 A.2d at 1186.
41. Id. at 64-65, 475 A.2d at 1187. Staubitz had planted trees, erected a shed, built a firepit, used it for a boat ramp, and buried a pet on it. Id.
42. Id. at 66-67, 475 A.2d at 1187-88.
43. Id. at 69, 475 A.2d at 1189-90.
44. Id. at 68, 475 A.2d at 1189; Storr v. James, 84 Md. 282, 290-91, 35 A. 965, 967 (1896).
45. 300 Md. at 69, 475 A.2d at 1189.
the expanded area is not adverse or hostile to the true owner.\textsuperscript{46}

The distinction seems to be that if the limits of the occupation be fixed with the intention of claiming them as the boundary line, the statute runs; but if the occupations and delineations of the boundaries appear to be merely provisional, with the intent to claim them as boundaries if they are found to be proper boundaries, then the statute does not run.\textsuperscript{47}

If no evidence exists as to purpose, however, a fence supports an inference that it is a boundary.\textsuperscript{48} In this case, the fence did not constitute a boundary because Staubitz had not built it.\textsuperscript{49} Staubitz was entitled, however, to acquire title to any land that he had actually occupied for the statutory period.\textsuperscript{50} Thus, the court remanded the case to determine what land, if any, that Staubitz had actually occupied.\textsuperscript{51}

4. **Right to Exclude.**—In Silbert v. Ramsey,\textsuperscript{52} the Court of Appeals held that a racetrack may exclude an individual convicted of lottery violations.\textsuperscript{53} The agency hired to provide racetrack security at Timonium Racetrack routinely excluded persons with a history of involvement with illegal gambling.\textsuperscript{54} Thus, it refused admission to Silbert, who had been convicted of lottery violations.\textsuperscript{55} Silbert then sought an injunction to restrain the racetrack owner and its agents from arresting him or ejecting him from public areas of the track without a court order.\textsuperscript{56}

Silbert first claimed a common law right of reasonable access,\textsuperscript{57}

\begin{itemize}
  \item 46. Tamburo v. Miller, 203 Md. 329, 336, 100 A.2d 818, 821 (1953).
  \item 47. Id.
  \item 49. 300 Md. at 73, 475 A.2d at 1191. The record owner’s predecessor in interest built the fence to prevent his cattle from straying. Id., 475 A.2d at 1191-92.
  \item 50. Id. at 74, 475 A.2d at 1192.
  \item 51. Id.
  \item 52. 301 Md. 96, 482 A.2d 147 (1984).
  \item 53. Id. at 107, 482 A.2d at 153. The court refused to overrule Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335 (1948). 301 Md. at 100-01, 482 A.2d at 149-50.
  \item 54. 301 Md. at 98-99, 482 A.2d at 148-49. The agency also routinely excluded persons who had a history of involvement with organized crime or who had been convicted of other serious crimes. These policies were developed to protect the integrity of the legal gambling at the racetrack. Id. at 99, 482 A.2d at 149.
  \item 55. Id. at 99, 482 A.2d at 149.
  \item 56. Id. at 99-100, 482 A.2d at 149. The trial court denied relief, and the Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals. Id. at 100, 482 A.2d at 149.
  \item 57. Id. at 100, 482 A.2d at 149.
\end{itemize}
preserved through the Maryland Public Accommodations Law.\textsuperscript{58} The court, however, pointed out that the common law has always recognized a proprietor's right to exclude unwanted persons.\textsuperscript{59} Although the Court of Appeals assumed that the common law right to exclude did not include exclusions violating public policy,\textsuperscript{60} it found no such violation in this case.\textsuperscript{61} According to the court, the public interest in protecting the integrity of thoroughbred racing outweighed any right of access.\textsuperscript{62}

Silbert then argued that the Maryland Public Accommodations Law\textsuperscript{63} abrogated the common law right to exclude.\textsuperscript{64} The Public Accommodations Law, however, prohibits only exclusions based on various characteristics, none of which applied to Silbert.\textsuperscript{65} Furthermore, the statute allows exclusions "for failure to conform to the usual and regular requirements, standards and regulations for the establishment."\textsuperscript{66} Thus, the court concluded that the legislature did not intend to abrogate the common law right to exclude.\textsuperscript{67}

Alternatively, Silbert argued that the creation of the Maryland Racing Commission\textsuperscript{68} and its rules and regulations\textsuperscript{69} abrogated the common law right to exclude. According to Silbert, the Commission's broad power to regulate racing overrides any common law right to exclude.\textsuperscript{70} The court, however, relied on *Greenfeld v. Maryland Jockey Club*,\textsuperscript{71} in which it held that the extensive regulation of

\textsuperscript{60} 301 Md. at 103, 482 A.2d at 151. The court based this assumption on Marzocca v. Ferrone, 93 N.J. 509, 461 A.2d 1133 (1983), in which the New Jersey Supreme Court proscribed exclusions that violated public policy, id. at 517, 461 A.2d at 1137. 301 Md. at 103, 482 A.2d at 151.
\textsuperscript{61} 301 Md. at 103, 482 A.2d at 151.
\textsuperscript{62} Id.
\textsuperscript{64} 301 Md. at 104, 482 A.2d at 151.
\textsuperscript{65} Id. MD. ANN. CODE art. 49B, § 5 (Supp. 1985) prohibits exclusions from places of public accommodations based on race, creed, sex, age, color, national origin, marital status, or physical or mental handicap.
\textsuperscript{66} MD. ANN. CODE art. 49B, § 5.
\textsuperscript{67} 301 Md. at 104, 482 A.2d at 151.
\textsuperscript{68} MD. ANN. CODE art. 78B, § 1 (1980).
\textsuperscript{69} Id. § 11(a) authorizes the Commission to prescribe rules and regulations. These regulations can be found at MD. ADMIN. CODE tit. 09, §§ 10.01.01 to 10.02.55 (1984).
\textsuperscript{70} 301 Md. at 105, 482 A.2d at 152.
\textsuperscript{71} 190 Md. 96, 57 A.2d 335 (1948).
racing did not completely extinguish private rights. Furthermore, the Commission's regulations primarily address the preservation of the integrity and honesty of betting for the public and have no particular bearing on exclusion of undesirables. Thus, the court refused to infer an intent to abrogate the common law from the Commission's failure to address the exclusion of undesirables from racetracks.

5. Cov enants.—In Maryland Commission on Human Relations v. Greenbelt Homes, Inc., the Court of Appeals held that a contractual provision that restricted home occupancy to persons in the member's immediate family did not constitute marital status discrimination. The court interpreted the state code provision banning discrimination on the basis of marital status as "clear and unambiguous" and concluded that "'marital status' connotes whether one is married or not married."

72. Id. at 104, 57 A.2d at 338.
73. 301 Md. at 106, 482 A.2d at 152.
74. Id. Silbert also argued that his exclusion violated his constitutional rights. He claimed a violation of procedural due process because he was not given a hearing before being deprived of a property right. The court did not consider this issue because Silbert did not raise it at trial as required by Md. R.P. 885. The court also noted that it could not determine whether Silbert had requested a hearing before the Racing Commission. Id. at 108, 482 A.2d at 153.

Silbert also claimed that the racetrack's policy of allowing informers access to the track despite their criminal record violated his right to equal protection. He conceded that he was not a member of a suspect class and that he had not been deprived of a fundamental right. Thus, the court applied the rational relationship test and found that no constitutional violation had occurred. The racetrack's decision to admit informers recognized their important role in criminal investigation and, thus, had a rational basis. Id. at 108-09, 482 A.2d at 153-54.

75. 300 Md. 75, 475 A.2d 1192 (1984).
76. Id. at 86, 475 A.2d at 1198-99. The court was interpreting Md. ANN. CODE art. 49B, § 20 (1979 & Supp. 1985), which states in pertinent part:

It shall be an unlawful discriminatory housing practice because of . . . marital status . . ., for any person having the right to sell, rent, lease, control, construct, or manage any dwelling constructed or to be constructed, or any agent or employee of such person:

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.

(6) To include in any transfer, sale, rental or lease of housing any restrictive covenant that discriminates; or for any person to honor or exercise, or attempt to honor or exercise any discriminatory covenant pertaining to housing.

77. 300 Md. at 83, 475 A.2d at 1196.
A couple entered into a mutual ownership contract with Greenbelt. The Greenbelt board of directors granted permission for the couple, their daughter, and their daughter's son to live in the unit. The mutual ownership contract limited occupancy to members and their immediate family; violation of the contract terms could result in termination of the agreement. Shortly thereafter, an unrelated male moved into the unit. No one sought a waiver of the contract restriction, and Greenbelt started action through its board of directors to enforce the contract. The daughter filed a housing discrimination complaint with the Maryland Commission on Human Relations. Greenbelt appealed the Commission's adverse decision.\footnote{78}

The court found that the daughter's marital status was irrelevant in considering whether the unrelated male had a right to occupy the unit. According to the court, "[i]t would have made no difference under the circumstances of this case if [the unrelated male] had been [the daughter's] best girlfriend, her favorite aunt, her destitute cousin, or her infant nephew."\footnote{79} The court rejected the argument that the Greenbelt contract treated unmarried persons differently from married persons.\footnote{80} According to the court, the legislature "intended to promote rather than denigrate the institution of marriage" by prohibiting marital status discrimination.\footnote{81} Restricting occupancy to families furthered this goal and, thus, was not marital status discrimination.\footnote{82}

This decision sheds little light on what constitutes marital status discrimination. Certainly the contract provision prohibited any unrelated person from sharing the Greenbelt unit. If, however, the unrelated male had been married to the daughter, he would have

\footnote{78}{Id. at 77, 475 A.2d at 1193-94.}
\footnote{79}{Id. at 83, 475 A.2d at 1196.}
\footnote{80}{Id., 475 A.2d at 1196-97. The court relied on Green v. Greenbelt Homes, Inc., 232 Md. 496, 194 A.2d 273 (1963), which upheld a similar contractual provision. Only one other Maryland case discusses marital status discrimination. In Prince George's County v. Greenbelt Homes, Inc., 49 Md. App. 314, 431 A.2d 745 (1981), the Court of Special Appeals held that denial of a joint membership to an unmarried couple did not constitute illegal discrimination. Id. at 320, 431 A.2d at 748. The court found that "neither complainant was denied membership individually because of his or her individual marital status." Id. at 319, 431 A.2d at 747-48 (emphasis in original). Although single persons separately have marital status, collectively they do not. Only marriage as prescribed by law gives a couple the marital status necessary to compel treatment as an entity. Id., 431 A.2d at 748. "[E]ven contemporary discrimination laws are not intended to promulgate promiscuity by favoring relationships unrecognized by statute or case law as having legal status." Id. at 320, 431 A.2d at 748.}
\footnote{81}{300 Md. at 84, 475 A.2d at 1197.}
\footnote{82}{Id.}
be permitted to live there under the terms of the contract. Therefore, Judge Davidson concluded in her dissent that "[the daughter's] right to reside in a Greenbelt housing unit with [the unrelated male] depended upon whether she was 'married or not married' and, therefore, depended upon her 'marital status.'"\(^8\)

In *Chesapeake Ranch Club v. CRC United Members*,\(^8^4\) the Court of Special Appeals held that membership dues for a community social club do not constitute covenants that run with the land,\(^8^5\) but that the property owners had to pay the dues unless they had a valid reason to rescind the contract.\(^8^6\) Appellant, developer of a private subdivision, sold lots to individuals on the condition that the purchaser's application for membership in the subdivision's private club was approved. The club's membership application provided that lot owners must pay club dues not to exceed $35 per year and road charges not to exceed $10 per year. The club dues were used to support facilities such as marinas, bathhouses, a lodge, beach areas, and social centers. Some of the property owners claimed that the developer failed to provide the social facilities and, thus, refused to pay dues.\(^8^7\)

The developer filed suit against the owners claiming: 1) that they could not resign as members of the Chesapeake Ranch Club; 2) that they had to pay dues pursuant to the contract if they could resign; 3) that all lot owners had to pay road fees; and 4) that the alleged failure of consideration in providing services did not excuse the refusal to pay dues.\(^8^8\) Upon the developer's motion for summary judgment,\(^8^9\) the circuit court held that club members could resign from the club and cease paying dues, but that failure of con-

\(^8^3\) *Id.* at 87, 475 A.2d at 1198 (Davidson, J., dissenting).
\(^8^5\) *Id.* at 616, 483 A.2d at 1337.
\(^8^6\) *Id.* at 618, 483 A.2d at 1338.
\(^8^7\) *Id.* at 611-12, 483 A.2d at 1335. Prior to the developer's filing suit, the lot owners brought an action in federal district court requesting an injunction prohibiting the developer from disposing of social facilities without approval by the property owners. *Id.* at 611, 483 A.2d at 1335.
\(^8^8\) *Id.* at 612, 483 A.2d at 1335. The property owners claimed that the availability of the social and recreational facilities had led them to purchase property at Chesapeake Ranch Club. According to the owners, the alleged sale of these facilities constituted a failure of consideration and, thus, relieved them of the obligation to pay dues. *Id.*

The developer also requested the court to declare that the property owners had no property right in Chesapeake Ranch Club, Inc. real property and that CRC could sell or encumber any real property that it owned. The trial court refused to consider these two issues because of the pending lawsuit in federal court. *Id.* at 612-13, 483 A.2d at 1336.

\(^8^9\) The landowners filed a motion raising preliminary objections to the developer's amended complaint. During the hearing on that motion, the parties agreed that the
sideration did not excuse the obligation to pay club dues. The court also held that the covenant to pay road fees ran with the land and therefore bound all property owners.

On appeal, the Court of Special Appeals determined that the covenant requiring property owners to pay club dues did not run with the land: the benefits involved did not touch and concern the land; the facilities did not necessarily increase the value of the community as a whole; and the social facilities were not essential to the owners' use of their property. Because the club dues did not run with the land, the dues could only be imposed on the basis of the membership contract signed by all prospective landowners.

The court also held that the trial court erred in ruling that a member could resign from the club and cease paying dues. The lot owners must have a legal reason that would justify rescission to avoid liability for club dues. Because of the unusual proceedings in the lower court, however, the Court of Special Appeals remanded the case for further factfinding.

In Bernui v. Tantallon Control Committee, the Court of Special Appeals found that a recorded declaration of covenants did not constitute a uniform general plan of development. Therefore, it did not apply to lots not expressly governed by the covenants that were conveyed without restrictions in their deeds. Bernui purchased a lot comprised partially of land subject to the recorded declaration of covenants and partially of land acquired after the recordation that was not explicitly subject to the restrictions. She planned to build a modular home on the unrestricted part of the lot, but neighboring

matter would be heard as a motion for summary judgment, which Chesapeake Ranch Club filed later that day. Id. at 612-13, 483 A.2d at 1336.

90. Id. at 613, 483 A.2d at 1336. The circuit court gave no basis for its conclusion that lot owners could resign their membership and cease paying dues. Id. n.2.

91. Id. at 613, 483 A.2d at 1336.

92. Id. at 616, 483 A.2d at 1337-38.

93. See id. at 615-16, 483 A.2d at 1337.

94. Id. at 618, 483 A.2d at 1338.

95. Id.

96. Id. When it became apparent that the trial court would decide the merits of the case at a preliminary hearing, the parties agreed to submit a summary judgment motion. While appellees justified the trial court's ruling on the ground that a material breach of the contract occurred when appellant sold some of the facilities, no factual determination was made by the trial court that such a material breach had occurred. Id. at 617-18, 484 A.2d at 1338.


98. Id. at 15, 488 A.2d at 190.

99. Id. at 16-17, 488 A.2d at 191.
landowners objected because the home did not conform to the neighborhood restrictions.100

The court determined that the recorded covenants did not restrict Bernui’s use of her lot.101 Looking at the pertinent factors set forth in Turner v. Brocato,102 the court found that her lot was not part of the subdivision restricted by the covenants and that the plat and the declaration of covenants did not purport to restrict afteracquired property.103 Neither Bernui’s deed nor any other deeds from that section of the subdivision mentioned the restrictions, and the developer had not demonstrated an intent to restrict all lots.104 Thus, the court followed the general rule that doubt must be resolved in favor of free alienability of land.105

B. Eminent Domain

1. Just Compensation.—In Baylin v. State Roads Commission,106 the Court of Appeals adopted the “scope of the project” rule107 to determine whether the enhanced value of land in the vicinity of a proposed public project can be an element of just compensation.108 In 1954 the State Roads Commission budgeted money for the Northwest Expressway to be completed between 1962 and 1965. Both the construction drawings and the zoning map showed the proposed

100. Id. at 10-13, 488 A.2d at 186-89. The declaration of covenants restricting certain lots in the Tantallon Hills and Tantallon-on-the-Potomac subdivisions provided:
   (1) no one-story residential structure shall be constructed which has a habitable floor area of less than 1800 square feet, exclusive of basements, porches, patios and garages, (2) no structure shall be erected which does not have a garage under the residence, or a closed garage attached to the dwelling or connected by a breezeway, and (3) no improvements shall be erected unless . . . approved, in writing, by the “Tantallon Control Committee.”

101. Id. at 15, 488 A.2d at 190.

102. 206 Md. 336, 349-50, 111 A.2d 855, 862-63 (1954). In Turner, the court found a uniform plan of development that implicitly restricted all lots within the development based on the following facts: 1) The lots were part of the original tract acquired by the developer; 2) the lots were shown as part of the development on all plats; 3) a sign referred to the community as “restricted”; 4) most of the deeds contained the restrictions; 5) community residents said that they bought their lots believing that the whole community was restricted; and 6) the phrase “Poplar Hill restrictions” was mentioned in the contracts of sale and the real estate brokers’ conversations. Id.

103. 62 Md. App. at 17, 488 A.2d at 191.

104. Id. at 18, 488 A.2d at 191-92. Although Bernui was aware of the restrictions, the real estate broker told her that her lot was not subject to the Tantallon restrictions. Id. at 12, 488 A.2d at 189.

105. See id. at 16, 488 A.2d at 190-91.


107. See infra notes 114-16 and accompanying text.

108. 300 Md. at 13, 475 A.2d at 1161.
project as requiring 19.32 acres of the landowner's property. In 1963 appellants' predecessor in title received a plat showing the location of the expressway. The plat and an accompanying letter noted that the plans were tentative and subject to revision. In 1965 appellants acquired a large tract of land, including the 19.32 acres, on which they planned to build a shopping center and residential and industrial developments. In 1970 the Mass Transit Authority recommended placing a rapid transit line in the median of the proposed expressway. The federal government accepted the final plan in 1977; the plan included a new road, the major interchange of the expressway, the major transit facility and the parking facilities, all located on appellants' property. In 1981, twenty-seven years after money was budgeted for the expressway, the state began condemnation proceedings for 137.341 acres of appellants' property.109

The trial court viewed the construction of the Northwest Expressway and the construction of the Mass Transit facility as one ongoing project, which began with the commitment and ended with the taking in 1981.110 Thus, the court instructed the jury, in accordance with section 12-105 of the Real Property Article,111 that it must exclude any increase in value caused by the public project for which the property was needed.112

In ruling that this jury instruction was erroneous, the court adopted the "scope of the project" rule113 articulated in U.S. v. 320 Acres of Land.114 "If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project."115 The land does not have to be specified in the original plans; it need only be shown that during the planning or original construction stages it appeared that

109. Id. at 3-7, 475 A.2d at 1156-58.
110. Id. at 8, 475 A.2d at 1158.
111. Md. REAL PROP. CODE ANN. § 12-105(b) (1981) provides that the "fair market value of property in a condemnation proceeding is the price . . . for the highest and best use . . . , excluding any increment in value proximately caused by the public project for which the property condemned is needed."
112. 300 Md. at 8, 475 A.2d at 1158.
113. Id. at 13, 475 A.2d at 1161.
114. 605 F.2d 762 (5th Cir. 1979).
115. Id. at 781-82. If the land was not within the scope of the original project, but subsequently condemned for the project, the landowner is entitled to the value added to that land because of its proximity to the original proposed project. United States v. Miller, 317 U.S. 369, 377 (1943).
the land probably would be needed for the project.\textsuperscript{116}

For the purpose of the "scope of the project" rule, the court adopted \textit{320 Acres of Land}'s definition of "committed": "the date as of which the prospect of imminent condemnation becomes sufficiently definite that it would be a major factor in the decision of any reasonable person to buy or develop the property."\textsuperscript{117} The parties agreed that the State was committed to the Northwest Expressway in 1954 when the project was announced to the public and funds were budgeted for it.\textsuperscript{118} They did not agree, however, that the 1954 commitment date for the Expressway also applied to the much larger project that was finally built. The court listed three factors relevant to whether, from the time the government became committed to a project, it was evident to the public that the condemned property might be taken for the project: 1) the foreseeability that the proposed dimensions of the project might change to include the condemned property; 2) the length of time between commencement of the project and condemnation of the property; and 3) government representations concerning the finality of the project as originally announced.\textsuperscript{119}

Applying these factors, the court found that it was not foreseeable that the property surrounding the Northwest Expressway would probably be used for a Mass Transit facility.\textsuperscript{120} The court also noted that twenty-seven years elapsed between commitment to the original project and condemnation for the project in its final and enlarged form.\textsuperscript{121} Although the court acknowledged that the Expressway plans were represented as tentative, it found it reasonable to infer that the notation "Tentative and Subject to Revision" related to changes in the Expressway plans, not the addition of a Mass Transit facility.\textsuperscript{122} Thus, the court determined that the land taken

\begin{itemize}
\item \textsuperscript{116} 300 Md. at 12, 475 A.2d at 1160. The court rejected the State's argument that this rule conflicted with \textit{MD. REAL PROP. CODE ANN.} § 12-105(b) (1981). This section refers to "public project," which the court construed as "defined project." The "scope of the project" rule determines whether property taken was within the contemplation of the parties from the time the government entity became committed. Thus, it serves as a means to define the term "public project" used in § 12-105(b). 300 Md. at 12-19, 475 A.2d at 1160-61.
\item \textsuperscript{117} 605 F.2d at 807.
\item \textsuperscript{118} 300 Md. at 13, 475 A.2d at 1161.
\item \textsuperscript{119} \textit{Id.} at 16-18, 475 A.2d at 1162-63.
\item \textsuperscript{120} \textit{Id.} at 16, 475 A.2d at 1162. The court noted that "[e]ven the most 'astute and informed' landowner . . . could not have foreseen that the property surrounding the Northwest Expressway 'would probably be incorporated' for the Transit facility." \textit{Id.} at 17, 475 A.2d at 1163 (citation omitted).
\item \textsuperscript{121} \textit{Id.} at 17-18, 475 A.2d at 1163.
\item \textsuperscript{122} \textit{Id.} at 18-19, 475 A.2d at 1163-64.
\end{itemize}
for the Mass Transit facility and the new road was not within the scope of the Expressway project. Therefore, the additional 118 acres for those purposes constituted a subsequent enlargement of the project, and appellants were entitled to any enhancement of value added by the proximity of that property to the Northwest Expressway.

The adoption of the "scope of the project" rule was necessary to reach a fair result in this case. Appellants bought the property, probably for an increased price due to the proposed expressway, because land near a new expressway would be a prime area for development. They did not buy the property anticipating that the additional acreage would be condemned and unavailable for development. The principles of just compensation dictate that the state should not be able to announce a project causing an increase in the price of nearby real estate and then, twenty-seven years later, build a much enlarged project and ignore the enhancement of value caused by the announcement of the first project.

2. Public Use.—In Anne Arundel County v. Burnopp, the Court of Appeals clarified the standard of review of a determination of public necessity and the definition of public use in connection with eminent domain proceedings. Anne Arundel County sought to condemn a strip of land from each appellee's property in order to add to an existing right-of-way and connect one portion of Sleepy Hollow Road with another smaller portion of the same road. The county claimed that the twenty-foot right-of-way connecting the roads was in bad repair and, in order to provide public services to the residences on the smaller part of the road, the right-of-way and some land on either side of it would have to be condemned and then improved.

The court found that the county had established public necessity. In Murphy v. State Roads Commission, the Court of Appeals held that public necessity is a legislative rather than a judicial question. Thus, the legislature's decision to undertake an improvement creates a prima facie presumption that the improvement is...
To rebut the presumption, the decision must be "so oppressive, arbitrary or unreasonable as to suggest bad faith." In Burnopp, the county authorized the acquisition of the road to make improvements, and no evidence tended to rebut the presumption. Thus, the court upheld the finding of public necessity.

The court also held that a proper public use was involved, even though the road primarily benefited only twenty-four residences. As long as the road is open to the public, its use by a small number of people does not affect the finding of public use.

3. Relocation Assistance.—In Rollins Outdoor Advertising, Inc. v. State Roads Commission, the Court of Special Appeals found that Rollins had not been displaced by a condemnation proceeding and, thus, was not entitled to relocation expenses. In 1979 the State acquired property in Frederick County in order to upgrade a nearby highway interchange. Three advertising signs were located on the property on a year-to-year lease that the State failed to renew. The State filed a condemnation proceeding in which Rollins requested relocation expenses. The circuit court denied this request, and Rollins appealed.

Although Maryland law allows the payment of actual relocation expenses in addition to the condemnation award, such payment must reimburse expenses not included in the fair market value of property acquired for condemnation. In addition, the acquisition of the land must displace a person or that person's personal property. Since Rollins was still in possession of the premises and had

130. Id.
131. Id.
132. 300 Md. at 349, 478 A.2d at 318.
133. Id., 478 A.2d at 318-19.
134. Id. at 350, 478 A.2d at 319.
136. Id. at 210, 481 A.2d at 1156.
137. Id. at 200-01, 481 A.2d at 1151-52.
138. Md. REAL PROP. CODE ANN. § 12-205 (1981). The court noted the similarity in language between this section and its federal counterpart, 42 U.S.C. § 4622 (1982). Thus, in the absence of Maryland case law on the subject, it could refer to federal cases for guidance. 60 Md. App. at 204, 481 A.2d at 1153.
139. 60 Md. App. at 209, 481 A.2d at 1156. The court rejected the State's argument that payment of both relocation expenses and fair market value would be duplicative payments prohibited by Md. REAL PROP. CODE ANN. § 12-208(b)(2) (1981). 60 Md. App. at 206, 481 A.2d at 1154. According to the court, § 12-208(b)(2) applies to payments made to a landlord and tenant when each has an interest in the condemned property and, thus, does not concern relocation expenses or an election between relocation and condemnation expenses. Id.
140. Md. REAL PROP. CODE ANN. § 12-201(c) (1981).
not moved its personal property, it was not displaced. Therefore, the court held that it was not entitled to relocation expenses.\textsuperscript{141}

4. \textit{Special Assessments}.—In \textit{Sulzer v. Montgomery County},\textsuperscript{142} the Court of Special Appeals upheld the validity of the special assessment of property benefiting from construction projects.\textsuperscript{143} Montgomery County acquired a strip of appellant's land that bisected the property in order to construct Twinbrook Parkway. While the appellants received compensation of $20,300 for the land taken, they were assessed front foot benefit charges of $92,285.06, later reduced to $45,500, because their property fronted on both sides of the parkway.\textsuperscript{144}

Appellants claimed that the special assessment should be reduced because the parkway caused their property to require regrading as a result of the change in grade differential between their property and the new road. Although these damages are normally included in condemnation awards,\textsuperscript{145} the court held that, if some damages cannot be determined before the eminent domain proceeding, the amount can be subtracted from the property owner's special assessment costs.\textsuperscript{146} Appellants also claimed that the rezoning of the property and the resulting increase in its value did not

\begin{itemize}
\item\textsuperscript{141} 60 Md. App. at 210, 481 A.2d at 1156.
\item The court also upheld the trial court's findings of good faith, public necessity, and amount of compensation. \textit{Id.} at 203, 481 A.2d at 1153. Rollins argued that the State did not exercise its power of eminent domain in good faith because it refused to renew the lease and decided to begin condemnation proceedings in retaliation for Rollins' failure to accept the State's offer of reimbursement for two other signs located on another tract. The court deferred to the trial court's decision that the State had acted in good faith. \textit{Id.} at 202-03, 481 A.2d at 1152-53. Rollins also argued that its signs did not interfere with the completed intersection; thus, the State had not demonstrated the necessity required by law. In upholding the finding of necessity, the court noted that necessity is established at the time the action to condemn began, not after the project's completion. \textit{Id.} at 201, 481 A.2d at 1152. Finally, Rollins challenged the condemnation award. The court, however, upheld the jury's decision to adopt the State's valuation rather than Rollins'. \textit{Id.} at 203, 481 A.2d at 1153.
\item\textsuperscript{142} 60 Md. App. 637, 484 A.2d 285 (1984).
\item\textsuperscript{143} \textit{Id.} at 649, 484 A.2d at 291.
\item\textsuperscript{144} \textit{Id.} at 641-43, 484 A.2d at 286-87.
\item\textsuperscript{145} \textit{Id.} at 645, 484 A.2d at 288. \textit{MD. REAL PROP. CODE ANN.} § 12-104(b) (1981) provides that an element of damages to be included in the condemnation proceedings is "any severance or resulting damages to the remaining land by reason of the taking." In \textit{Big Pool Holstein Farms, Inc. v. State Roads Comm'n}, 245 Md. 108, 225 A.2d 283 (1967), the Court of Appeals observed that when a partial taking affects the access to the remaining property, the costs necessary to secure access is an element of damages. \textit{Id.} at 113, 225 A.2d at 287.
\item\textsuperscript{146} 60 Md. App. at 647, 484 A.2d at 290. The court remanded to determine the costs of regrading. \textit{Id.}
result from the construction of the parkway. Therefore, the increased value should not have been used to calculate the assessment.\textsuperscript{147} The court found, however, that the construction of the parkway coupled with a sufficient change in the neighborhood’s character and a mistake in the zoning map justified the zoning change and the inclusion of the increased property values in determining the assessment.\textsuperscript{148}

Finally, appellants claimed that the special assessment was invalid because their property did not derive a special benefit from the project. The court, however, found that appellants failed to rebut the presumptions that local improvements specially benefit the assessed properties and that the legislative determination of which properties should be specially assessed is correct.\textsuperscript{149} The court also justified the assessment on two additional grounds: First, the property owners were only assessed one-half of the total construction costs because the general public also benefited from the parkway; and second, the assessment was levied pursuant to a just, definite, and nonfraudulent scheme.\textsuperscript{150}

5. Valuation of Fruit Trees.—In State Roads Commission v. Too- mey,\textsuperscript{151} the Court of Appeals determined that fruit trees should not be valued separately from the land in a condemnation proceeding.\textsuperscript{152} The State Roads Commission condemned property that was part of a productive orchard. Rejecting the property owner’s theory that the land and trees should be valued separately, the circuit court granted the Commission’s motion to bar testimony at the condemnation proceeding with respect to a separate valuation of the trees.\textsuperscript{153} The Court of Special Appeals agreed that the property owner could not recover for the loss of the trees valued separately

\textsuperscript{147} Id. at 648, 484 A.2d at 290. The property was initially zoned for single family use. The property was rezoned for multifamily, low density residential use in October 1963, after the authorization of the Twinbrook Parkway. In May 1964, the property was rezoned again for multifamily, medium density use. \textit{Id.}

\textsuperscript{148} Id. at 649, 484 A.2d at 290-91. The court distinguished Surkovitch v. Daub, 258 Md. 263, 265 A.2d 447 (1970), relied on by appellants, in which the Court of Appeals held that completion of a new roadway contemplated at the time of the original zoning was not sufficient to mandate rezoning. \textit{Id.} at 272-73, 265 A.2d at 452. That case, said the Court of Special Appeals, did not hold that a proposed road could not be the basis for rezoning. In \textit{Surkovitch}, the zoning authority recognized the planned road when it did the initial zoning. 60 Md. App. at 648-49, 484 A.2d at 290.

\textsuperscript{149} 60 Md. App. at 650, 484 A.2d at 291.

\textsuperscript{150} Id. at 650-51, 484 A.2d at 291.

\textsuperscript{151} 302 Md. 94, 485 A.2d 1006 (1985).

\textsuperscript{152} Id. at 98, 485 A.2d at 1008.

\textsuperscript{153} Id. at 95-96, 485 A.2d at 1006-07.
from the land, but remanded the case to allow the property owner to introduce evidence of the extent to which the trees enhanced the value of the land.\textsuperscript{154}

The Court of Appeals reversed the remand.\textsuperscript{155} Although the trees did enhance the value of the land,\textsuperscript{156} the property owner relied on the theory of separate valuation at trial and failed to provide evidence as to the value of the land enhanced by the trees. Thus, he should not be allowed to have a second opportunity.\textsuperscript{157}

\textbf{C. Mechanics' Liens}

In \textit{Himmighoeffer v. Medallion Industries},\textsuperscript{158} the Court of Appeals held that an individual who acquires equitable title prior to institution of a suit to establish a mechanics' lien is not subject to the lien.\textsuperscript{159} Ridgely Builders, Inc., the owner and developer of two lots in a subdivision, contracted to sell the lots to appellants. Medallion Industries, which had supplied labor and materials to Ridgely Builders, filed a petition for a mechanics' lien after the contracts were signed. The contracts were executed before entry of the default decree establishing liens on the property. Appellants discovered the liens when the properties were advertised for sale and filed petitions to intervene, to vacate the decree, and to enjoin the sale.\textsuperscript{160}

The court first determined that the contracts between Ridgely and appellants gave appellants equitable title.\textsuperscript{161} Under the doctrine of equitable conversion,\textsuperscript{162} these executory contracts secured

\textsuperscript{154.} \textit{Id.} at 96, 485 A.2d at 1007.
\textsuperscript{155.} \textit{Id.} at 102, 485 A.2d at 1010.
\textsuperscript{156.} \textit{Id.} at 98, 485 A.2d at 1008. In \textit{Montgomery County v. Old Farm Swim Club}, 270 Md. 708, 313 A.2d 458 (1974), the Court of Appeals noted that nursery stock could be valued separately from the land. \textit{Id.} at 713 n.4, 313 A.2d at 461 n.4. Toomey argued that this principle applied to orchards. \textit{See} 302 Md. at 97, 485 A.2d at 1007. The court, however, agreed with the State that the fruit trees did not constitute nursery stock. Thus, the general rule applied. \textit{Id.} at 98-99, 485 A.2d at 1008.

\textsuperscript{157.} \textit{Id.} at 99, 485 A.2d at 1008-10.
\textsuperscript{158.} \textit{Id.} at 101, 485 A.2d at 1009-10.
\textsuperscript{159.} \textit{Id.} at 270, 487 A.2d 282 (1985).
\textsuperscript{160.} \textit{Id.} at 281, 487 A.2d at 288.
\textsuperscript{161.} \textit{Id.} at 271-72, 487 A.2d at 282-83. The contracts between the appellants and Ridgely were signed November 17, 1981, and November 24, 1981. Medallion filed a petition to establish a mechanics' lien on December 23, 1981. The conveyances of the lots occurred on December 31, 1981, and January 8, 1982, and the default decree was passed on February 2, 1982. \textit{Id.} at 271, 487 A.2d at 282-83.
\textsuperscript{162.} The execution of a contract to sell real property vests equitable title in the pur-
the buyers’ interest in the land and gave them title superior to that of a creditor. In addition, the court noted that no mechanics’ lien exists under Maryland law until a court order establishes it. Thus, because appellants held equitable title prior to the filing of the petition to establish the lien, the appellants’ interest in the property could not be reached by the mechanics’ lien.

In Ocean Plaza Joint Venture v. Crouse Construction Co., the Court of Special Appeals reviewed the procedural requirements for the establishment and enforcement of a mechanics’ lien. Although the court merely applied established principles, this case illustrates that the establishment of a lien requires strict adherence to relevant statutory procedures.

A subcontractor filed for a lien against a shopping center after a payment dispute with the general contractor. Prior to this filing, the subcontractor had executed a waiver of liens. In its answer to the petition for the lien, the owner of the shopping center did not contest that money was owed the subcontractor or raise the issue of the waiver. At trial, the court refused to hear the owner’s defenses because they were not raised in the answer.

The Real Property Article governs the establishment and enforcement of mechanics’ liens. In general, to obtain a lien a party must first file a petition and supporting affidavit in the circuit court in which at least part of the property is located. The opposing party then files a response, and the court schedules a show cause hearing at which it will ascertain whether the case presents a “genu-

chaser. The seller holds the legal title in trust for the purchaser. 8A G.W. THOMPSON, REAL PROPERTY § 4447 (Grimes Repl. Vol. 1963).

163. 302 Md. at 279, 487 A.2d at 287.
165. 302 Md. at 281, 487 A.2d at 288.
167. Id. at 439-42, 490 A.2d at 254-56.
169. Id. § 9-105(a).
ine dispute of material fact." If no conflict is evident, the court can enter a final order establishing the lien. If the court finds probable cause for the lien, but a dispute is evident, the court can enter an interlocutory order establishing the lien and schedule a trial.

In this case, the lower court entered an interlocutory order without specifying what issues would be determined at trial. The appellate court determined that this omission harmed the respondent who otherwise could have amended its complaint. The lower court also erred in refusing to hear the dispute over the amount of the lien. Because the trial court should have allowed testimony and evidence relating to the lien amount, the Court of Special Appeals reversed and remanded. The court upheld, however, the finding that the waiver of liens and general release were not available as a defense because the owner had not specifically pleaded the waiver at the time of the initial response.

D. Land Installment Contracts

In Sidhu v. Shigo, buyers of real property sought to have the Maryland Land Installment Contract Act applied to their transaction in order to avoid their contract and recover all payments under it. The Court of Special Appeals found that the Act did not apply and the contract could not be avoided.

Appellants contracted to purchase appellees' home for $298,000, paying $5000 down and $50,000 one month later. The payment schedule included monthly interest-only payments for two years, followed by a $215,000 final payment to pay off the first mortgage and the second deed of trust. Sellers would then take back a note for $28,000 at twelve percent interest amortized over twenty-

170. Id. § 9-106(a).
171. Id. § 9-106(b)(1).
172. Id. § 9-106(b)(3).
174. Id. at 448, 490 A.2d at 259. Note, however, that an amendment made within 15 days of the trial requires written consent of the adverse party. Md. R.P. 2-341.
175. 62 Md. App. at 447-48, 490 A.2d at 258-59. A lien established under an interlocutory order only constitutes a rough calculation, subject to amendment at the trial on the merits. Id. at 448, 490 A.2d at 259.
176. Id. at 452, 490 A.2d at 261.
177. Id. at 445, 490 A.2d at 257.
179. Id. at 63, 484 A.2d at 1034-35.
180. Id. at 71, 484 A.2d at 1038.
five years with a balloon payment at the end of two years. With the $215,000 final payment, a deed would be executed and the property conveyed to the buyers.\(^{181}\)

The Land Installment Contract Act\(^{182}\) defines an installment contract as an agreement to pay the purchase price in five or more payments exclusive of the down payment with the seller retaining title as security.\(^{183}\) The Act imposes stringent requirements on the seller, including an obligation to record the installment contract.\(^{184}\) Failure to comply with this provision gives the buyer an unconditional right to cancel the contract and receive a refund.\(^{185}\)

The buyers argued that their contract met these conditions and was, therefore, a land installment contract subject to protective provisions with which the sellers had not complied.\(^{186}\) Specifically, they contended that the two payments plus either the twenty-three interest payments between the first and second installment or the anticipated payments on the $28,000 note brought them within the five-payment definition of a land installment contract.\(^{187}\)

The court rejected both of the buyers' theories. Based on the plain language of the statute, the twenty-three interest payments did not constitute payments on the purchase price.\(^{188}\) The $28,000 note and its payment also did not bring the transaction within the statutory definition.\(^{189}\) Both sides intended title to pass with the final $215,000 payment; thus, the $28,000 note was not an installment contract subject to the Act.\(^{190}\)

\(^{181}\) Id. at 64-65, 484 A.2d at 1035.
\(^{183}\) Id. § 10-101(b) (1981).
\(^{184}\) Id. § 10-102(f). Id. § 10-102(b) requires the seller to give the buyer a copy of the contract. If the seller fails to do so within 15 days, the buyer may avoid the contract and obtain a full refund of all payments. Id. § 10-105(a) gives the purchaser the right to convert the contract to a mortgage after payment of 40% or more of the original cash price, and id. § 10-107 requires the seller to provide certain information to the purchaser during the duration of the contract. If the vendor fails to comply with these two sections, the buyer can enforce them in equity. Id. § 10-108.
\(^{185}\) Id. § 10-102(f).
\(^{186}\) 61 Md. App. at 64-65, 484 A.2d at 1035.
\(^{187}\) Id. at 65, 484 A.2d at 1035.
\(^{188}\) Id. at 66, 484 A.2d at 1036.
\(^{189}\) Id. at 71, 484 A.2d at 1038.
\(^{190}\) Id. Although the settlement date could not be ascertained from the face of the agreement, testimony at trial established that the parties intended to settle by October 6 and pass title at that time. Id. at 70-71, 484 A.2d at 1038.
E. Legislative Developments

1. Condominiums.—The 1985 General Assembly made several changes in the Maryland Condominium Act to reflect the changes recommended by the Governor's Commission on Condominiums, Cooperatives and Homeowners Associations. Although the law required condominium developers to pay tenants' moving costs up to $750, it did not define precisely what those costs included, which led to confusion on the part of both developers and consumers. Therefore, the legislature amended section 11-101 to define the term "moving expenses" to include transportation, packing, moving, insurance, and utility connection costs.

The legislature also clarified public offering statement requirements. Amended section 11-126 now requires that the public statement given to a condominium purchaser include an annual operating budget and information about initial capital contributions or similar fees paid by the unit owners and the use of those fees.

Chapter 552 allows charges for utility services to be assessed and collected on the basis of usage rather than solely on the basis of percentage interest. Provision for this assessment method must be included in the declaration or bylaws; the assessment is then enforceable in the same way as those for other common expenses.

The most significant addition to condominium law is the creation of the Maryland Contract Lien Act, although the impact of that legislation reaches beyond the condominium law itself. The Maryland Contract Lien Act creates an enforcement procedure for
liens against property owners who fail to pay assessments as required by any covenant or contract recorded among the land records.\textsuperscript{202} Liens created under the Act would be limited to the payment of damages, including unpaid sums under a contract,\textsuperscript{203} costs of collection, late charges, and attorney's fees.\textsuperscript{204}

Previously, the Condominium Act had provided for an automatic lien on unpaid assessments.\textsuperscript{205} The Court of Appeals had declared a similar provision in the mechanics' lien statute unconstitutional in 1976,\textsuperscript{206} and the Commission believed that the court would invalidate section 11-110 as well.\textsuperscript{207} Thus, the Commission recommended, and the legislature enacted, changes in the lien procedures for unpaid condominium assessments.\textsuperscript{208}

The Act attempts to remedy the notice and hearing problems by requiring that the recorded covenant or contract must provide for the lien\textsuperscript{209} and by requiring written notice within two years of the breach of the covenant or contract.\textsuperscript{210} The Act also defines proper notice\textsuperscript{211} as well as the procedure by which the party against whose property the lien is sought may obtain a hearing on the establishment of a lien.\textsuperscript{212} The Commission believes that these alterations will insulate the lien process from constitutional challenges while providing an effective and reasonably efficient remedy for failure to pay certain sums.\textsuperscript{213}

\textsuperscript{202} Md. Real Prop. Code Ann. § 14-202 (Supp. 1985). A contract is defined as "a real covenant running with the land or a contract recorded among the land records . . ." and includes "a declaration or bylaws recorded under the provisions of the Maryland Condominium Act." Id. § 14-201(b). The Act expressly exempts land installment contracts and deeds of trust or mortgages. Id. § 14-205.

\textsuperscript{203} Damages may include both interest accruing on such unpaid sums and fines levied under the Maryland Condominium Act, but do not include consequential or punitive damages. Id. § 14-201(c).

\textsuperscript{204} Attorney's fees must either be provided for in a contract or awarded by a court for breach of contract. Id. § 14-202(b)(4).

\textsuperscript{205} Id. § 11-110(d) (1981).


\textsuperscript{208} 1985 Report, supra note 192, at 5.


\textsuperscript{210} Id. § 14-203(a),(b).

\textsuperscript{211} Id. § 14-203(b).

\textsuperscript{212} Id. § 14-204(c)-(g). If a hearing is held, the burden of proof is on the party seeking the lien. Id. § 14-203(d).

\textsuperscript{213} 1985 Report, supra note 192, at 5.
2. Rental Housing Resource Corporation.—During its 1985 session, the General Assembly created the Rental Housing Resource Corporation to stimulate the construction and rehabilitation of rental housing for low income families.214 The corporation will accomplish this purpose through a special fund comprised of interest earned on trust accounts held by real estate licensees,215 interest earned on escrow accounts held by vendors or builders of new housing,216 grants, donations, and federal funds.217

3. Notice of Ejectment Proceedings.—New legislation provides for notice to certain mortgagees of ejectment proceedings against tenants for failure to pay ground rent. Chapter 181 provides that a landlord must give written notice to any mortgagee of all or part of the lease before the entry of an ejectment judgment if the mortgagor recorded a request for notice of judgment in the land records of the county where the property is located.218 The request for notice of judgment must be recorded in a book under the name of the mortgagor, identify the property, give the date and recording reference of the mortgage, state the name and address of the mortgage holder, and identify the ground lease by recording reference, date of recordation, and name of the original lessor.219 Once the mortgagor records the request for notice of judgment, the landlord must provide written notice of a pending entry of judgment to the mortgagee and must send the notice to the address of the mortgagee as found on the docket.220 If the landlord fails to give notice, any judg-

216. Md. Real Prop. Code Ann. §§ 10-301, 10-301.1 (Supp. 1985). The legislature amended § 10-301 to declare it legal and ethical for vendors or builders of new housing to pay interest on escrow accounts into the Rental Housing Resource Fund. The legislature adopted § 10-301.1 to permit vendors or builders of new housing to deposit and commingle escrow funds in interest-bearing accounts under certain circumstances in order to draw interest to donate to the fund.
220. Id. § 8-402.2(e). The notice must be sent by certified mail, return receipt requested. Id.
ment in favor of the landlord shall not impair the lien of the mortgagee.\footnote{221}

4. **Renewal of Mobile Home Rental Agreements.**—Chapter 583 provides that, upon the expiration of a lease term or upon request of a resident during a month-to-month term, a park owner must offer a rental agreement for a one-year period to a qualified resident.\footnote{222} A qualified resident is defined as a person who (1) has made rental payments on the due date or within the permitted grace period for the past year; (2) has not committed a repeated violation of any rule for the past six months or has no substantial violation at the expiration of the term; and (3) owns a mobile home that qualifies for resale and passes the park’s annual inspection.\footnote{223} If a park owner refuses to renew an unqualified resident’s lease, the park owner must inform the resident within five days in writing of the specific reason for nonrenewal.\footnote{224} Finally, the law provides that, if the use of the park land is changed, all park residents must receive written notice of termination six months prior to termination unless a longer term is specified in the rental agreement.\footnote{225}

5. **Disposition of Abandoned Property.**—In 1966 the General Assembly enacted the Disposition of Abandoned Property Act,\footnote{226} based substantially on the 1954 Uniform Disposition of Unclaimed Property Act.\footnote{227} Although the uniform act has been revised twice,\footnote{228} the legislature has only partly adopted these changes.\footnote{229} In 1985 the General Assembly made several additional changes.\footnote{230} First, proceeds of life insurance policies held by an insurance company are presumed abandoned, and the insurer must report them as such, if the insurer knows that the insured has died, even though actual proof of death has not been furnished to the insurer.\footnote{231}

\footnotesize
\begin{enumerate}
\item\footnote{221} Id.
\item\footnote{222} Act of May 28, 1985, ch. 583, 1985 Md. Laws 2819 (codified at Md. Real Prop. Code Ann. § 8A-202(c) (Supp. 1985)).
\item\footnote{224} Id. § 8A-202(c)(4).
\item\footnote{225} Id. § 8A-202(c)(3).
\item\footnote{227} Unif. Disposition of Unclaimed Property Act, 8A U.L.A. 223 (1954).
\item\footnote{231} Md. Com. Law Code Ann. § 17-302 (Supp. 1985).
\end{enumerate}
Under the former law, these proceeds generally would not have been considered abandoned or reportable as such until the 103rd anniversary of the decedent's birth.\textsuperscript{232} Second, the legislature clarified when stocks become abandoned property by defining the key terms in the present statute.\textsuperscript{233} Third, the new statute provides that failure to demand payment does not affect the running of the five-year statute of limitations for unclaimed wages.\textsuperscript{234} Fourth, the legislature increased from $25 to $50 the value at which a holder of property presumed abandoned must give notice to the State Comptroller and the Comptroller must give public notice to persons appearing to be owners of abandoned property.\textsuperscript{235} Finally, the legislature changed the distribution of funds received by the Comptroller as proceeds of the sale of abandoned property. The funds are now to be distributed to the General Fund of the State, each of the counties, and Baltimore City in the same proportions as these entities received funds in fiscal year 1981. After the allocation is made, however, the net amount due to the General Fund is reduced by an amount up to $500,000, which is to be paid to the Maryland Legal Services Corporation.\textsuperscript{236}

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X. Taxation

A. Overview of The Tax-Property Article

1. Introduction.—A new Tax-Property Article, enacted by the Maryland General Assembly during the 1985 Session,1 is the latest achievement of the Commission to Revise the Annotated Code in its continuing revision of Maryland’s public general laws. This revision process began in 1973 and has now resulted in the enactment of seventeen new major articles.2 Each of these articles represents a formal bulk revision3 in which the Commission has endeavored to improve organization, eliminate obsolete, unnecessary, and unconstitutional provisions, resolve inconsistencies, correct omissions, and generally improve statutory language and expression.4

The new Tax-Property Article recodifies nearly all the provisions in former article 81 of the Annotated Code relating to property taxes, recordation taxes, and transfer taxes. The new article also contains substantially all of the provisions of the public general laws that concern tax collectors, property tax assessment appeal boards, and the operations and duties of the State Department of Assessments and Taxation. Further, large parts of title 5, subtitle 3 of the Natural Resources Article,5 which relate to the conservation of woodland areas, have been incorporated into the new article.


3. A revision must be distinguished from a recompilation. A revision aims at the modernization and clarification of a code and involves the repeal of laws existing prior to the revision; a recompilation simply reorganizes the code according to a new topical system. Governor’s Commission to Revise the Annotated Code of Maryland, Revisor’s Manual 2-5 (2d ed. 1973). The last true revision of the Maryland public general laws was in 1888; the last recompilation was in 1957. Id.

4. Id. at 1-5, 22-28, 35-54. These goals were set for the Commission when it was formally established in 1970. Id. at 1-2.

The new article took effect February 1, 1986. It is the first of two articles that will completely rewrite Maryland's tax laws. The second, to be designated Tax-General, will be introduced into the 1986 session of the General Assembly.

2. Organization of the New Article.—The new article is divided into fourteen titles. To foster clarity and to provide a basis for future consolidation of all parts of the tax law, the article has four basic parts:

(1) Definitions and General Provisions (title 1);
(2) Administrative Provisions, i.e., those provisions that primarily concern government (titles 2 through 4);
(3) Substantive Provisions, i.e., those provisions that apply to the assessment of property and imposition of tax and primarily concern taxpayers (titles 5 through 13);
(4) Procedural Provisions, i.e., those provisions, such as appeals, refunds, interest, and penalties, that apply after a tax is imposed (title 14).

Each section and many subsections of the new article are followed by revisor's notes that explain all significant changes made in the revision process. By explaining the relationship of the old to the new, these notes provide continuity between the revised law and the law it supersedes.

3. Desirable Changes of Law and Language Achieved by the New Article.—The following discussion highlights the more notable changes achieved by the recodification. In the interest of brevity, many routine changes, though desirable, are not mentioned.

(a) Unnecessary Provisions Deleted.—Former article 81, section 71(a) presents an example of a redundant definition. The subsection defined “collector” for purposes of tax sale provisions, though a subsection had already been set aside to define the word in article...
81, section 2(21). The recodification deletes article 81, section 71(a); section 2(21) survives as Tax-Property, section 1-101(e).

A notable instance of an unnecessary provision is former article 81, section 69. The section provides that a succeeding collector may collect the taxes that the collector's predecessor was entitled to collect, but did not. This provision, however, states no more than that an officer may exercise the powers of his or her office. Accordingly, the recodification deletes section 69.

(b) Obsolete Provisions Deleted.—With the passage of time some statutory language becomes obsolete. Former article 81, sections 69A, 69B, 69C, and 69D present a striking instance of such obsolescence. This series of statutes was enacted in 1852 to provide a procedure for sheriffs and collectors to petition a court for additional time to pay taxes. The tax collection process has changed so much, however, that this procedure no longer has application. These sections, therefore, have been deleted.

(c) Ambiguous Provisions Clarified.—Ambiguous statutory language is potentially troublesome. For example, former article 81, section 277(B)(e)(2) provided an exemption from recordation or transfer tax for certain corporate or partnership transfers to "a direct descendant or relative within two degrees of a person who was an original shareholder or partner of the entity involved." Neither that section nor any other, however, stated whether the common law or civil law method of counting degrees was to be used. Since this issue had been addressed and resolved in section 1-203 of the Estates and Trusts Article, which prescribes counting by the civil law method, language requiring the civil law method was added to Tax-Property section 12-108(Q) as to recordation tax. Sections 13-207(a) and 13-405(c) then cross-reference section 12-108(Q) as to transfer tax.

(d) Provisions Altered or Added to Conform to Current Law or Practice.—In Rosecraft Trotting & Pacing Association v. Prince George's County, the Court of Appeals held that a county could not levy

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9. This section was added because the concurrent use of both civil and common law methods in the case law had led to considerable confusion. See Md. Est. & Trusts Code Ann. § 1-203 comment to former article 93, § 1-203 (1974). The civil law method was chosen because it is simpler and measures differences more precisely. Id.
property taxes on real and personal property at different rates.\textsuperscript{11} Tax-Property section 6-302(b) incorporates this result.

Other important provisions of this type in the Tax-Property Article are subsections (R), (S), and (T) of section 12-108, which respectively exempt land installment contracts, options agreements, and deeds for prior contracts of sale from recordation tax. These subsections were all added to conform to current practice. In the cases of land installment contracts and option agreements, this practice had its origin in two opinions of the Maryland Attorney General.\textsuperscript{12}

4. Desirable Changes Not Achieved by the New Article.—The purpose of the Commission in recodifying the Tax-Property was modernization and clarification, not policymaking.\textsuperscript{13} Accordingly, when the Commission determined that a provision which involved a fundamental policy issue should be altered or deleted, it left the provision unchanged, but brought the provision's defects to the attention of the General Assembly with a recommendation for action.\textsuperscript{14} In many cases, the General Assembly acted on the Commission's recommendations.\textsuperscript{15} In the following cases, however, the General Assembly did not act, and the questionable provisions remain in the new article:

(1) Sections 7-222(b) and 7-224 through 7-226 of the new article specify exemption percentages that counties may allow on personal property and allow counties to modify these exemptions. Since county governing bodies will inevitably change the exemption percentages, it is probable that the percentages in the revision will soon be inaccurate. The Commission's recommendation that the provisions be decodified or transferred to appropriate public local laws,\textsuperscript{16} however, was not accepted.

(2) Former article 81, section 12F-3, which concerned property tax relief for elderly or disabled renters, required the De-

\textsuperscript{11} Id. at 601, 471 A.2d at 730.
\textsuperscript{13} REPORT ON S.B. 1, supra note 6, at 1-2.
\textsuperscript{14} Id.
\textsuperscript{15} See, e.g., the provisions on land installment contracts and options, supra text accompanying note 12. See also former article 81, § 9E, revised as Tax-Property § 7-104, which specified the abatement of taxable property for an entire taxable year and not a part thereof. The Commission recommended change, see Tax-Property § 7-104 revisor's note, and the General Assembly responded by passing House Bill 322 (Act of April 9, 1985, ch. 51, 1985 Md. Laws 1162), which amended § 7-104 to incorporate a provision allowing abatement from the date when tax exempt property is transferred.
partment of Assessment and Taxation to give notice of property tax relief to all eligible renters.\textsuperscript{17} This requirement is perpetuated in Tax-Property section 9-102(d). As the Commission noted,\textsuperscript{18} however, the implementation of this provision is virtually impossible unless notice is by publication. A similar impracticable requirement is perpetuated in Tax-Property section 9-301(d), which requires that each tax bill contain notice of each Tax-Property title 9, subtitle 3 tax credit to which the taxpayer is entitled.

(3) Former article 81, section 12G-1 regulated the granting of special tax credits for newly constructed and substantially rehabilitated single dwelling units. Subsection (b) of that section made reference to termination of the credit when the dwelling was "sold, rented, or merely occupied."\textsuperscript{19} This apparent requirement that the dwelling be unoccupied was inconsistent with the prior subsection, which required only that a dwelling by "unsold or unrented."\textsuperscript{20} This inconsistency is perpetuated in Tax-Property section 9-207.\textsuperscript{21}

(4) Parts I through III, subtitle 8, title 14 of the Tax-Property Article concern the collection of tax through tax sales. They have as yet been only technically and not substantively revised.\textsuperscript{22} A substantive revision, which has been proposed,\textsuperscript{23} will address the due process notice issues raised in \textit{Mennonite Board of Missions v. Richard C. Adams},\textsuperscript{24} a recent United States Supreme Court decision.

5. \textbf{Effect of the New Article on Recent Case Law.}—In the course of the recodification much statutory language has been altered or eliminated. As a result, the holding in one recent Maryland appellate court decision has been rendered virtually meaningless, and the precedential force of another has been placed in considerable doubt.

\begin{itemize}
  \item \textsuperscript{17} \textit{MD. ANN. CODE art. 81, § 12F-3(g) (1980).}
  \item \textsuperscript{18} \textit{REPORT ON S.B. 1, supra note 6, at 17.}
  \item \textsuperscript{19} \textit{MD. ANN. CODE art. 81, § 12G-1(b) (1980 & Supp. 1984).}
  \item \textsuperscript{20} \textit{MD. ANN. CODE art. 81, id. § 12G-1(a) (1980 & Supp. 1984).}
  \item \textsuperscript{21} \textit{Compare MD. TAX-PROP. CODE ANN. § 9-207(F) with id. § 9-207(G) (1985).}
  \item \textsuperscript{22} \textit{REPORT ON S.B. 1, supra note 6, at 23.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} 462 U.S. 791 (1983). In \textit{Mennonite}, the United States Supreme Court held that the due process clause of the fourteenth amendment requires notice by mail to mortgagees prior to a tax sale. \textit{Id.} at 800. The Court established a general rule against constructive notice, declaring that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party . . . if its name and address are reasonably ascertainable." \textit{Id.}
In *Woodmont Country Club, Inc. v. Montgomery County*, the Court of Special Appeals construed former article 81, section 19(e), which permitted preferential treatment of country club property in the assessment and taxation of real property. This section was ambiguous. It permitted the deferral of property taxes on property used for country club purposes and limited the amount of deferred taxes that could be recaptured to the amount of taxes deferred over a prior ten-year period. It did not state, however, whether the ten recapture years were to be counted from the beginning of the country club use forward, or from the end of that use backward. Just which ten-year period applied for recapture purposes made a considerable difference in *Woodmont*.

Woodmont used certain land for a country club from 1966 to 1981. When a portion of that property was sold in 1981, the county calculated the recapture amount from 1981 back to 1971 and arrived at a tax due of over $182,000. Woodmont, however, calculated the recapture amount from 1966 to 1976 and arrived at a much smaller figure. The court reasoned that statutory exemptions are to be strictly construed in favor of the taxing authority and upheld the county's calculation.

If the new Tax-Property Article had already existed, this litigation would not have arisen. Tax-Property section 8-216(c)(2) states unequivocally that the computation shall be made from the last year backward. The *Woodmont* decision is thus rendered superfluous.

An oddity of the recodification is that *Woodmont* does not appear to have been considered in the drafting of section 8-216. No mention is made of the decision in the revisor's notes, which simply state: "This section is new language derived without substantive change from former Art 81, § 19(e)(7), (8) and (11)."

In *Vytar Associates v. City of Annapolis*, the issue before the Court of Appeals was whether landlords who voluntarily paid rental

27. *Id.* § 19(e)(2).
28. *Id.* § 19(e)(7)(A).
30. *Id.* at 233-34, 486 A.2d at 221.
31. *Id.*
32. *Id.* at 238, 486 A.2d at 223.
33. Md. TAX-PROP. CODE ANN. § 8-216(c)(2) (1985) reads in pertinent part: "The deferred property tax is due for a 10-year period ending with the year in which the land subject to an agreement is conveyed."
dwelling license fees under an ordinance later invalidated were entitled to a refund. The landlords based their claim on Maryland's refund statute, former article 81, section 215. The city argued that the statute was inapplicable. In deciding for the landlords, the court performed a detailed analysis of both the language and legislative history of section 215.

Section 215 has not been explicitly repealed by the new codification. Discrete parts of section 215, however, are restated in separate provisions of the new article. For example, Tax-Property section 14-907 restates the provisions of the first sentence of section 215, as that section relates to recordation tax. Section 14-908 does the same with regard to transfer tax. Nothing similar has been done with respect to license fees, however; thus, Vytar's narrow holding is still good law. Absent the recodification, this narrow holding could easily have been construed more broadly to apply to taxes such as transfer and recordation taxes, since section 215 by its language covers "special taxes or other fees or charges." The stare decisis effect of Vytar is now limited, however, since section 215 is now but a shell of its former self, most of its import having been transferred to the new sections. Although Vytar may apply to the new Tax-Property sections, the new sections contain significantly different language.

6. Conclusion.—The new Tax-Property Article represents a major advance in the General Assembly's continuing revision of Maryland's public general laws. The article's greatly improved organization, consistency, and clarity will be welcomed by all those who have occasion to research Maryland's tax and property laws.

36. Id. at 560, 483 A.2d at 1264.
37. Former article 81, § 215 read in pertinent part:
   Whenever any person shall have erroneously or mistakenly paid to any State, county or municipal agency authorized to collect the same more money for special taxes or other fees or charges than was properly and legally payable, or shall have paid any special taxes which were erroneously or illegally assessed or collected, or penalties or interest thereon collected without authority, or in any other manner wrongfully collected, he may file with such agency a written claim for the refund thereof.
38. 301 Md. at 564-65, 483 A.2d at 1266-67.
39. Id. at 565-74, 483 A.2d at 1267-71.
40. See supra note 37.
B. Real Estate Taxation

1. Transfer by Condemnation.—In Vournas v. Montgomery County,\(^4\) the Court of Appeals held that a transfer of privately owned real property to the United States as a result of condemnation came within the purview of Montgomery County Code provisions\(^4\) that levy a tax on all transfers in the county of fee simple interests in real property.\(^4\) The court rejected the condemnee's argument that the code provisions should be construed in the context of the law as it existed in 1961 when the provisions were enacted.\(^4\) At that time federal condemnation proceedings were immune from state or local taxation.\(^4\) The court held instead that events occurring subsequent to the enactment of the code provisions were appropriate factors to be considered in determining the scope of the provisions.\(^4\) The court relied in particular on the enactment by Congress in 1971 of statutes providing for federal reimbursement of any local transfer tax assessed against a federal condemnee.\(^4\) These subsequent federal enactments, as well as the broad general language of the county tax provisions, convinced the court that transfers of real property to the United States as a result of condemnation should not be immune from local transfer tax.\(^4\)

The conclusion reached by the court is quite reasonable, given the broad sweep of the county provisions. The court's explanation of its decision, however, is somewhat misleading. The court sets up


Section 52-20 reads in pertinent part: “(a) . . . The county council for Montgomery County is empowered and authorized to levy and impose by resolution or ordinance a tax to be paid and collected on the transfer in Montgomery County of any fee simple interest in real property except by way of mortgage or deed of trust.”

Section 52-21 reads in pertinent part: “There is hereby levied a tax on all transfers in the county of a fee simple interest in real property . . . .”

\(^4\) 300 Md. at 128, 476 A.2d at 707.
\(^4\) Id. at 128, 132, 476 A.2d at 707, 709.
\(^4\) Id. at 128, 476 A.2d at 707. See Kohl v. United States, 91 U.S. 367, 371-74 (1875).

\(^4\) 300 Md. at 132, 476 A.2d at 709.
The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States . . .

\(^4\) 300 Md. at 131-32, 476 A.2d at 709.
a dichotomy between events existing at the time of a statute's enactment and those occurring subsequently and states that the subsequent events may occasionally be considered in determining the statute's scope. This explanation, however, either states the obvious—that subsequent controversies will entail the consideration of subsequent events—or misstates the cardinal rule of statutory construction, that a court is to ascertain the actual purpose of the legislative body at the time of the statute's enactment.

2. Wraparound Deed of Trust.—In Prince George's County v. McMahon, the Court of Special Appeals was asked to decide the basis upon which the state recodification tax and local Prince George's County transfer tax should be computed for a wraparound deed of trust. The court resolved the question by first discussing the concept of a wraparound deed of trust (or mortgage). It then separately analyzed the individual components of the wraparound deed of trust at issue—prior debt discharged, amount held in escrow, and new money—to determine whether the recordation and transfer tax provisions applied to each component.

As the court noted, the wraparound deed of trust or mortgage "was introduced in the United States about twenty years ago in an effort to combat the high interest rates of secondary financing in

49. Id. at 128-29, 476 A.2d at 707-08.
50. Id.
52. The Maryland Attorney General has stated that "[t]he State recordation and transfer taxes are in the nature of excise taxes imposed on the privilege of recording certain instruments that reflect, among other things, the transfer of title to real property." 64 Op. Att'y Gen. 285, 287 (1979). Prior to the recent recodification of Maryland's public general laws relating to property taxation in a new Tax-Property Article, the provisions concerning the state recordation tax were codified at Md. Ann. Code art. 81, § 277 (1980 & Supp. 1984). In the new recodification, effective February 1, 1986, § 277 is restated without substantive change in various parts of Title 12. See infra note 82.
54. 59 Md. App. at 683-84, 477 A.2d at 1219.
55. Id. at 686-87, 477 A.2d at 1220.
56. Prior debt discharged denotes the preexisting deed of trust or mortgage that is entirely paid off by the new wraparound trust or mortgage. Id. at 685-86, 477 A.2d at 1220.
57. Amount held in escrow denotes the amount that the wraparound lender sets aside to meet the debt service on a preexisting mortgage or deed of trust. Id.
58. New money denotes the amount of additional funds, above the prior debt discharged and amount in escrow, disbursed by the wraparound lender. Id.
59. Id. at 689-93, 477 A.2d at 1222-23.
It differs from a conventional second trust in that its face amount includes an amount necessary to cover payments on an existing first trust, which is not discharged. The wraparound deed of trust is often used when a steep prepayment penalty on the existing senior deed of trust makes prepayment impractical. The face amount of the wraparound deed of trust at issue in McMahon was $1,319,000. Of this amount, $876,000 was put into an escrow account to pay off an existing first trust, $400,000 was used to pay off an existing second trust, and the trustees retained $43,000 in cash.

Prince George's County sought, pursuant to article 81, section 277 of the Maryland Annotated Code, to have the state recordation tax imposed on the entire $1,319,000 face amount. The county also sought to have the county transfer tax collected against $919,000, which represented the face amount minus the extinguished second trust. The trustees argued that the only amount subject to tax—either recordation or transfer tax—was the $43,000 that they received as cash. Thus, the taxability of the extinguished debt component, $400,000, and the amount in escrow component, $876,000, was at issue.

The court reasoned that its prior decision in Hampton Plaza Joint Ventures, Inc. v. Clerk, Circuit Court for Baltimore County disposed of the assertion that no recordation tax should be assessed against the $400,000. That decision reiterated the principle that an agreement whereby a prior mortgage is discharged by a new one is a taxable transaction, even though the underlying indebtedness is not

60. Id. at 686, 477 A.2d at 1220.
61. Id.
62. The actual amount was $1,318,550. This figure has been rounded for convenience. For the same reason, the actual amount in escrow ($875,773) has been rounded to $876,000, and the new money amount ($42,777) has been rounded to $43,000. Id. at 685-86, 477 A.2d at 1220.
63. Id. at 684, 477 A.2d at 1219.
64. The State of Maryland filed an amicus curiae brief, but did not appear as a party because in Prince George's County, unlike in every other county in Maryland, county officers collect the state recordation tax. Id. at 685 n.2, 477 A.2d at 1221 n.2.
65. MD. ANN. CODE art. 81, § 277 (1980 & Supp. 1984). See supra note 52 and infra note 82 as to recodification of this section.
66. 59 Md. App. at 685, 477 A.2d at 1219.
67. The face amount ($1,319,000) minus the extinguished second trust ($400,000) equals $919,000. Id.
68. Id. at 685, 477 A.2d at 1219-20.
70. 59 Md. App. at 688, 477 A.2d at 1221.
When the new trust has the effect of extinguishing the
prior instrument, the Hampton Plaza court held, it cannot be con-
sidered supplemental. It therefore cannot qualify for the statutory ex-
emption from recordation tax for mere supplemental or
confirmatory documents. Citing Hampton Plaza as controlling, the
McMahon court concluded that discharge of the $400,000 prior deed
of trust was a taxable transaction.

The court reached a different conclusion with respect to the
$876,000 placed in escrow. The $876,000 debt, it found, was not
extinguished but was simply being gradually discharged in monthly
installments via an escrow agreement; no new debt was being in-
curred. New debt is required by statute as a condition for impos-
ing the recordation tax. The amount in escrow component,
therefore, was not subject to the recordation tax.

Turning to the county transfer tax, the court first distinguished
its provisions from those of the recordation tax. It noted that,
while the recordation tax is triggered by a new instrument creating a
new indebtedness, the transfer tax applies in refinancing only to the
amount financed above the original mortgage or deed of trust.
Since neither extinguishing the prior trust of $400,000 nor placing
money in escrow to pay the $876,000 first trust involved increasing
the amount of an original trust or mortgage, the court concluded
that neither was subject to transfer tax.

The court's tax treatment of the wraparound deed of trust is
sensible and rests on a reasonable construction of legislative pur-
pose. Better than a proper judicial construction of legislative pur-
pose, however, is an explicit statement by the legislature itself. It is
therefore regrettable that the General Assembly did not avail itself
of the occasion of the new Tax-Property Article recodification to
unequivocally set forth its position on the taxability of wraparound
trusts. Since it has not done so, and since the major statutory provi-
sions construed in McMahon have been revised without substantive

71. 55 Md. App. at 54, 460 A.2d at 635.
72. Id. at 55, 460 A.2d at 635.
73. 59 Md. App. at 689, 477 A.2d at 1221-22.
74. Id. at 692, 477 A.2d at 1223.
75. Id. at 690, 477 A.2d at 1222.
76. Id.
77. Id. at 691-92, 477 A.2d at 1223.
78. Id.
79. Id.
80. Id.
change in the new article, the McMahon holding may properly be regarded as applicable to the recodification.

3. Special Assessments.—At issue in Montgomery County v. Schultze was the validity of special assessments levied against properties abutting a road improvement project in Montgomery County. The assessments were calculated, pursuant to language in the County Code, according to the front-foot formula. This method allocates a share of the road’s total construction costs to each abutting property in proportion to its frontage on the road. Affirming the Court of Special Appeals, the Court of Appeals held that this front-foot method could not be mechanically applied to require property owners to pay the total cost of the project without consideration of the special benefit actually conferred upon the property. “[T]he assessment must take into account, as a matter of fact, whether the special benefit is less in amount than the total project costs, bearing in mind the benefit which accrues to the general public by reason of the improvement.”

The front-foot assessment method has a long history of approved use. Over a century ago, in Baltimore v. Johns Hopkins Hospital, the Court of Appeals sanctioned the method and noted its general adoption. In 1916 a challenge to the front-foot method found its way to the United States Supreme Court in Gast Realty & Investment Co. v. Schneider Granite Co. Writing for the Court, Justice

82. Md. Ann. Code art. 81, § 277(a) has been recodified as Md. Tax-Prop. Code Ann. §§ 12-102, -101(c), -108; § 277(b) has been recodified as Md. Tax-Prop. Code Ann. §§ 12-103, -104, -108, -113; § 277(k) has been recodified as Md. Tax-Prop. Code Ann. § 12-105; § 277(h) has been recodified as Md. Tax-Prop. Code Ann. § 12-108(e), -101(g).
83. 302 Md. 481, 489 A.2d 16 (1985).
84. Id. at 483, 489 A.2d at 17.
Section 49-37(b) reads in pertinent part: “Whenever a road is constructed as a ‘front foot assessment’ project . . . the portion of the cost chargeable and assessed to the benefited abutting properties shall be all costs of construction, including costs of acquisition of land or interest therein, for right-of-way.”
Section 49-55 reads in pertinent part: “Such assessments shall be computed on the basis of the linear footage of such properties. . . .”
86. 302 Md. at 484, 489 A.2d at 17.
87. Id.
89. 302 Md. at 492, 489 A.2d at 21.
90. Id.
91. 56 Md. 1 (1881).
92. Id. at 32.
Holmes approved the method, stating: "[T]he law does not attempt an imaginary exactness, or go beyond the reasonable probabilities."^94

The method, however, lends itself to a mechanical application, as the facts in _Schultze_ illustrate. In _Schultze_ the assessment was calculated by simply dividing the road project's total construction cost by its total linear footage and multiplying by each property owner's individual linear footage.^95 This simplified method was employed despite the fact, conceded by the county, that the road project was intended primarily to benefit the public and not the individual property owners.^96

The court's decision rejecting this mechanical application and remanding to the county for an apportionment of costs to reflect public benefit seems consonant with simple justice. It must be granted, however, that accurately measuring an abstraction such as "public benefit" will pose a considerable administrative problem for the county. In this regard the suggestion by the Court of Special Appeals,^97 to determine first the private benefit and then subtract this from the total costs of construction, appears quite sensible.

Maryland's intermediate appellate court also had an opportunity to consider the validity of a special assessment calculated according to the front-foot formula. In _Sulzer v. Montgomery County_,^98 the Court of Special Appeals addressed the validity of a special assessment levied against property fronting on land acquired for a parkway project.^99 The court found that: 1) damages to the appellants' property unascertainable at the time of the condemnation proceeding could be offset against the special assessment;^100 2) construction of the parkway was a relevant factor contributing to the rezoning of the appellants' property and the increase in their property values;^101 and 3) appellant property owners failed to rebut the presumptions that local improvements benefit the property specially assessed and that a legislative determination of assessment is correct.^102

This case began with the acquisition of a strip of appellants'
land by Montgomery County. The condemned property, which bisected appellants' remaining land,\textsuperscript{103} was acquired for the purpose of constructing Twinbrook Parkway.\textsuperscript{104} While the appellants received compensation of $20,300 for the land taken, they were also assessed front-foot benefit charges of $92,285. The assessment was later reduced to $45,500, the amount of benefit that accrued to appellants' property as a result of the construction of the road.\textsuperscript{105}

Appellants appealed the assessment. They claimed that the special assessment should be reduced because the change in grade differential between their remaining property and the new road caused their remaining property to require regrading.\textsuperscript{106} Damages of this type, the court said, are normally within the realm of damages for which compensation is provided in the condemnation proceeding.\textsuperscript{107} The court held, however, that, if a portion of the damages cannot be determined before the eminent domain proceeding, such as the damages in this case, that amount can be subtracted from the property owner's special assessment costs.\textsuperscript{108}

Appellants also claimed that the construction of the parkway had not contributed to the rezoning of their property and its resulting increase in the value and, therefore, such increase in value should not have been considered when calculating the assessment.\textsuperscript{109} The court ruled, however, that the construction of the

\begin{footnotes}
\item[103] \textit{Id.} at 641, 484 A.2d at 286-87.
\item[104] \textit{Id.}
\item[105] \textit{Id.} at 642-43, 484 A.2d at 287. The court noted that the assessment in this case adhered to its earlier decision in Montgomery County v. Schultze, 57 Md. App. 571, 471 A.2d 1129 (1984), as it apportioned the total cost of the road between the abutting property owners and the public tax coffers. \textit{Id.} at 650-51 n.5, 484 A.2d at 291 n.5. See supra notes 83-97 and accompanying text.
\item[106] 60 Md. App. at 643-44, 484 A.2d at 288.
\item[107] \textit{Id.} at 645, 484 A.2d at 288. \textit{Md. Real Prop. Code Ann.} § 12-104(b) (1981) provides that among the elements of damages to be included in the condemnation proceedings are "any severance or resulting damages to the remaining land by reason of the taking,..." In Big Pool Holstein Farms, Inc. v. State Roads Comm'n, 245 Md. 108, 225 A.2d 283 (1967), the Court of Appeals observed that, when a partial taking affects the access to the remaining property, evidence as to the costs necessary to secure access is an element of damages. \textit{Id.} at 113, 225 A.2d at 285.
\item[108] 60 Md. App. at 647, 484 A.2d at 290.
\item[109] The property was initially zoned for single family use. The property was rezoned for multifamily, low density residential in October 1963, after the authorization of the Twinbrook Parkway. The property was rezoned further to multifamily, medium density in May 1964.
\item[108] The court distinguished Surkovich v. Doub, 258 Md. 263, 265 A.2d 447 (1970), relied on by appellants, in which the Court of Appeals held that completion of a new roadway contemplated at the time of the original zoning was not sufficient to mandate rezoning. \textit{Id.} at 272-73, 265 A.2d at 452. That case, said the Court of Special Appeals, does not stand for the proposition that a proposed road cannot be the basis for
parkway, coupled with a sufficient change in the character of the neighborhood and a mistake in the zoning map, resulted in the zoning change. Thus, the inclusion of the increased property values in determining the assessment was justified.\textsuperscript{110}

Finally, appellants claimed that the special assessment was invalid because their property did not derive a special benefit from the project.\textsuperscript{111} The court found, however, that appellants failed to present evidence sufficient to rebut the presumptions that local improvements specially benefit the assessed properties and that a legislative determination of which properties should be specially assessed is correct.\textsuperscript{112} The court saw no reason "to overrule the factual determinations and actions of the County Council in this regard."\textsuperscript{113}

\section*{C. Income Tax}

1. \textit{Taxation of Corporate Income.}—On two occasions the Court of Special Appeals considered issues relating to the taxation of multi-state corporations operating partly in Maryland. In \textit{Chesapeake Industries, Inc. v. Comptroller of the Treasury},\textsuperscript{114} the Court of Special Appeals determined that the separate filing requirement of article 81, section 295 of the Maryland Annotated Code\textsuperscript{115} precludes a unitary business,\textsuperscript{116} operating through separate corporate entities, from combining the income of the corporate group and calculating the tax due by applying the unitary apportionment method to that combined figure.\textsuperscript{117}

\textsuperscript{110} 60 Md. App. at 648-49, 484 A.2d at 290.
\textsuperscript{111} Id. at 649-50, 484 A.2d at 291.
\textsuperscript{112} Id. at 650, 484 A.2d at 291.
\textsuperscript{113} Id. at 651, 484 A.2d at 291. The court remanded the case for consideration of the cost of regrading. \textit{Id}.
\textsuperscript{115} MD. ANN. CODE art. 81, § 295 (1980). \textit{See infra} note 122 and accompanying text.
\textsuperscript{116} A "unitary business" is one which has unity of ownership, unity of use, and unity of operation or one whose divisions are interdependent. \textit{See Xerox Corp. v. Comptroller of the Treasury}, 290 Md. 126, 139, 428 A.2d 1208, 1215-16 (1981).
\textsuperscript{117} 59 Md. App. at 379, 475 A.2d at 1228-29. A unitary business must file a combined return reflecting the income (or loss) of the entire business. Tax is assessed on the portion of the income attributable to Maryland. MD. ANN. CODE art. 81, § 316(c) (1980) provides in part:

The portion of the business income derived from . . . the trade or business carried on within this State may be determined by a separate accounting where practicable, but never in the case of a unitary business; however, where separate accounting is neither allowable nor practicable the portion of the business income of the corporation allowable to this State shall be determined in accordance with a three-factor formula of property, payroll and sales. . . ."
For the tax years in question, Chesapeake Industries, Inc. (Chesapeake) was a parent corporation, managing a number of incorporated subsidiaries.\textsuperscript{118} Chesapeake and one of its subsidiaries, Southern Door, Inc., were located in Maryland.\textsuperscript{119} They filed physically separate Maryland income tax returns, but both reported the combined income of Chesapeake and all of its subsidiaries.\textsuperscript{120} The combined income reflected losses of subsidiaries that did no business in Maryland and were not taxable in Maryland.\textsuperscript{121}

Article 81, section 295 requires "[e]very corporation and every association . . . having any income allocable to this State . . . [to] file a return stating specifically the items of its gross income and the items claimed as deductions. . . . Corporations and associations which are affiliated shall each file separate returns."\textsuperscript{122} Appellants conceded that the effect of section 295 was to preclude a corporation from filing a consolidated return,\textsuperscript{123} but argued that they had complied with the statute by filing physically separate returns.\textsuperscript{124}

The Court of Special Appeals held that section 295, which prohibits consolidated returns, also prohibits combined reporting.\textsuperscript{125} The court rejected appellants' argument for two reasons. First, the effect of combined reporting is the same as if a consolidated return had been filed.\textsuperscript{126} In each case, the income of the corporate group is reported as a whole, disregarding the existence of separate corporate entities.\textsuperscript{127} Second, the court noted that the Maryland legislature considered an alteration to section 295 that would have permitted both consolidated and combined reporting, but the bill

\textsuperscript{118} 59 Md. App. at 373, 475 A.2d at 1225-26.
\textsuperscript{119} \textit{Id.}, 475 A.2d at 1226.
\textsuperscript{120} \textit{Id.} at 374, 475 A.2d at 1226. Both corporations initially filed returns showing their separate taxable income; they later filed amended returns reflecting the combined income of the entire corporate group. \textit{Id.} at 373-74, 475 A.2d at 1226.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} Md. ANN. CODE art. 81, § 295 (1980).
\textsuperscript{123} This concession is consistent with prior decisions. \textit{See}, e.g., Comptroller of the Treasury v. Atlantic Supply Co., 294 Md. 213, 448 A.2d 955 (1982). In a "consolidated" return, the income of the entire corporate group is reported on one return and tax is paid on the income shown. By contrast, a "combined" return also reports the income of the group, but only for purposes of determining what portion of the income will be allocated to the taxing state. \textit{See} Buresh & Weinstein, \textit{Combined Reporting: The Approach and Its Problems}, 1 J. STATE TAX'N 5, 7 (1978).
\textsuperscript{124} 59 Md. App. at 376, 475 A.2d at 1227.
\textsuperscript{125} \textit{Id.} at 378-80, 475 A.2d at 1228-30.
\textsuperscript{126} \textit{Id.} at 379, 475 A.2d at 1229.
\textsuperscript{127} \textit{Id.}
did not pass. In light of this, the court had "no doubt" that the legislature intended to prohibit combined reporting.

The court realized that this construction of the statute creates two problems. First, it applies different rules to unitary businesses operating through wholly owned subsidiaries than to those with unincorporated divisions. Second, this construction seems inconsistent with Maryland's adoption of the federal tax base. Nevertheless, the court reasoned that a different result could not be reached without rewriting section 295.

This decision involves an issue of tremendous importance to multistate businesses with operations in Maryland and will affect the organizational decisions made by those contemplating structural change. Although this issue should be clearly resolved by the legislature, it seems unlikely that the General Assembly will act in the near future. Until then, businesses are forced to rely on the intermediate appellate decision for guidance in making decisions affecting millions of dollars of potential tax liability.

In *Celanese Corporation v. Comptroller of the Treasury,* the Court of Special Appeals determined the Maryland state income tax treatment of depreciation recaptured as a result of the sale of foreign assets by a unitary business operating partly in Maryland. *Celanese Corporation* (Celanese), a Delaware corporation, owned plants in Maryland, Virginia, South Carolina, and Texas. In 1974 the Texas plant was sold and a portion of the profits representing

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128. *Id.* at 380, 475 A.2d at 1229. The court refers to House Bill 1384, introduced in the 1984 session of the General Assembly.

129. *Id.*

130. *Id.* at 381, 475 A.2d at 1229. Indeed, as the court notes, "If Chesapeake Industries operated through unincorporated branches or divisions instead of incorporated subsidiaries... it would have been required to do, in effect, what it did in this case." *Id.* at 380, 475 A.2d at 1229. Other jurisdictions have found this inconsistency persuasive. See, e.g., *Edison Cal. Stores, Inc. v. McColgan,* 30 Cal. 2d 472, 183 P.2d 16 (1947) ("[T]he conclusion is irresistible that the same rule should apply to incorporated wholly controlled branches... ").

131. 59 Md. App. at 381-82, 475 A.2d at 1229-30. The federal tax base for corporations was adopted and codified at Md. ANN. CODE art. 81, § 280A (1980). The court considered it only a superficial inconsistency, however, since the corporate group could file a pro forma federal tax return that would satisfy the Maryland requirement. 59 Md. App. at 381-82, 475 A.2d at 1229. Other jurisdictions have found this inconsistency persuasive. See, e.g., *Edison Cal. Stores, Inc. v. McColgan,* 30 Cal. 2d 472, 183 P.2d 16 (1947) ("[T]he conclusion is irresistible that the same rule should apply to incorporated wholly controlled branches... ").


134. *Id.* at 399, 483 A.2d at 363.

135. *Id.* at 393, 483 A.2d at 360.

136. *Id.*
a recapture of accelerated depreciation was treated as ordinary income for federal income tax purposes. The question remained whether under Maryland's corporate income tax provisions any of such income should be allocated to Maryland.

The relevant Maryland statute divided corporate income into three categories for the purpose of allocating that income to the various states where a corporation does business. Article 81, section allocated income from "ground rents, rents, and royalties and other income from real estate or tangible personal property" to the situs state, here Texas. Section 316(b) dealt exclusively with capital gains and losses. Section 316(c) allocated so much of the "remaining net income" reasonably attributable to the trade or business of the corporation carried on within Maryland to Maryland and the balance of such income outside the state.

The income in question did not qualify for capital gains treatment under the Internal Revenue Code. The court reasoned that, by virtue of Maryland's adoption of the federal tax base, this income could not qualify for capital gains treatment under state law either. Thus, section 316(b) did not apply. Furthermore, this in-

137. Id.
138. Id. at 394, 483 A.2d at 360.
140. Id. § 316(a) provided: "Income from ground rents, rents and royalties and other income from real estate or tangible personal property permanently located in this State . . . shall be allocated to this State; and such income from real estate or tangible personal property permanently located outside this State . . . shall be allocated outside this State."
141. Id. § 316(b) provided:
   1. Capital gains and losses from sales of real property located in this State are allocable to this State.
   2. Capital gains and losses from sales of tangible personal property are allocable to this State if: (A) the property had a situs in this State at the time of the sale; or (B) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the state in which the property had a situs.
   3. Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's domicile is in this State.
142. Id. § 316(c) provided in part:
   The remaining net income . . . shall be allocated to this State if the trade or business of the corporation is carried on wholly within this State, but if the trade or business of a corporation is carried on partly within and partly without this State so much of the business income of the corporation as is derived from or reasonably attributable to the trade or business of the corporation carried on within this State, shall be allocated to this State and any balance of the business income shall be allocated outside this State.
143. 60 Md. App. at 393, 398, 483 A.2d at 360, 362.
145. Section 280A adopted the taxable income of a corporation as determined for
come, as income from a sale, did not qualify as "income from ground rents, rents, and royalties or other income from real estate or tangible personal property" within the meaning of section 316(a). Since the income in question did not fall within sections 316(a) or (b), the court held that it was "remaining net income" and subject to allocation under section 316(c). "It is inconceivable that the Legislature intended to permit the corporate taxpayer to reduce its tax liability to Maryland by apportionment of the depreciation deduction and at the same time to deny Maryland the right to benefit along with other states when the depreciation was recaptured."  

2. Legislative Developments.—(a) Pension Income.—Existing law provides that, under certain circumstances, pension income could be deducted from an individual's gross income for State income tax purposes. The Maryland legislature has attempted to clarify the provisions as they relate to Social Security benefits.

(b) Subchapter S Corporations.—Under Maryland law, individuals paying income tax to another state are permitted to credit that amount against their Maryland income taxes. The Maryland legislature has extended that credit to allow shareholders of a Subchapter S corporation to claim a credit for taxes paid by the corporation to a state that does not recognize federal tax treatment of subchapter S corporations. In such circumstances, however, federal tax purposes. Since capital gains and losses are reflected in that figure, Maryland necessarily adheres to the Internal Revenue Code's method of computing capital gains.

146. 60 Md. App. at 398, 483 A.2d at 362. Celanese had contended that the profit attributable to the recapture of depreciation should be allocated for state taxation to the state of Texas pursuant to § 316(a). The court held that the rule of ejusdem generis prevented "sales" from being included under § 316(a). Further, the court reasoned that to include "sales" under § 316(a) would be to ignore completely subsection (b) which deals solely with capital gains derived from sales. Id.

147. Id.

148. Id. at 399, 483 A.2d at 363. Note that subsections (a) and (b) of art. 81, § 316 were repealed by Act of May 15, 1984, ch. 294, 1984 Md. Laws 1838. For taxable years beginning after December 31, 1983, all net income of a corporation will be allocated pursuant to former § 316(c).


151. Under 26 U.S.C. §§ 1371-797 (1982 & Supp. 1984) (Subchapter S), small business corporations that make the appropriate election are not taxed as a corporation. Rather, corporate income is distributed to the shareholders, who are taxed as individuals.

the shareholders must add the amount of the credit claimed to their federal adjusted gross income. For purposes of determining the amount of credit that can be claimed by each shareholder, the amount of tax paid by a subchapter S corporation to another state will be deemed paid on a pro rata basis by all shareholders. In addition, subchapter S corporations with nonresident shareholders must now withhold tax on each nonresident’s share of corporate income.

(c) “Taxpayer” Defined.—The Maryland legislature has changed the wording of the definition of “taxpayer” clearly to include certain employers and corporate officers.

(d) Tax Tables.—The Maryland legislature has directed the Comptroller to prepare tax tables for computation of an individual’s annual income tax up to $50,000. Prior to the enactment of this

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Code art. 81, §§ 280(b)(6), (7), (8), 290(c), 312(a-2), (g), (h)(4) (Supp. 1985)). Section 290(c) provides:

(c) For the purposes of subsection (a) of this section, the state shall deem any income taxes or taxes based on income paid to another state by a small business corporation that has elected to be taxed as an "S" corporation under the Internal Revenue Code as paid on a pro rata basis by the shareholders of the corporation.

Under prior Maryland law, shareholders were able to claim the tax credit only if it was based on tax paid to a state that taxed them as individuals. The effect of this new provision is to allow the credit regardless of whether the tax is paid on a corporate or on an individual basis.


(b) There shall be added to federal adjusted gross income: . . .

(8) The amount of the credit claimed under section 290(c) of this subtitle, if the credit is based upon taxes paid by an "S" corporation to a state which does not recognize federal "S" corporation tax treatment.

154. Id. at 2677; see supra note 152.

155. Id. at 2677. The new legislation also makes subchapter S corporations subject to the existing penalties for failure to withhold and remit taxes by amending Md. Ann. Code art. 81, § 312 (1980) to include subchapter S corporations.


(c) “Taxpayer” means:

(1) Any person required by this subtitle to pay a tax or file a report; and

(2) As to taxes required to be withheld by an employer from employees pursuant to 312 of this subtitle:

(I) Any employer; and

(II) In the case of a corporate employer, any officer of the corporation who exercises direct control over the fiscal management of the corporation and any agent of the corporation who, in his capacity as such, is under a duty to withhold and transmit the tax to the comptroller.

bill, taxpayers with incomes greater than $20,000 could not use the tax tables to calculate the amount of tax due.

D. Maryland Tax Court

1. Right to a Jury Trial.—In Allnutt v. Comptroller of the Treasury, the Court of Special Appeals held that a taxpayer has no constitutional or statutory right to a jury trial in Tax Court and a Tax Court order denying a request for such is not immediately appealable. The Court of Special Appeals first addressed the appealability of Tax Court orders. The Maryland Tax Court is an administrative agency; thus, only its "final orders" are immediately appealable. Since denial of a request for a jury trial is not

In lieu of the regular method of computation provided by this subtitle, on the payment of the tax imposed by § 288(a) of this subtitle, an individual reporting on a cash basis for a calendar year and whose Maryland adjusted gross income for such year is $50,000 or less, may elect to pay the tax shown in tables which the Comptroller shall prepare, imposing a tax corresponding to the taxpayer's Maryland adjusted gross income. Such tables shall divide the range of Maryland adjusted gross incomes from $0 to $50,000 into intervals not to exceed $100, and impose on all Maryland adjusted gross incomes within any one such interval the same amount of tax, equal to the whole number of dollars nearest to the tax liability of a taxpayer whose Maryland adjusted gross income is the midpoint of such interval, taking account of the standard deduction provided by § 282 hereof and the personal exemptions provided by § 286 hereof. For purposes of this section, Maryland adjusted gross income shall have the same meaning as set forth in § 282(b) of this article.

158. 61 Md. App. 517, 487 A.2d 670 (1985). Two appeals were consolidated in this opinion. The separate cases originated as appeals from sales tax and income tax assessments. Id. at 519-21, 487 A.2d at 671-72.

Prior to this appeal, Allnutt had been convicted of willfully failing to file tax returns and pay income and sales tax. Allnutt v. State 59 Md. App. 694, 694, 478 A.2d 321, 322 (1984). He defended his action by claiming that gold and silver are the only legal tender under the U.S. Constitution and, therefore, the State could not collect taxes in federal reserve notes. Id. at 698, 478 A.2d at 322. On appeal, Allnutt attacked the trial court's instruction to the jury. Id. at 698-99, 478 A.2d at 323. The Court of Special Appeals held that the judge's charge on the issue of willfulness "mirrored" that used by the Court of Appeals and as such, there was no error. Id. at 699, 478 A.2d at 323. Further, the trial court was correct when it instructed the jury that the law is clear that federal reserve notes are legal tender and that the jury should act as judges only of the facts. Id. at 700-01, 478 A.2d at 324.

159. 61 Md. App. at 525-27, 487 A.2d at 674-75.
160. Id. at 522-25, 487 A.2d at 673-74.
161. Id. at 521, 487 A.2d at 672. Md. ANN. CODE art. 81, § 224 (1980) provides in part: "An administrative body designated as the Maryland Tax Court is hereby created. . . ." (emphasis added).
162. 61 Md. App. at 522, 487 A.2d at 673. The relevant statute provides: "Any party to the proceedings may appeal from the Court's final order to the circuit court of a county or to the Baltimore City Court." Md. ANN. CODE art. 81, § 229(1) (1980).
such a final order, it is not immediately appealable.

With respect to Allnutt's right to a jury trial, the court pointed out that there is no constitutional right to a jury trial in administrative proceedings. Furthermore, procedure in the tax court is governed by section 229 of article 81 of the Annotated Code of Maryland, which provides that submission of issues of fact to a jury is within the discretion of the Tax Court. Thus, no statutory right to a jury trial in Tax Court exists either.

2. Scope of Appellate Review.—In Ramsay, Scarlett & Co. v. Comptroller of the Treasury, the Court of Appeals held that a reviewing court may not substitute its own judgment for that of the Tax Court with respect to a finding that a business is unitary or separate and distinct for tax purposes. Ramsay, Scarlett & Company is a Maryland corporation with several out-of-state divisions, including one in Louisiana. Its Maryland operations include a steamship agency and stevedoring; the Louisiana division engages primarily in warehousing. Each division performs a number of functions independently, but the Maryland office handles company-wide employee benefits and payroll.

The Tax Court noted the connections between the two branches, but found that the Louisiana division operated independently from the parent corporation. The Court of Special Appeals reversed the Tax Court's decision and held that the

163. 61 Md. App. at 522, 487 A.2d at 673. The court reasoned that denial of Allnutt's request for a jury trial was not a final order because it neither concluded his rights nor denied him any means of defending those rights. Id.

164. Id. at 526, 487 A.2d at 675.

165. Id. at 525, 487 A.2d at 674. Md. Ann. Code art. 81, § 229(g) (1980) provides that "[u]pon the request of any party in interest, the Court, in its discretion, may submit to a court of law, in the jurisdiction where the taxpayer resides or carries on business, issues of fact for trial before a jury. . . ."

166. 302 Md. 825, 490 A.2d 1296 (1985).

167. Id. at 838, 490 A.2d at 1303. Pursuant to Md. Ann. Code art. 81, § 316 (Supp. 1984) of the, a unitary business is taxed on a portion of the income of the entire business, including income from out-of-state divisions. In this case, if the court found Ramsay, Scarlett's Louisiana division to be part of a unitary business, a portion of that division's income would be allocated to Maryland, resulting in additional taxes of $31,840.00. 302 Md. at 829, 490 A.2d at 1298.

168. 302 Md. at 829, 490 A.2d at 1298.

169. Id. at 830, 490 A.2d at 1299.

170. Id. at 831, 490 A.2d at 1299.

Louisiana division was part of a unitary business. In so holding, the Court of Special Appeals determined that the issue of whether a business is unitary or separate and distinct is solely a question of law. Therefore, the court reasoned, it could substitute its own judgment for that of the Tax Court.

The Court of Appeals reversed. Relying on Comptroller v. Diebold, the court held that the application of the unities and dependency tests is not solely a matter of law. Resolution of this issue requires the application of agency expertise and is subject to a very narrow standard of review. The reviewing court must affirm the Tax Court order if it is not erroneous as a matter of law and is supported by substantial evidence. The Court of Appeals found that the Tax Court had applied the proper test to the facts and that substantial evidence in the record supported the Tax Court’s order. Thus, the decision was entitled to a presumption of validity.

3. Legislative Development.—The Maryland legislature has provided that certain appeals may be decided by a single member of the Tax Court. Under prior law, a majority of the court members was required to exercise any power of the court.

Appeals vacated the circuit court’s judgment and directed the Tax Court’s order to be reversed. Id. at 348, 473 A.2d at 479.

172. Id. at 345, 473 A.2d at 478.

173. Id. at 339-41, 473 A.2d at 474-75.

174. Id. at 340, 473 A.2d at 475. Although the Court of Special Appeals noted the narrow standard of review under § 229, it held that the standard specified in that section was limited to review of factual findings. Id. at 337, 473 A.2d at 473-74. Since the underlying facts of the case were undisputed and the court did not believe agency expertise was involved in the decision, the court held that a substitution of judgment standard was appropriate. Id. at 340, 473 A.2d at 475.

175. 302 Md. at 839, 490 A.2d at 1303.


177. The unities and dependency tests are used to determine whether a business is unitary for tax purposes. These tests were adopted by Maryland in Xerox Corp. v. Comptroller of the Treasury, 290 Md. 126, 428 A.2d 1208 (1981).

178. 302 Md. at 834, 490 A.2d at 1301. The relevant statute provides in part that “the circuit court or Baltimore City Court shall affirm the Tax Court order if it is not erroneous as a matter of law and if it is supported by substantial evidence appearing in the record.” MD. ANN. CODE art. 81, § 229(o) (1980).

179. 302 Md. at 837, 490 A.2d at 1302.

180. Id. at 837-38, 490 A.2d at 1303.

181. Id. at 839, 490 A.2d at 1305.

182. Act of May 21, 1985, ch. 232, 1985 Md. Laws 1987 added subsection (b) to MD. ANN. CODE art. 81, § 228, which provides that “[a] single member of the Court may decide an appeal within the Court’s jurisdiction when the member is a member of the bar of the State of Maryland.”
E. Other Developments

1. Use Tax.—In Macke Co. v. Comptroller of the Treasury,\(^ {183} \) the Maryland Court of Appeals concluded that food containers dispensed through vending machines were not subject to the use tax.\(^ {184} \) Items purchased for resale are exempt from use tax under Maryland statutes.\(^ {185} \) In Macke, the court determined that paper and plastic food containers were "resold" when dispensed along with food through vending machines owned and operated by Macke Co. (Macke).\(^ {186} \)

The Comptroller contended that these items were subject to use tax because the food that they contained was to be consumed on the premises.\(^ {187} \) The Comptroller further argued that the containers were not "sold" to the ultimate consumer because no separate consideration was given.\(^ {188} \)

A majority of the Court of Appeals disagreed. They rejected the on-off premises distinction as "clearly in conflict with the plain meaning of § 324(f)(i)."\(^ {189} \) The majority reasoned that such a distinction "is irrelevant to whether that item is resold to the ultimate consumer."\(^ {190} \) Rather, the inquiry should focus on whether the

\(^{183} \) 302 Md. 18, 485 A.2d 254 (1984).
\(^{184} \) Id. at 28, 485 A.2d at 260. Use tax is a tax on the use, storage, or consumption of tangible personal property, designed to tax those items that are not subject to sales tax. See Funk, Tax Planning for Maryland Retail Sales and Use Taxes, in THE IMPACT OF MARYLAND TAXES ON COMMERCIAL TRANSFERS AND BUSINESS OPERATIONS 85 (MICPEL 1985).
\(^{185} \) Md. ANN. CODE art. 81, § 372 (d) (1980) excludes from use tax: "(1) The purchase of tangible personal property by any vendor . . . for the purpose of resale within the meaning of § 324(f)(i) of this article."
\(^{186} \) 302 Md. at 24, 485 A.2d at 258.
\(^{187} \) Id. at 22, 485 A.2d at 256. The Comptroller's position was based on the commissioner's interpretation of the statute shortly after it was passed. This interpretation equated the paper products to dinnerware purchased by restaurants solely to facilitate sales of food. Id. at 32, 485 A.2d at 262 (Murphy, J., dissenting). The significant difference between these items is that title passes to the consumer in the former, but not in the latter. See infra note 188.
\(^{188} \) 302 Md. at 25, 485 A.2d at 258. Md. ANN. CODE art. 81, § 324(d) (1980) defines "sale" and "selling" as "any transaction whereby title or possession, or both, of tangible personal property is or is to be transferred . . . for a consideration . . . by a vendor to a purchaser. . . ."
\(^{189} \) 302 Md. at 23, 485 A.2d at 257. The relevant statute provides: "Retail sale" and "sale at retail" means the sale in any quantity or quantities of any tangible personal property or service taxable under the terms of this subtitle. The term shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is (i) to resell the property so transferred in the form in which the same is, or is to be, received by him. . . .
\(^{190} \) 302 Md. at 23, 485 A.2d at 257.
statutory requirements for the exclusion have been met. First, the property must be resold in the same form in which it is acquired; second, title or possession to the property must pass to the consumer, and third, consideration must be paid.

In deciding that the containers were not subject to use tax, the majority determined that consideration had been paid because the containers added to the saleability and value of the food. The value added by the container need not be great or even accurately ascertainable. Further, the consideration does not need to be separately stated or paid since the container and the food are sold as a unit, and each is relatively valueless to the consumer without the other. The majority also reasoned that this result is consistent with the policy of avoiding double taxation. A different result would require Macke to pay use tax when it purchases the containers and collect sales tax when the containers are sold with the food.

By disregarding the on-off premises distinction, the majority eliminated what had become an unworkable construction of the statute. What was a reasonable distinction thirty years ago seems arbitrary in light of today’s massive fast food industry in which carry-out and eat-in meals are often sold in the same containers. This decision, however, has left open the question of how items will be treated that are sold as a unit when either has separate value to the consumer. Although seeming to distinguish those cases from

191. Id.
194. Id.
195. The retail sales exception did not apply to other paper and plastic goods that Macke provided free of charge to purchasers and nonpurchasers of the food items. 302 Md. at 28, 485 A.2d at 260.
196. Id. at 26-27, 485 A.2d at 258-59. Since the first two requirements had been fairly clearly met, the majority addressed them only briefly before turning to a discussion of whether consideration had been paid for the containers.
197. Id.
198. Id.
199. Id. at 26-27, 485 A.2d at 259.
200. Id. at 28, 485 A.2d at 259-60.
201. Id. The dissent argued that the purchase by Macke and subsequent sale to the consumer are separate taxable events. Id. at 37-38, 485 A.2d at 264 (Murphy, J., dissenting).
202. The dissent did not believe that the Comptroller's longstanding construction should have been disregarded. Id. at 32-33, 485 A.2d at 262 (Murphy, J., dissenting).
203. One can only speculate as to how the courts will determine what has value to a consumer.
204. 302 Md. at 27, 485 A.2d at 254. The majority distinguished Sta-Ru Corp. v.
Macke, the majority failed to realize that such items would also satisfy the statutory requirements for the resale exclusion and would be subject to double taxation if the exclusion were not allowed.

2. **Homeowner’s Tax Credit.**—In Wargo v. Department of Assessments and Taxation, the Court of Special Appeals considered whether the State Department of Assessments and Taxation (SDAT) may lawfully require applicants for the homeowner’s tax credit to submit copies of their federal income tax returns as a prerequisite for eligibility. The court first determined that the legislature gave SDAT the authority to establish rules and regulations to implement the tax credit program. According to the court, requiring applicants to submit a copy of their federal tax return was a reasonable means of verifying eligibility for the income-based program; thus, this requirement, as part of a voluntary application procedure, was not an illegal search or seizure prohibited by the Constitution.

3. **Legislative Developments.**—(a) **Delegation of Authority by Comptroller.**—The Maryland legislature has authorized the Comptroller to delegate the authority to sign and execute liens, releases of liens, claims, and other documents. The Comptroller may delegate that authority to any of the Comptroller’s employees.

Mahin, 64 Ill. 2d 330, 356 N.E.2d 67 (1976), with facts similar to Macke, as having relied on cases in which the main item had a value even without the second item. In Sta-Ru, the Illinois court relied on American Airlines, Inc. v. Department of Revenue, 58 Ill. 2d 251, 319 N.E.2d 28 (1974), in which the tax was held applicable to meals served on an airline flight because separate consideration was not paid by consumer.

206. MD. ANN. CODE art. 81, § 12F-I(f) (1980) provides in part that “[t]he applicant may be required to provide copies of income tax returns, or other evidence of income . . . to substantiate the application for the property tax credit.”
207. Pursuant to this authority, SDAT established the application procedures for the tax credit. MD. ADMIN. CODE tit. 18, § 07.01.03 B(1) (1982) provides that “[a]n applicant shall submit with the application form copies of the federal income tax return and accompanying schedules and forms.”
208. 62 Md. App. at 625-26, 490 A.2d at 1306. The amount of the credit applied to a homeowner’s property tax bill is the amount by which the tax exceeds a certain percentage of the homeowner’s gross income. MD. ANN. CODE art. 81, § 12F-1(c) (1980).
209. Act of May 21, 1985, ch. 286, 1985 Md. Laws 2110 deleted the words “the Chief of the Income Tax Division” from MD. ANN. CODE art. 81, § 304(a) (1980) and substituted the words, “any employee of the Comptroller.”
(b) *Inheritance Tax.*—The Maryland legislature has provided an exemption from inheritance tax for certain kinds of transfers.\(^{211}\) The statute excludes transfers between a decedent and spouse of real property and the first $100,000 of other property.

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211. Act of May 28, 1985, ch. 645, 1985 Md. Laws 3006 adds subsection (d) to Md. ANN. CODE art. 81, § 149. This new subsection provides:

(d) Both the tax imposed by this section and the tax imposed by 150 of this subtitle do not apply to a transfer of the following types of property from a decedent to the spouse of the decedent:

(1) Real property; and
(2) The first $100,000 of property other than real property.
XI. Torts

A. Defamation

In *Mareck v. Johns Hopkins University,*¹ the Court of Special Appeals reversed the trial court’s grant of a directed verdict for Hopkins and held that a jury could have found that the employer had abused its qualified privilege.² Maryland courts recognize a conditional or qualified privilege to make defamatory statements.³ The privilege relieves the speaker or publisher of liability if the publication of that statement advances “social policies of ‘greater importance than the vindication of a plaintiff’s reputational interest.’”⁴ Thus, as a matter of policy, no liability attaches to a good faith publication of a statement in furtherance of one’s own legitimate interests,⁵ interests shared with others,⁶ or interests of the general public.⁷ The privilege must be reasonably exercised for a proper purpose, however.⁸ The privilege is lost if the publication is made with actual malice.⁹ In addition, a speaker loses the privilege if the

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2. Id. at 227, 482 A.2d at 22.
4. 60 Md. App. at 224, 482 A.2d at 21 (quoting Marchesi v. Franchino, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978)). The existence of a qualified privilege has been recognized for reports of public proceedings; statements made in the public interest; statements made in defense of one’s conduct, property, or reputation; statements made in the interest of the recipient in securing information; and statements in the common interest of the recipient and the publisher. *Restatement (Second) of Torts* §§ 593-598 (1976).
5. See Marchesi v. Franchino, 283 Md. 131, 135, 387 A.2d 1129, 1131 (speaker’s safety provided a speaker qualified privilege to publish).
6. See id. at 135-136, 387 A.2d at 1131 (immunity accorded supervisor publishing in order to discharge his department’s responsibilities).
8. 60 Md. App. at 224, 482 A.2d at 21. While the court does not define “proper purpose,” its discussion of the policy rationale for extending a qualified privilege suggests that a purpose is proper if reasonable publication for that purpose “advances social policies of ‘greater importance than the vindication of a plaintiff’s reputations interest.’” Id. (quoting Marchesi v. Franchino, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978)).
communication exceeds the privilege's scope. Abuse or loss of the privilege is a question of fact to be determined by the jury.

Mareck had worked for Johns Hopkins University for ten years when her supervisor learned that she planned to disclose some unspecified information to The Washington Post. Without further inquiry, the supervisor decreased plaintiff's responsibilities. He told other university employees of the change and claimed that he had lost confidence in her ability to keep information confidential. Plaintiff actually intended to discuss the university's grievance procedures and salary structure with the newspaper.

Although the university, as Mareck's employer, had a qualified privilege, the court found sufficient evidence to infer an abuse of that privilege. Thus, the court ordered a new trial for a jury to consider whether the University lost its qualified privilege.

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10. See 60 Md. App. at 225, 482 A.2d at 21. For example, the privilege is lost if the statement does not further the protected interest, Restatement (Second) of Torts § 605 (1976), if it is made to persons other than those reasonably necessary, General Motors Corp. v. Piskor, 277 Md. 165, 173, 352 A.2d 810, 816 (1976), or if the statement includes matters outside the purpose of the privilege. Restatement (Second) of Torts § 605 (1977).

11. 60 Md. App. at 227, 482 A.2d at 22 (citing Jacron Sales Corp. v. Sindorf, 276 Md. 580, 600, 350 A.2d 688, 700 (1976)).

12. Id. at 219-21, 482 A.2d at 18-19. Mareck told Hopkins' Affirmative Action Officer, Theodore, that she intended to publicize her dissatisfaction with the university's grievance procedures and salary structure. Id. at 221, 482 A.2d at 19. Theodore told Zdanis, the university's Vice Provost, that Mareck intended to disclose some unspecified information to the Post. Id. Without identifying his source, Zdanis then repeated to Galambos, Mareck's supervisor, what Theodore had told him. Id.

13. Id. at 222-23, 482 A.2d at 20. Without confronting Mareck about the nature of the "unspecified information," Galambos repossessed her office keys, reassigned her duties to other employees, and assigned her to low priority work. Id. At trial, Galambos testified that he did not know what Mareck contemplated telling the Post. Id. at 221, 482 A.2d at 19-20. Mareck testified that "until the termination of her employment, she was watched continuously... ostracized and shunned by the other staff members." Id. at 223, 482 A.2d at 20.

14. Id. at 221, 482 A.2d at 19.

15. Id. at 227, 482 A.2d at 22. The court did not find that Galambos had abused the privilege by malicious publication. However, it reversed the trial court's directed verdict and remanded, finding that plaintiff had produced some legally relevant competent evidence from which a reasonable mind could infer that Galambos acted in reckless disregard of the truth. Id. at 225-27, 482 A.2d at 22. See also Impala Platinum v. Impala Sales, 283 Md. 296, 328, 389 A.2d 887, 905-06 (1978) (court invades jury's province by granting a directed verdict if there is any legally relevant competent evidence, no matter how slight, from which a reasonable mind could infer a fact in issue). Hence, whether the qualified privilege had been abused was a question for the jury. 60 Md. App. at 227, 482 A.2d at 22. See also Jacron Sales Co. v. Sindorf, 276 Md. 580, 600, 350 A.2d 688, 700 (1976) (whether a qualified privilege has been abused is generally a question of fact for the jury).

16. 60 Md. App. at 227, 482 A.2d at 22.
In *Happy 40, Inc. v. Miller*, the Court of Special Appeals examined two sources of the employer's qualified privilege to make defamatory statements: the employer-employee relationship and article 95A of the Maryland Code. Miller, a discharged employee, brought a defamation suit against her former employer, Happy 40, Inc., and its president, Booher. After Miller's discharge, other Happy 40 employees asked Booher the reason for Miller's discharge. He responded that he "had evidence that there had been some money missing" and that "[t]he tapes were being fixed... and that's how she was taking money." When Miller applied for unemployment, Booher responded to the Maryland Employment Security Administration's inquiry by explaining that Miller "was fired for improper job performance and under suspicion of possible misappropriation of funds."

At trial, Miller based her claim for defamation primarily on Booher's conversations with her coemployees and the statement made to the Employment Security Administration. Booher never appeared either as an adverse witness or in his own defense. Thus, "[t]here was no evidence of what Booher knew or did not know when he published his concededly defamatory statements . . . ." The trial court ruled as a matter of law that all of Booher's defamatory statements were covered by a qualified privilege. Although Miller never cross-appealed this ruling, the Court of Special Appeals raised the issue sua sponte and affirmed the trial court's ruling.

The court held that the qualified privilege accorded the defamatory remarks published to Miller's coemployees was based on the settled privilege accorded statements published in

18. *Id.* at 31, 491 A.2d at 1214. M.D. ANN. CODE art. 95A, § 12(g)(2) (1979) provides a statutory privilege for communications made concerning unemployment compensation applications:

No report, communication or any other such matter either oral or written from the employee or employer to each other or to the Executive Director or Board of Appeals or any of their agents, representatives or employees, which shall have been written, sent, delivered or made in connection with the requirements and administration of this article shall be made the subject matter or basis of any suit for slander or libel in any court, unless such report, communication, or other matter is false and malicious.

(Emphasis added.)

19. 63 Md. App. at 28, 491 A.2d at 1212.
20. *Id.* at 29, 491 A.2d at 1213.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 31, 491 A.2d at 1214.
the context of the employer-employee relationship. The court also held that Booher's defamatory response to the Employment Security Administration was privileged under both the Maryland Unemployment Insurance Law and the common law notion protecting a person who "share[s] information with a recipient who justifiably is entitled to receive it."

The court also considered whether malice could be inferred when an employer discharges an employee on suspicion of theft without first confronting the employee. It again held that, since Miller "had the burden of proving . . . every element of her cause of action," she could not prove abuse of privilege because "the record below contains no evidence of scienter on the part of Booher when he published the [defamatory] statements."

**B. Interference with Business**

In *Natural Design, Inc. v. Rouse Co.*, the Court of Appeals held


28. 63 Md. App. at 34, 491 A.2d at 1215.

29. *Id.* at 37, 491 A.2d at 1217 (emphasis in original). In so holding, the court distinguished Mareck v. Johns Hopkins University, 60 Md. App. 217, 482 A.2d 17 (1984), on grounds that "the [defendant] was called as a witness and actually testified as to what he knew at the time [of publication]." 63 Md. App. at 37-38, 491 A.2d at 1217. Thus (i) the defendant's testimony as to his knowledge and (ii) his failure to corroborate his beliefs together was sufficient evidence to permit a jury to infer an abuse of privilege. *Id.* at 38, 491 A.2d at 1217. While acknowledging that Booher chose not to confront Miller with the evidence against her, the court held that "failure to do so, without more, is simply not sufficient evidence of abuse . . . to warrant submitting that issue to the jury." *Id.* (emphasis added). *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974) (mere failure to confront plaintiff with the defamatory material is not sufficient evidence of actual malice).

While this analysis is unobjectionable, the record also contained additional evidence that may have been relevant to scienter: Booher's revision of his reason for discharging Miller. Perhaps Booher's later statement of a more cautious and arguably nondefamatory reason (i.e., "suspicion of possible misappropriation of funds"), is probative of scienter or reckless disregard of the truth when compared with his earlier, and less guarded defamatory statement (i.e., "she was taking money"). If so, perhaps such evidence together with Booher's failure to corroborate his belief would be sufficiently probative to warrant an inference of scienter.

30. 302 Md. 47, 485 A.2d 663 (1984). Natural Design, a former tenant in the Village Square Shopping Center, alleged that its landlord—Rouse Co.—and another tenant—The Store, Ltd.—conspired to restrain trade or commerce unreasonably and attempted to monopolize trade or commerce in order to exclude competition and control prices, in violation of the Maryland Antitrust Act. Md. Com. Law Code Ann. § 11-204(a)(1),
that a price fixing combination in violation of the Maryland Antitrust Act also constituted the common law tort of malicious interference with business.\textsuperscript{31} Maryland recognizes two types of intentional interference with business relationships: inducing breach of contract and malicious interference with economic relationships absent contract.\textsuperscript{32} Although the same principle underlies both forms of the tort,\textsuperscript{33} the two actions differ "in the limits on the right to interfere."\textsuperscript{34} When "a contract . . . exists, the circumstances in which a third party has a right to interfere with [its] performance . . . are . . . narrowly restricted. A broader right to interfere . . . exists where no contract . . . is involved."\textsuperscript{35} Thus, competition is not tortious
unless the means used violate public policy.\textsuperscript{36}

The court looked to the \textit{Restatement (Second) of Torts} for limits on the right to compete.\textsuperscript{37} Section 768 defines as improper competitive acts that cause a third person to decline prospective contractual relations with another or to discontinue an existing contract terminable at will, if those acts create or continue an \textit{unlawful restraint of trade}.\textsuperscript{38} Because price-fixing may unlawfully restrain trade in violation of the Maryland Antitrust Act, it may also constitute tortious

150 Md. 677, 682, 133 A. 843, 845 (1926); Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co., 114 Md. 403, 414-15, 80 A. 48, 50 (1911). The broader right to interference also exists for contracts terminable at will. 302 Md. at 69-70, 485 A.2d at 674. Although policy considerations may support different limits on the right to interfere, the court did not find it necessary to provide such a rationale. In Cumberland Glass Mfg. Co. v. Dewitt, 120 Md. 381, 394, 395, 87 A. 927, 932 (1913), \textit{aff'd}, 237 U.S. 447 (1915), however, the court held that the policy considerations that support a right of competition do not extend to protect acts of malicious interference or inducing breach of contract. In Willner v. Silverman, the court listed the following elements of malicious interference with economic relations: "(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." 109 Md. 341, 355, 71 A. 962, 964 (1909) (quoting Walker v. Cronin, 107 Mass. 555, 562 (1871)). In \textit{Natural Design}, the court noted that this list of elements provided little guidance in determining what acts constitute the tort. For example, the court's definition of malice has varied and has seemed to depend primarily on the facts in a given case. 302 Md. at 71, 485 A.2d at 675. "Malice" has meant ill will or spite in some contexts, Willner, 109 Md. at 357, 71 A. at 964, legal malice or a wrong intentionally done without just cause or excuse in other contexts, McCarter v. Baltimore Chamber of Commerce, 126 Md. 131, 136, 94 A. 541, 542 (1915), and an unlawful act in still others, Goldman v. Harford Road Bldg. Ass'n, 150 Md. 677, 682, 133 A. 843, 845-846 (1926). 302 Md. at 71-72 & n.12, 485 A.2d at 675 & n.12.


37. 302 Md. at 73, 485 A.2d at 676.

38. \textit{Restatement (Second) of Torts § 768 (1977)} provides:

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) \textit{his action does not create or continue an unlawful restraint of trade} and

(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the
interference with the plaintiff's business.\textsuperscript{39} Natural Design had produced sufficient evidence to support its price-fixing claim and thus its tort claim.\textsuperscript{40} Thus, the Court of Appeals reversed the summary judgment for defendants and remanded for a new trial.\textsuperscript{41}

C. Workers' Compensation

1. Nondelegable Duties.—In Athas v. Hill,\textsuperscript{42} the Court of Appeals held that section 58 of the Maryland Workers' Compensation Act\textsuperscript{43} did not authorize an employee to sue a supervisory coemployee for the negligent discharge of the employer's duty to provide a safe work environment.\textsuperscript{44} In reaching its decision, the court surveyed the law on point in other jurisdictions, adopted the Wisconsin rule, and affirmed the judgment of the Court of Special Appeals. Hill attacked his coemployee, Athas, with a butcher knife during working hours. Athas recovered damages for permanent disability and disfigurement from his employer, Summit Country Club, under the Workers' Compensation Act. Athas then brought a negligence action against Summit's corporate officers and supervisory employees for failure to exercise reasonable care and caution in selecting competent, nonviolent employees and in providing a safe work environment.\textsuperscript{45} Although workers' compensation usually provides the exclusive remedy for workplace injuries, Athas argued that section...
58, which allows tort actions for compensable injuries arising from circumstances that create "a legal liability in some person other than the employer,"\(^{46}\) authorized his suit.\(^{47}\)

The court first surveyed other jurisdictions' interpretation of similar provisions. Several states extend immunity to coemployees because workers' compensation statutes provide the exclusive remedy.\(^{48}\) Other courts, however, have interpreted "some person other than the employer" literally and held that a coemployee is subject to liability because he cannot be an employer.\(^{49}\) The Court of Appeals adopted a compromise position termed the "Wisconsin approach,"\(^{50}\) under which corporate officers or supervisory employees are liable for negligence only if they breach a duty of care personally.

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\(^{47}\) Id. at 136, 476 A.2d at 712.

\(^{48}\) See, e.g., Brown v. Estess, 374 So. 2d 241, 242-243 (Miss. 1979) (purpose of workers' compensation act to make compensation employee's exclusive remedy for injury sustained during the course of employment; corporate officer immune from common law action in tort); Madison v. Pierce, 156 Mont. 209, 215, 478 P.2d 860, 864 (1970) (allowing employee to bring negligence action in addition to receiving workers' compensation award would defeat the statute's purpose); Warner v. Leder, 234 N.C. 727, 732, 69 S.E.2d 6, 10 (1952) (acceptance of benefits under workers' compensation act forecloses employee's right to bring common law tort action against not only the employer, but also those conducting the employer's business).

Moreover, the majority of states have enacted legislation expressly granting immunity to coemployees and corporate officers if the employer and the injured employee are covered by the workers' compensation law. See A. Larson, The Law of Workmen's Compensation § 72.21, at 14-73 & n.23 (1983).


In Tully, the court held that a supervisor is liable as a coemployee for negligence in discharging his official duties that results in injury to his fellow employee. Thus, the immunity from common law liability in tort afforded the employer does not extend to the supervisor. 196 Kan. at 139, 409 P.2d at 784. In reaching its decision, the Kansas court held "the term employer has a precise and well-defined meaning, as the same is used in common parlance, and we do not feel free to ascribe to the word a wholly different or strained significance." Id. It further reasoned that

[w]hile a supervisor for a corporate employer . . . [has] responsibilities in overseeing and directing the work done by other employees . . . he does not thereby become an employer himself, but remains simply an employee and acts in such a capacity only. . . . [T]here is no similarity so far as legal status under [the Workers' Compensation Act] is concerned, between a supervisory employee and an employer.

. . . .

If suits of this character . . . against coemployees [have any] consequences . . . which [are] socially undesirable . . . [they] embrace questions of public policy which properly should be addressed to the [legislature] . . . .

Id. at 139-40, 409 P.2d at 784-85.

\(^{50}\) 300 Md. at 143-48, 476 A.2d at 715-18.
owed to the plaintiff.  

Hence, liability outside of the Workers’ Compensation Act arises only if the tortious conduct occurred "outside the scope of the employer’s responsibility. The coemployee is not liable merely for breaching a duty that the employer owed the injured employee."  

The duty to provide a safe work environment and to retain competent, nonviolent employees has always rested with the employer.  

Moreover, the court pointed out that in Wood v. Abeli it had established that "the ultimate responsibility of performing nondelegable duties remains with the employer notwithstanding the fact that an employee has been charged with carrying them out." Consequently, under the court’s ruling, a supervisory coemployee cannot be personally liable for breaching the employer’s nondelegable duty to provide a safe work environment.  

2. Subsidiary Immunity.—In Dolan v. Kent Research & Manufacturing Co., the Court of Special Appeals held that the Workers’ Compensation Act precludes an employee’s tort action only when the defendant is the plaintiff’s employer.  

Thus, the trial court erred in

51. Id. at 143, 476 A.2d at 715.  
52. Id. at 144, 476 A.2d at 715. The court explained that the "'[l]iability of a corporate officer in a third-party action must derive from acts done by such officer in the capacity of a coemployee, and may not be predicated upon acts done by such officer in his capacity as corporate officer.'" Id. (quoting Kruse v. Schieve, 61 Wis. 2d 421, 426, 213 N.W.2d 64, 67 (1973)).  
55. 300 Md. at 149, 476 A.2d at 718. Although the court did not expressly define "nondelegable duty," an employer’s duty may be said to be nondelegable "in the sense that the employer could not escape responsibility for [it] by entrusting [it] to another, whether . . . a servant or an independent contractor." PROSSER & KEETON ON THE LAW OF TORTS § 80, at 572 (W. Keeton 5th ed. 1984). The duty to provide a safe work environment, see Frizzell v. Sullivan, 117 Md. 388, 390, 83 A. 651, 652 (1912), and the duty to hire and retain competent employees, see Chesapeake Stevedoring Co. v. Hufnagel, 120 Md. 53, 60, 87 A. 4, 6 (1913), are examples of nondelegable duties.  
56. In reaching its decision, the court reasoned that "'[c]orporations perform their acts only through agents. The acts of the corporate officers and agents here cannot be separated from that of the corporation.'" 300 Md. at 149, 476 A.2d at 718. Thus, without reaching policy considerations, the court concluded that "the ‘Wisconsin’ reasoning [is] persuasive and [we therefore] base our decision on such an interpretation as well as the logic of Maryland Law." Id. at 148, 476 A.2d at 718.  
58. MD. ANN. CODE art. 101, § 15 (1985) "provides that an employer who complies with the Act remains immune from a common-law action in tort." 63 Md. App. at 59, 491 A.2d at 1228 (emphasis added).  
59. 63 Md. App. at 64, 491 A.2d at 1230. Although the court acknowledged that the Court of Appeals considered the relationship of two companies in Saf-T-Cab Service, Inc. v. Terry, 167 Md. 46, 172 A. 608 (1934), it determined that the Court of Appeals
focusing on the relationship between Dolan's employer and its subsidiary, Kent Research & Manufacturing Co.\(^{60}\)

Dolan was injured while on property owned by a subsidiary of his employer company.\(^{61}\) Pending resolution of his workers' compensation claim, Dolan and his wife sought tort damages from the subsidiary.\(^{62}\) The subsidiary claimed statutory immunity from suit because of its business relationship with the parent company.\(^{63}\) Although the trial court agreed,\(^{64}\) it focused on the subsidiary's relationship to the parent corporation rather than Dolan's relationship to the subsidiary.\(^{65}\) The trial court also erred in finding that the parent corporation so controlled the subsidiary as to render it a "mere instrumentality" immune from liability under the Workers' Compensation Act.\(^{66}\) Finally, the Court of Special Appeals found that the trial court erred in admitting the plaintiff's Workers' Compensation Order as proof of plaintiff's employer.\(^{67}\) Because this or-

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\(^{60}\) Id. at 59, 491 A.2d at 1228.

\(^{61}\) Id. at 60, 491 A.2d at 1229.

\(^{62}\) Id. at 61, 491 A.2d at 1229.

\(^{63}\) Id.

\(^{64}\) Id. at 63, 491 A.2d at 1230.

\(^{65}\) Id. at 65, 491 A.2d at 1231. The Court of Special Appeals concluded that, as a matter of law, Kent Research & Mfg. Co. was not a mere instrumentality of its parent company. The court found the following factors dispositive: (1) The subsidiary retained its own factory employees; (2) the subsidiary and parent were incorporated separately—the subsidiary in Maryland and the parent in Pennsylvania; and (3) the subsidiary owned the building in which the appellant was injured. The court attached the greatest weight to this last factor because the subsidiary's contract to lease part of the building to the parent contained an indemnification clause and required the subsidiary to maintain the roof and structure of the building. Id. at 65-67, 491 A.2d at 1231-2.

\(^{66}\) Id. at 68, 491 A.2d at 1233. The Workers' Compensation Order stipulated that
der may have affected the jury’s determination, the court refused to
reinstate the jury’s verdict and remanded for a new trial.68

D. Constructive Discharge from Employment

In Beye v. Bureau of National Affairs,69 the Court of Special Ap-
peals held that Maryland law recognizes the concept of constructive
discharge.70 To determine whether a resignation constitutes a con-
structive discharge, the court applied an objective test: “whether
the employer has deliberately caused or allowed the employee’s
working conditions to become so intolerable that a reasonable per-
son in the employee’s place would have felt compelled to resign.”71

Beye resigned from his job after being threatened by one of
several employees whom he had reported to the police for gam-
bling, drug, and handgun violations. His employer initially prom-
ised him protection and granted him an administrative leave. Six
days later, his employer demanded that Beye return to work or be
fired and refused to guarantee his safety. Beye finally resigned. He
then filed an abusive discharge action against his employer.72

the parent company was plaintiff’s employer. The plaintiff argued that this stipulation
implicitly excluded the subsidiary as his employer. Such an implication, however, over-
looks the fact that an employee may have more than one employer for purposes of the
Workers’ Compensation Act. Id. at 67-68, 491 A.2d at 1232-33. Furthermore, the order
did not bind the subsidiary because Kent did not participate in the workers’ compensa-
tion proceeding and that proceeding did not consider whether Kent also employed the
plaintiff. Id. at 68, 491 A.2d at 1233.
68. Id. at 69, 491 A.2d at 1233.
70. Id. at 653, 477 A.2d at 1203.
71. Id. The court found only one Maryland precedent on the issue of constructive
discharge, Cumberland & Pa. R.R. v. Slack, 45 Md. 161 (1876), a century-old case in-
volving a railroad superintendent who was ordered to resign. It found ample support,
however, in civil rights and labor relations cases for the idea that constructive discharge
occurs when an employer allows or causes working conditions to become intolerable. E.g.,
Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982); Johnson v. Nord-
strom-Larpenteur Agency, 623 F.2d 1279, 1281 (8th Cir.), cert. denied, 449 U.S. 1042
(1980); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980); J.P. Stevens &
Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); Neale v. Dillon, 534 F. Supp. 1381, 1390
(E.D.N.Y. 1982), aff’d mem., 714 F.2d 116 (2d Cir. 1982).

The action need not be intended by the employer to force a resignation. See Clark v.
Marsh, 665 F.2d 1168, 1175 n.8 (D.C. Cir. 1981); Bourque, 617 F.2d at 65. Several cases
support the use of an objective test to determine whether the resignation is truly invol-
untary. See Bourque, 617 F.2d at 65; Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119
(1st Cir. 1977); Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir.), cert. denied, 431
Corp., 291 Md. 31, 432 A.2d 464 (1981), the Court of Appeals recognized a cause of
action for “abusive discharge by an employer of an at will employee when the motivation
for the discharge contravenes some clear mandate of public policy.” Id. at 47, 432 A.2d
Although a reasonable person might indeed have resigned in the circumstances, the court found that the employer "neither created nor could reasonably be expected to control" those circumstances. As a matter of law, "[t]he employer cannot be expected to police the workplace" to prevent "personal attacks by fellow employees in response to private, non-employment related grievances"; as a matter of fact, Beye failed to allege that the employer possessed any practical means of insuring his safety. Because Beye was not discharged, constructively or otherwise, he was not abusively discharged.

E. Governmental Immunity

In Tadjer v. Montgomery County, the Court of Appeals reaffirmed the principle that local governments have immunity only for liability arising from governmental acts. If the government engages in acts deemed proprietary rather than governmental, it has no immunity. In this case, the proper characterization of Montgomery County's landfill operation was a question of fact; thus, the trial court erred in granting the county's demurrer.

Wodoslawsky sued Tadjer and eight others for injuries sustained by him in an explosion of methane gas. Tadjer, who had purchased the land where the explosion occurred from Montgomery

at 473. Such public policy must be clearly stated, preferably by the legislature, but in an appropriate cause by judicial decisions or administrative regulations. Id. at 45, 432 A.2d at 472. Adler, who was a manager of American Standard's commercial printing division, was allegedly fired to prevent him from reporting to top management certain illegal corporate practices that Adler had discovered while performing his job. Id. at 33-34, 432 A.2d at 465-66. For examples of successful Adler-type claims, see Roberts v. Citicorp Diners Club, Inc., 597 F. Supp. 311 (D. Md. 1984); Ring v. River Walk Manor, Inc., 596 F. Supp. 393, 396 (D. Md. 1984); Moniodis v. Cook, 64 Md. App. 1, 10-12, 494 A.2d 212, 216-18 (1985).

73. 59 Md. App. at 655, 477 A.2d at 1204.
74. Id. at 655-56, 477 A.2d at 1204.
75. Id. at 648, 477 A.2d at 1200. The court also affirmed the dismissal of Beye's claim for intentional infliction of emotional distress, calling the claim "woefully inadequate" under the strict standards set out in Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977). 59 Md. App. at 656-58, 477 A.2d at 1204-05. Beye's claims for breach of contract and civil conspiracy also failed because Beye could not lay a foundation for them by showing that he was discharged. Id. at 656, 658-59, 477 A.2d at 1204, 1205-06.
77. Id. at 546, 479 A.2d at 1324.
78. Id. The dissent in Tadjer observed that the "governmental proprietary distinction, which has never been expressly sanctioned by the Maryland Legislature, was adopted by this Court relatively recently in history and with little reasoning." Id. at 555, 479 A.2d at 1329 (Eldridge, J., concurring in part and dissenting in part).
79. Id. at 550, 479 A.2d at 1326.
County, impleaded the county as cross-defendants in a third-party suit for indemnification or contribution. Tadjer alleged that negligence and nuisance in the county's operation of the landfill located on his property caused the explosion.\(^8\)

In general, an act is governmental in nature if it is (1) sanctioned by legislative authority, (2) solely for the public benefit, (3) with no profit inuring to the municipality, and (4) it has no element of private interest.\(^8\) Usually, refuse collection and disposal meet these criteria.\(^8\) Although the county charged a fee for use of the landfill, the court did not find this fact dispositive.\(^8\) Rather, the court held that the landfill was a government function if "the income was not adequate . . . or . . . barely adequate to cover expenses."\(^8\) The landfill would be a proprietary function, however, "if the income derived was . . . substantially in excess of the county's expenses for . . . the landfill . . . ."\(^8\)

Tadjer also alleged that the county's landfill operation and resulting explosion constituted nuisance, both public and private.\(^8\) The court rejected both contentions. First, the third-party declarations did not allege "that any land of the original plaintiff was in any way invaded,"\(^8\) a necessary element of a private nuisance action.\(^8\) Second, none of the allegations satisfied the requirements for public

\(^8\) See Baltimore v. State, 173 Md. 267, 275-276, 195 A. 571, 576 (1937). In Baltimore, the court explained the rationale for sovereign immunity:

[I]t is better that the adequate performance of . . . an act [governmental in nature] be secured by public prosecution and punishment of officials who violate the duties imposed upon them in respect to it than to disburse public funds dedicated to the maintenance of such public conveniences . . . at the public expense to private persons who have suffered loss through the negligence of municipal employees charged with their management.

\(^8\) Id. at 547, 479 A.2d at 1325.

\(^8\) Id. at 548, 479 A.2d at 1325.

\(^8\) Id. at 549, 479 A.2d at 1326 (citing Baltimore and Austin v. City of Baltimore, 286 Md. 51, 405 A.2d 255 (1979)).

\(^8\) Id. The court did not explain why sovereign immunity does not extend to proprietary functions of the government. One may infer, however, that proprietary functions are not due the same protection because the government earns a profit from these activities. Thus, the government can presumably afford to treat tort damages arising from such functions as additional operating expenses. Furthermore, compensation for such damages would not require the government to disburse public funds. Instead, private users of such services would underwrite the cost of liability for torts arising from proprietary functions.

\(^8\) Id. at 550, 479 A.2d at 1326.

\(^8\) Id. at 554, 479 A.2d at 1328.

\(^8\) Id.
nuisance in the *Restatement (Second) of Torts*, section 821B. Consequently, the court considered that Tadjer's nuisance counts were merely an attempt to allege a cause of action properly framed in negligence.

**F. Negligence**

1. **Innkeepers.**—In *Schear v. Motel Management Corp.*,91 two guests alleged negligence and negligent misrepresentation against the motel from which their costly jewels, furs, and clothing were stolen.92 The court upheld a directed verdict for the motel manager on the negligence count because all customary security measures were provided, including a 24-hour security guard.93 It also upheld the directed verdict on the negligent misrepresentation count regarding the motel's central security monitoring room, or "nerve center," because the guests did not justifiably rely on any misrepresentation of the center's effectiveness in deciding where to lodge.94 Finally, although the trial judge erred in failing to instruct the jury that

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89. *Restatement (Second) of Torts* § 821B comment g (1979) provides: Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be interference with a public right. A public right is one common to all members of the general public [and] . . . is collective in nature . . . not like the individual right that everyone has not to be . . . negligently injured.

90. 300 Md. at 554, 479 A.2d at 1328. On remand, the Court of Special Appeals held that the applicable statute of limitations did not bar third-party claims against the county for negligent conduct that occurred more than three years prior to the filing of the third-party declaration. *Tadjer v. Montgomery County*, 61 Md. App. 492, 496, 487 A.2d 658, 660 (1985). See *Md. Cts. & Jud. Proc. Code Ann.* § 5-101 (1984). Since third-party actions for indemnification are based on claims that have not accrued from payments already made, the court reasoned that "[t]he statute of limitations has not even begun to run, much less operate as a bar to suit." 61 Md. App. at 497, 487 A.2d at 660. Thus, third-party plaintiffs "can bring suit prior to becoming liable to the original plaintiff and these actions are not barred by . . . any statute of limitations since it is [the defendants'] liability and not [the third-party defendant's] negligence which commenced the running of the statute." *Id.*


92. *Id.* at 677-80, 487 A.2d at 1248-45.

93. *Id.* at 685-86, 487 A.2d at 1247-48. The fact that the manager failed to comply with his franchisor's loss prevention manual was not significant; the manual's procedures were suggestions only. *Id.* at 686, 487 A.2d at 1248.

A jury issue of contributory negligence was presented because the guests (1) failed to lock up their valuables in safety deposit boxes provided by the motel, (2) failed to request the motel to provide an additional security guard or to inform the hotel of the valuables that they were carrying, (3) gave their name, motel, and room number over the telephone to a gem dealer that they had never met, and (4) left their room key on the counter in the lobby without ensuring its receipt by a motel employee. *Id.* at 683, 487 A.2d at 1246.

94. *Id.* at 684-85, 487 A.2d at 1247.
negligence on the motel's part would deprive it of the $300 liability limitation under the "innkeepers' statute," the mistake was harmless error because the jury found no negligence.

2. Vicious Propensity.—In Benton v. Aquarium, Inc., the Court of Special Appeals ruled that the issue of a dog's vicious propensity should have gone to the jury despite plaintiff's failure to show that the dog had ever attacked a human before it bit plaintiff. The court distinguished Slack v. Villari, in which a directed verdict was properly granted to defendant because the dog had never attacked a human and the owner had no reason to believe it ever would. In Benton, evidence indicated that the dog's owner knew the dog was trained to attack, but had simply never before used its attack skills against a human. Although the plaintiff presented jury issues on all the elements of negligence in an animal attack case, the court upheld the directed verdict because the defendant had introduced uncontroverted evidence that plaintiff had failed to heed warning signs and thus had assumed the risk of attack.

96. 61 Md. App. at 688-91, 487 A.2d at 1249-50. For discussion of other issues raised in this case, see supra EVIDENCE notes 155-62 and accompanying text.
98. Id. at 377-78, 489 A.2d at 551.
100. Id. at 477, 476 A.2d at 234-35.
102. "[T]hree elements . . . must be proven against a defendant in order to show negligence [in an animal attack case]: (1) owning or harboring of an animal; (2) with vicious propensities, (3) with knowledge (scienter) of its vicious propensities." Hamilton v. Smith, 242 Md. 599, 608, 219 A.2d 783, 788 (1965). Scienter, which means that the animal's owner knew or should have known of the animal propensity to do the particular mischief complained of, can be shown by evidence that the animal on previous occasions growled and bristled at people, acted as if it were going to bite a person, bit and tore a person's coat, or actually attacked any human being. See id. at 607, 219 A.2d at 787; Bachman v. Clark, 128 Md. 245, 248-50, 97 A. 440, 441-42 (1916); Twigg v. Ryland, 62 Md. 380, 386-87 (1884); Slack, 59 Md. App. at 473, 476 A.2d at 232-33. It is not enough, however, to show that the animal previously attacked other animals, Twigg, 62 Md. at 386, or that the animal attacked a person who provoked it, Slack, 59 Md. App. at 474-75, 476 A.2d at 233, or that the animal belongs to a breed known to be dangerous, id. at 475-76, 476 A.2d at 234.
103. Plaintiff went through a door marked "TRESPASSERS WILL BE EATEN" next to a drawing of a bulldog with its teeth bared. Plaintiff argued that he did not assume the risk because (1) the sign was comical, (2) he knocked first and called out, (3) he perceived no evidence that a dog was present, (4) he was on defendant's premises during normal business hours, and (5) he was a business invitee. 62 Md. App. at 380, 489 A.2d at 552. The court noted, however, plaintiff's own testimony regarding another sign that he saw posted on a nearby door: "That would be kind of dumb of me if I saw a sign that said, 'GUARD DOG ON DUTY,' not to think it was put there for a reason." Id.
3. Attorney Malpractice.—In Kirgan v. Parks,104 the Court of Special Appeals held that an actual or intended beneficiary has no cause of action against the testator's attorney for negligence in drafting the will if the will is valid, the intent expressed in the will is carried out, and the attorney does not concede error.105 The court based its holding on Jones v. Holloway,106 in which the Court of Appeals held that the use of extrinsic evidence to show that the intent of the testator differed from the “plain and unambiguous” language of the will would violate Maryland law.107 In Kirgan, the court did not decide whether a different set of facts, such as an invalid will, would support a malpractice claim against the testator's attorney for negligence in preparing the will.108

G. Products Liability

In Virgil v. “Kash N’ Karry” Service Corp.,109 the Court of Special Appeals stressed the importance of reasonable inferences in establishing the existence of a seller-caused defect110 in a products liability action. Thus, when a thermos sold by defendant exploded when

at 381, 489 A.2d at 553. Thus, as a matter of law, plaintiff was “unreasonable” not to take the warnings seriously, and he assumed the risk when he “voluntarily left his place of safety and crossed the threshold of danger.” Id.

104. 60 Md. App. 1, 478 A.2d 713 (1984). 105. Id. at 12, 478 A.2d at 718-19. In Count I, plaintiff alleged that defendant negligently prepared the testator's will by not making “ample and adequate provision for plaintiff that the testator intended to make.” Count II asserted the same claim in contract, on the theory that plaintiff was a third-party beneficiary of the defendant's employment contract with the testator. The trial court sustained defendant's demurrer to these allegations. Id. at 5, 478 A.2d at 715.

106. 183 Md. 40, 36 A.2d 551 (1944), cited with approval in Kirgan, 60 Md. App. at 13, 478 A.2d at 719.

107. 183 Md. at 46-47, 36 A.2d at 554. Md. EST. & TRUSTS CODE ANN. § 4-102 (1974) requires that “every will shall be (1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator.”

108. 60 Md. App. at 12, 478 A.2d at 718. See Lucas v. Ham, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (legatee, as third-party beneficiary to the employment contract between attorney and client, can maintain action against attorney for negligence in preparing a will).

In deciding whether certain amendments to plaintiff's declaration related back to the time of the filing of the original declaration, the court also held that an amendment does not relate back if it attempts to introduce a new cause of action. 60 Md. App. at 14, 478 A.2d at 719. See Mack Trucks, Inc. v. Webber, 29 Md. App. 256, 262, 347 A.2d 865, 869 (1975).


110. To recover on either a theory of implied warranty of merchantability or strict liability, “plaintiff in a products liability case must satisfy three basics from an evidentiary standpoint: (1) the existence of a defect, (2) the attribution of the defect to the seller, and (3) a causal relation between the defect and the injury.” Id. at 30, 484 A.2d at
plaintiff poured hot coffee into it, the inference of a defect was raised; plaintiff did not need to produce expert testimony to pinpoint the nature of the defect. Similarly, proof that plaintiff handled and cleaned the thermos carefully permitted the factfinder to infer that the defect existed at the time of sale; the mere passage of two or three months between sale and accident did not require, as a matter of law, an inference that the defect arose after the sale.

H. Latent/Patent Rule

In Banks v. Iron Hustler Corp., the Court of Special Appeals reluctantly applied the latent/patent rule to a negligence claim, but declared it inapplicable to a strict liability claim. Characterizing the rule as “an anachronism [that] ought to be discarded,” the court nevertheless followed Court of Appeals precedent and held that a conveyor manufacturer had a duty only to eliminate


111. Id. at 27, 31, 484 A.2d at 654, 656. The court distinguished Jensen v. American Motors Corp., 50 Md. App. 226, 437 A.2d 242 (1981), in which “a complete absence of essential facts from which an inference of a defect could reasonably be drawn” prevented the factfinder as a matter of law from finding a defect in a steering mechanism because driver “testified only that he heard a squeal in the tires and then lost control.” 61 Md. App. at 32, 484 A.2d at 656-57.

112. 61 Md. App. at 27, 33, 484 A.2d at 654, 657. The occurrence of an accident, coupled with “circumstantial evidence tend[ing] to eliminate other causes, such as product misuse or alteration,” may satisfy plaintiff’s burden of proving that the defect existed at time of sale. Id. at 32, 484 A.2d at 657.

113. Id. at 33, 484 A.2d at 657. “The effect of lapse of time on causation is a factor to be considered by the trier of fact in determining the existence of a defect.” Id.


115. The court defined the latent/patent rule as follows: “No cause of action is made out in the absence of an allegation that the injury was caused by a latent defect not known to the plaintiff or a danger not obvious to him, which was attendant on proper use, and that the manufacturer was under a duty to correct or prevent that defect or warn of the peril, at least where the injury is foreseeable or probable . . . or that the article was unsafe for the use for which it was supplied. . . .” Id. at 419, 475 A.2d at 1248 (quoting Myers v. Montgomery Ward & Co., 253 Md. 282, 293, 252 A.2d 855, 862 (1969)).

116. Id. at 427, 475 A.2d at 1252.

117. Id. at 422, 475 A.2d at 1250. Maryland adopted the latent/patent rule from Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), which was overruled 26 years later by Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976) (requiring products be free of “unreasonable risk of harm,” hidden or obvious).

latent defects, not obvious hazards. Thus, if Banks, a scrap metal worker who caught his hand in an unguarded conveyor mechanism, knew or should have known of the danger before his injury, he would have no negligence claim.

The patency of the danger, however, is a jury question to be decided with reference to such factors as "the complexity of the machine, the knowledge, age, background, experience, intelligence, and training of the person injured, the extent to which his required contact with the device is routine and repetitive, [and the extent to which] he is subject to distractions." The latent/patent rule does not operate to bar a claim in strict liability; instead, the distinction between latent and patent dangers is one of seven factors to be weighed by the factfinder in deciding whether a product is unreasonably dangerous under Restatement (Second) of Torts, section 402A.

The question of causation also presented a jury issue. Iron Hustler Corp. manufactured the conveyor without a guard to protect workers from coming in contact with "nip points," areas where the moving belt contacted stationary metal plates. After installation, Banks' employer added rollers to replace the flat plates, which had tended to shred the belt; the alternations increased the number of "nip points" from four to fourteen. Iron Hustler claimed that these alterations were intervening causes that negated its liability.

The law of negligence recognizes two types of intervening cause: (1) superseding cause, which "so entirely supersedes the operation of the defendant's negligence that [the superseding clause] alone, without [the defendant's] negligence contributing thereto in the slightest degree, produces the injury," and (2) re-

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119. 59 Md. App. at 423, 475 A.2d at 1250.
120. Id. at 412-15, 475 A.2d at 1244-46, 1250.
121. Id. at 424, 475 A.2d at 1251.
123. 59 Md. App. at 433, 475 A.2d at 1255-56.
124. Id. at 412-13, 475 A.2d at 1244-45.
125. Id. at 429, 475 A.2d at 1253.
responsible cause, which is the unnatural and extraordinary negligent act of a second party, not reasonably foreseeable by "a man of ordinary experience and sagacity, acquainted with all the circumstances." 126 A superseding cause always insulates a defendant from liability; a responsible cause does so only if the defendant could not reasonably foresee the intervening actions. 127

The jury must decide whether either type of intervening cause exists and whether a responsible cause severs defendant's liability. 128 In this case, a reasonable jury could have found that (1) the additional rollers did not supersede defendant's negligent failure to install a guard that would have shielded all "nip points," whether original or added equipment, and (2) Iron Hustler should have foreseen that a customer would install rollers to solve the belt shredding problem. 129

In the strict liability context, a manufacturer escapes liability if its product undergoes "substantial change" after sale. 130 This, too, is a jury question; 131 but no matter which of the available standards is used for determining "substantial change," 132 the jury in this case had sufficient evidence to conclude that no such change had occurred. 133

I. Contributory Negligence

In Sanders v. Rowan, 134 the Court of Special Appeals ruled that the familiar distinction between "servants" and "independent con-
tractors" does not always determine whether an agent's contributory negligence will bar the principal's claim against a third party. Historically, the distinction between the two kinds of agent arose from the control test, which imputed to principals the negligence of servants (whose physical movements are subject to close control by the principal), but not the negligence of independent contractors (whose physical movements are not so controlled). The control test, however, was a means of relaxing the principle of respondeat superior in response to the rapid growth of motor vehicle torts and judicial reluctance to hold principals responsible across the board for their agents' highway accidents.

Outside the realm of physical torts, the underlying rationale of respondeat superior continues to govern. Under that rationale, the contributory nonphysical negligence of any agent will be imputed to the principal, whether the control test would classify that agent as a servant or an independent contractor. Thus, a horse owner could not rely on the control test to classify the horse's trainer as an independent contractor in order to avoid having his claim barred by the trainer's negligent misrepresentation. The court stressed

he was responsible for bringing the proper horse to the paddock before each race, id. at 58-59, 484 A.2d at 1032.
135. Id. at 59, 484 A.2d at 1032.
136. Id. at 50-51, 484 A.2d at 1028-29.
137. "In recent years, on account of the extensive use of the motor vehicle with its accompanying dangers, the courts have realized that a strict application of the doctrine of respondeat superior in the modern commercial world would result in great injustice." Henkelmann v. Insurance Co., 180 Md. 591, 599, 26 A.2d 418, 422-23 (1942).
138. 61 Md. App. at 57-58, 484 A.2d at 1032.
139. Id. at 55-56, 484 A.2d at 1031. See RESTATEMENT (SECOND) OF AGENCY § 317 (1958).
140. 61 Md. App. at 51, 484 A.2d at 1028-29. To show that plaintiff's trainer, because he was an independent businessperson not under plaintiff's control, was not a servant, plaintiff relied inter alia on Henkelmann v. Insurance Co., 180 Md. 591, 26 A.2d 418 (1942) (servant/agent renders service to the master; nonservant/agent renders service for the master) and Globe Indemnity Co. v. Victill Corp., 208 Md. 573, 581, 119 A.2d 423, 427 (1956) ("Persons who render service but retain control over the manner of doing it are not servants.").
141. In reaching this conclusion, the court found especially helpful RESTATEMENT (SECOND) OF AGENCY §§ 258, 261, 265, 267 and 317. 61 Md. App. at 57, 484 A.2d at 1032. Under the general rule that an agent's contributory negligence bars the principal's recovery against a third party (§ 317), the Court found that the trainer in this case, while acting within his apparent authority (§ 261), "wittingly or unwittingly" misrepresented the horse's identity (§ 258), causing harm to third parties who relied on the misrepresentation (§ 267). Id. at 59, 484 A.2d at 1032.

The court also looked for support to Maryland precedent, including B.P. Oil Corp. v. Mabe, 279 Md. 632, 643, 370 A.2d 554, 560-61 (1977) (apparent adoption of RESTATEMENT § 267); State v. Katcef, 159 Md. 271, 150 A. 801 (1930) (principals responsible for false representations of their agents); Atlantic Fruit Co. v. Railroad Co., 149 Md.
that the regulatory scheme governing horse racing in Maryland establishes beyond doubt that the owner is "constructively present" through the trainer when the latter brings horses to the paddock and identifies them. As a result, the horse owner could not recover from a racetrack that, along with the trainer, negligently misrepresented the identity of a horse so that it was sold at a loss under the wrong name.

J. Punitive Damages

In Medina v. Meilhammer, the Court of Special Appeals considered the qualitative level of negligence necessary to award punitive damages. The facts of the case were, for the most part, undisputed. Two persons had dug a wide hole in the ground to repair the pipes of an apartment house boiler. The workers knew that a group of children had been playing in the water that had seeped through the hole. They warned the children to stay away and shortly afterwards left the area to obtain materials to cover and barricade the hole. The workers placed a piece of plywood over the hold before leaving, but it only covered two-thirds of the opening. Upon returning, they discovered the plaintiff, two years old at the time, being rescued from the scalding water that had filled the hole. A jury awarded the plaintiff $400,000 in compensatory damages and $300,000 in punitive damages; the defendants

1, 130 A. 63 (1925) (negligence of fruit shipper's agent in regulating railroad car temperature barred shipper's suit against railroad; anticipation of Restatement § 317); and Tome v. Parkersburg R.R., 39 Md. 36 (1873) (adopting the broad rule of respondeat superior).

142. 61 Md. App. at 58-59, 484 A.2d at 1032.
143. Id.
145. Id. at 248-51, 489 A.2d at 39-41. The court also considered a claim of improper venue and the standard of evidence for a directed verdict. The court found that venue was proper. It determined that Md. CTS. & JUD. PROC. CODE ANN. § 6-201 (1984) allows a court to assert jurisdiction, even when the corporation has not established its principal place of business in Maryland. 62 Md. App. at 245-246, 489 A.2d at 38. The appellant also objected to the trial court's dismissal of his motion for a directed verdict. The court pointed out that any evidence, "however slight," presented by the appellees would keep the trial court from granting a directed verdict. Id. at 246, 489 A.2d at 38.
146. 62 Md. App. at 243, 489 A.2d at 37.
147. Id.
148. Id. at 244, 489 A.2d at 37.
149. Id.
150. Id. at 248, 489 A.2d at 39. As a result of his fall into the water-filled hole, two-year-old John Meilhammer "suffered severe burns requiring extensive medical treatment." Id. at 244, 489 A.2d at 37.
contested the award of punitive damages.  

Punitive damages can be awarded in a negligence action if the defendant’s conduct is extraordinary or outrageous. The court defined such conduct as an intentional "act of unreasonable character [done] in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." Although the court charged the defendants with a higher degree of care than usual, it found that their conduct amounted to no more than ordinary lack of care. Thus, the court found that the defendants' conduct was not "so extraordinary or outrageous" that it justified a jury award for punitive damages.

The Medina case appears to be a straightforward tort action, and much of the court's reasoning is drawn from previous Maryland cases and the Restatement. Bearing this in mind, the court's result concerning the punitive damages is surprising. It seems that ample evidence established "reckless" and "willful" conduct by the defendants. After Medina, one can only speculate about what would support a punitive damages award.

K. Contribution

In two cases the Court of Appeals interpreted the provisions of Maryland's Uniform Contribution Among Tort-Feasors Act that specify the proper treatment of releases. In Martinez v. Lopez,  

\[151. \text{Id. at 248, 489} \ A.2d \ at \ 39-40.\]
\[152. \text{Id. The court likened extraordinary or outrageous conduct to wanton, reckless disregard for others.}\]
\[153. \text{Id. at 249-50, 489} \ A.2d \ at \ 40 \ (quoting PROSSER & KEETON ON THE LAW OF TORTS, § 34, at 213 (W. Keeton 5th ed. 1984)).}\]
\[154. \text{Id. at 250, 489} \ A.2d \ at \ 40-41. \text{The court determined that the scalding water with which the defendants were working was a "dangerous instrumentality" that required a higher degree of care. Id.}\]
\[155. \text{Id. at 251, 489} \ A.2d \ at \ 41.\]
\[156. \text{Id.}\]
\[157. \text{Id. at 251-252, 489} \ A.2d \ at \ 41.\]
\[158. \text{Md. ANN. CODE art. 50, §§ 16-24 (1979).}\]
\[159. \text{Id. § 19 provides:}\]
\[\text{A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.}\]
\[\text{Id. § 20 provides:}\]
\[\text{A release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another joint tort-feasor unless the release is given before the right of the other tort-feasor to secure a money}\]
plaintiffs in a medical malpractice action released the codefendant hospital for $725,000 and then obtained a jury verdict against the codefendant doctor for $600,000. The Court of Appeals held that the plain language of section 19 required the reduction of plaintiffs’ claim by the consideration paid for the release ($725,000) because that figure exceeded the hospital’s pro rata share ($300,000) specified in the release. The jury’s verdict of $600,000 established the value of plaintiffs’ claim; hence, the reduction by $725,000 eliminated the entire claim, leaving the nonsettling doctor free from liability to plaintiffs.

The statute “adopt[ed] the jury verdict as the measuring rod of the Plaintiffs’ claim.” Since the release in this case provided for a reduction by the hospital’s pro rata share, the Court of Special Appeals reasoned that § 20 governed exclusively, that the verdict should be reduced only by the hospital’s pro rata share (one-half), and that the doctor was therefore liable for the remaining $300,000 to plaintiff. On appeal, the Court of Appeals stated that §§ 19 and 20 are not mutually exclusive; § 19 is “simply more encompassing than § 20.” The court relied heavily on its opinion in Swigert v. Welk, 213 Md. 613, 133 A.2d 428 (1957), in justifying its holding that consideration exceeding the releasee’s pro rata share must be used to reduce the nonsettling defendant’s liability. In Swigert, the court noted that a $3,500 release would reduce a $4,000 jury verdict to $500, for which the nonsettling tortfeasor would be liable. Id. at 619, 133 A.2d at 431. Thus, Martinez
The court noted that the legislature intended nonsettling defendants to reap such windfalls and that the "parties to the release cannot by their agreement restrict the benefit which the statute says flows from that release to the nonsettling defendant who is not a party to the agreement";\(^6\) nor can the "language of § 19 . . . be tortured into extinguishing that advantage."\(^6\) Plaintiffs, too, benefit from this interpretation of the Act since they retain the excess of the consideration over the verdict and thus receive "more than the total compensation to which [they are] entitled in the eyes of the jury."\(^6\)

\(^6\) Chilcote v. Von Der Ahe Van Lines\(^6\) involved an automobile negligence action in which plaintiffs released two tortfeasors (a driver and his vicariously liable employer) for $18,500 and then obtained a jury verdict against a third tortfeasor (another driver) for

differs only in the degree to which plaintiff's claim is reduced, not in the principle of reduction announced by § 19.

The court also pointed out that four of the seven states that have adopted the Uniform Act in the same form as Maryland (Delaware, Pennsylvania, New Mexico, and Rhode Island) have decided cases on facts similar to Martinez or Swigert. If the consideration paid for the release exceeded both the total liability of settling and nonsettling defendants, i.e., the entire value of plaintiff's claim, the claim was held to be paid in full. Raughley v. Delaware Coach Co., 47 Del. 343, 348, 91 A.2d 245, 247 (Del. Super Ct. 1952); Daugherty v. Hershberger, 386 Pa. 367, 374-75, 126 A.2d 730, 733-34 (1956). If the amount paid for the release exceeded the releasee's pro rata share, but was less than the total shares of all nonsettling tortfeasors, the court reduced plaintiff's claim and credited nonsettling defendants. Garrison v. Navajo Freight Lines, 74 N.M. 238, 392 P.2d 580, 582-83 (1964); Daugherty, 386 Pa. at 374-75, 126 A.2d at 733-34; Augustine v. Langlais, 121 R.I. 802, 402 A.2d 1187, 1189 (1979). 166. 300 Md. 100, 105, 476 A.2d 204 at 201. The benefit flowing to the nonsettling defendant will be short-lived, indeed illusory, if the nonsettling defendant is vulnerable to a contribution action by a releasee who has completely discharged plaintiff's claim. Section 17(c) of the Maryland Act provides that "[a] joint tort-feasor who enters into settlement with the injured person is not entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by the settlement." MD. ANN. CODE art. 50, § 17(c) (1979) (emphasis added). No Maryland court has interpreted the term "extinguished." One plausible reading of the section is that the release must explicitly provide for the elimination of the nonsettling tortfeasor's liability before a contribution action will lie. However, a Pennsylvania court has held that a releasee whose payment more than covers plaintiff's entire claim has "extinguished" the liability of fellow wrongdoers within the meaning of the Uniform Act, leaving the nonsettling defendant open to an action for contribution. Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427 (1962). Contra Best Sanitary Disposal Co. v. Little Food Town, Inc., 339 So. 2d 222 (Fla. Dist. Ct. App. 1976). 167. 300 Md. 106, 476 A.2d at 204.

168. Id. at 104, 476 A.2d at 203. Thus, the court dismissed the Court of Special Appeals' contention that § 19 should not be applied "at the expense of the victims" by wiping out plaintiff's claim against the doctor.

$110,000.\textsuperscript{170} Under \textit{Martinez}, the court had to calculate the pro rata share by which the plaintiff's claim would be reduced.\textsuperscript{171} For purposes of this calculation, the court held that the liabilities of master and servant should be counted as one pro rata share, not two.\textsuperscript{172} Thus, the master's and servant's combined liability represented one-half the $110,000 verdict, or $55,000, and not two-thirds. Since the $55,000 pro rata share exceeded the $18,500 consideration paid for the release, section 19 required that plaintiffs' claim be reduced by $55,000.

In both \textit{Martinez} and \textit{Chilcote}, the court addressed the argument that its interpretation of section 19 would discourage settlements.\textsuperscript{173} Noting that encouraging settlement is a problem for the legislature, the court hinted that adoption of the new version of the Uniform Act\textsuperscript{174} might be the best approach. The new version discharges a settling defendant from all liability for contribution to his fellow tortfeasors, whether or not the release reduces plaintiff's claim by the settling party's pro rata share.\textsuperscript{175}

\textsuperscript{170} \textit{Id.} at 109, 476 A.2d at 206.

\textsuperscript{171} As was the case in \textit{Martinez}, the release provided for reduction of plaintiff's claim by the releasee's pro rata share. Thus, under § 19, the plaintiffs' claim would be reduced by the larger of (1) the consideration paid for the release or (2) the amount of the pro rata share. \textit{Id.} at 110-11, 476 A.2d at 207.

\textsuperscript{172} \textit{Id.} at 122, 476 A.2d at 213. The court based its decision on the history of the Uniform Act, the opinions of commentators, and "the ramifications of indemnification of a master by a servant." \textit{Id.} at 114, 114-22, 476 A.2d at 209, 208-13. Regarding the third consideration, the court noted that servants' duty to indemnify their masters would force the servant in this case to pay two-thirds of the claim if pro rata shares were computed simply on the number of tortfeasor parties. The fairer rule regards their pro rata share as one so that the servant is ultimately liable for only half the total claim, while the other negligent driver is liable for the remaining amount. \textit{Id.} at 121, 476 A.2d at 212-13.


\textsuperscript{173} \textit{See Martinez}, 300 Md. at 104-05, 476 A.2d at 204; \textit{Chilcote}, 300 Md. at 112 n.4, 476 A.2d at 208 n.4

\textsuperscript{174} In 1941, Maryland adopted the Act as published by the Commissioners on Uniform State Laws in 1939. \textit{Martinez}, 300 Md. at 97, 476 A.2d at 200. The new version was published in 1955, but has not been adopted in Maryland. \textit{Id.} at 104-05, 476 A.2d at 204.

\textsuperscript{175} \textit{Id.}; \textit{UNIF. CONTRIBUTION AMONG TORT-FEASORS ACT} § 4, 12 U.L.A. 98 (1975).
Thus, settling defendants can "take a release and close the file," knowing that they have purchased absolute relief.176 Moreover, plaintiffs who were reluctant under the old version to give up an unpredictable pro rata share can, under the new version, rest assured that their claims will be reduced by no more than the consideration paid for the release.177 Nonsettling tortfeasors, on the other hand, remain liable for the whole verdict, reduced only by the consideration paid for the release, unless the release itself provides for a larger reduction.178

This approach creates a danger of collusion or discrimination on the part of a plaintiff who might release one defendant cheaply, whether "from motives of sympathy or spite, or because it might be easier to collect from one than from the other."179 Thus, the Uniform Act adds a good faith requirement that "gives the court occasion to determine whether the transaction was collusive."180

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177. Id.
178. Id. § 4(a).
179. Id.
180. Id.
XII. OTHER DEVELOPMENTS

A. Age Discrimination

In *Johnson v. Mayor of Baltimore*,¹ the Supreme Court held that a federal retirement provision² that establishes age fifty-five as the general retirement age for federal firefighters does not constitute an absolute defense for a local government in an age discrimination action.³ The Age Discrimination in Employment Act (ADEA)⁴ prohibits employment discrimination against persons between forty and seventy⁵ unless the employer establishes that age is a bona fide occupational qualification (BFOQ).⁶ Baltimore City required firefighters to retire at age fifty-five or sixty.⁷ Johnson challenged this provision as a violation of the ADEA. The city contended, however, that the federal requirement for federal firefighter retirement created a BFOQ.⁸

The United States Court of Appeals for the Fourth Circuit agreed with Baltimore City and held that the federal retirement age for firefighters created a BFOQ as a matter of law.⁹ The Fourth Circuit based this ruling on *EEOC v. Wyoming*,¹⁰ in which the Supreme Court upheld the extension of ADEA to state and local governments.¹¹ In *Wyoming*, the Court stated that a state's discretion in retirement decisions was "merely being tested against a reasonable federal standard."¹² The Fourth Circuit interpreted that phrase to

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2. 5 U.S.C. § 8335(b) (1982).
3. 105 S. Ct. at 2727.
5. Id. § 623(a) (1982).
6. Id. § 623(f)(i) (Supp. 1984). The BFOQ must be "reasonably necessary to the normal operation of the particular business." *Id.* In Western Air Lines v. Criswell, 105 S. Ct. 2743 (1985), the Supreme Court adopted the two-prong test developed in *Usery v. Tamiami Trail Tours*, 532 F.2d 224, 235-36 (5th Cir. 1976), to evaluate the merits of a BFOQ defense. 105 S. Ct. at 2753. The test requires the employer to demonstrate first that its age restriction is related to the essence of its business. *Id.* at 2751. Then the employer must demonstrate that it is reasonable to use age as a BFOQ. *Id.* at 2751-52.
8. 105 S. Ct. at 2720.
11. *Id.* at 243.
12. *Id.* at 240. The State had argued that the application of the ADEA to the states violated the tenth amendment, and the federal district court agreed. EEOC v. Wyoming, 514 F. Supp. 595, 600 (D. Wyo. 1981). The Supreme Court, however, found that the ADEA did not "'directly impair' the State's ability to 'structure integral operations
mean that a federal statute requiring retirement at fifty-five for a class of employees established that age as a reasonable standard, and therefore a BFOQ as a matter of law.\(^{13}\)

The Supreme Court reversed.\(^{14}\) It first pointed out that the reasonable standard referred to in \textit{Wyoming} was the ADEA itself, not any particular federal retirement statute.\(^{15}\) The court then reviewed the legislative history of both the federal retirement statute and the ADEA.\(^{16}\) The Court concluded that Congress did not intend the retirement statute to create a BFOQ; rather, it enacted the law to "deal with the idiosyncratic problems of federal employees in the federal civil service,"\(^ {17}\) as well as to maintain a "youthful workforce."\(^ {18}\) The Court found no indication that the age limit was in any way related to the demands of the occupation and even suggested that the motives behind the mandatory retirement age might be inconsistent with the newer ADEA.\(^ {19}\)

The Court also concluded that Congress excluded the previously enacted mandatory retirement statutes from the ADEA because of political expediency, rather than an intention to create a BFOQ.\(^ {20}\) If review of every retirement program had had to be accomplished before enactment, the extension of the ADEA to federal employees would have been significantly delayed.\(^ {21}\) Instead, Congress chose to retain existing retirement ages subject to later review by appropriate congressional committees.\(^ {22}\) Thus, the court

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\(^{13}\) 731 F.2d at 215-16.

\(^{14}\) 105 S. Ct. at 2727.

\(^{15}\) \textit{Id.} at 2722.

\(^{16}\) \textit{Id.} at 2725-25.

\(^{17}\) \textit{Id.} at 2723.

\(^{18}\) \textit{Id.} at 2724. Congress first added this provision to give law enforcement personnel the option of early retirement. Later amendments extended the statute to firefighters and then \textit{required} early retirement. Apparently Congress was concerned that the voluntary provision enabled the best employees to leave government service with an attractive pension and obtain desirable jobs in the private sector. \textit{Id.} at 2723-24.

\(^{19}\) \textit{Id.} at 2724. \textit{But see id.} n.10: "Congress, of course, may exempt federal employees from application of the ADEA and otherwise treat federal employees, whose employment relations it may directly supervise, differently from those of other employers. . . ." (Citations omitted.)

\(^{20}\) \textit{Id.} at 2726.

\(^{21}\) \textit{Id.} at 2725.

\(^{22}\) \textit{Id.}
determined that Congress did not intend the federal retirement provisions to establish BFOQs.\textsuperscript{23}

Because the federal statute mandating retirement for firefighters at age fifty-five did not establish a BFOQ, the Court found its existence irrelevant to Baltimore's argument that a similar retirement age is a BFOQ.\textsuperscript{24} As a result, the Fourth Circuit erred in giving "any weight, much less conclusive weight, to the federal retirement provision."\textsuperscript{25}

The city also argued that congressional determination of a BFOQ for federal employees is dispositive for nonfederal ones.\textsuperscript{26} Although this argument had no application in Johnson once the Court determined that the federal retirement age was not a BFOQ,\textsuperscript{27} the Court noted that Congress could expressly extend a BFOQ to nonfederal occupations.\textsuperscript{28} The Court also suggested that a federal employment BFOQ might be relevant to nonfederal occupations, but would be only one factor to be considered.\textsuperscript{29}

\textbf{B. Gun Control}

In Montgomery County v. Atlantic Guns, Inc.,\textsuperscript{30} the Court of Appeals held that a state gun control law\textsuperscript{31} preempted a Montgomery County ordinance\textsuperscript{32} regulating the sale of ammunition.\textsuperscript{33} Atlantic Guns challenged the ordinance's validity and sought an injunction against its enforcement.\textsuperscript{34} The trial court declared the ordinance invalid because state law preempted the county's action and enjoined its enforcement.\textsuperscript{35}

The Court of Appeals rejected defendant's argument that the

\begin{itemize}
\item \textsuperscript{23} Id. at 2726.
\item \textsuperscript{24} Id. at 2726-27.
\item \textsuperscript{25} Id. at 2726.
\item \textsuperscript{26} Id. at 2722-23.
\item \textsuperscript{27} Id. at 2727.
\item \textsuperscript{28} Id. at 2726.
\item \textsuperscript{29} Id. at 2727. Bills to amend the ADEA to exclude from its coverage both hiring and retirement age limits for state and local firefighters and law enforcement officers have been introduced in both houses of Congress. H.R. 1435, 99th Cong., 1st Sess. (1985); S. 298, 99th Cong., 1st Sess. (1985).
\item \textsuperscript{30} 302 Md. 540, 489 A.2d 1114 (1985).
\item \textsuperscript{31} Md. ANN. CODE art. 27, §§ 36B-36G (1982 & Supp. 1985).
\item \textsuperscript{32} MONTGOMERY COUNTY, Md., CODE § 57-12 (Supp. 1983). The ordinance prohibited the sale of ammunition unless the purchaser provided proof of lawful possession of the firearm for which the ammunition was being purchased. \textit{Id}.
\item \textsuperscript{33} 302 Md. at 549, 489 A.2d at 1118.
\item \textsuperscript{34} Id. at 541-42, 489 A.2d at 1114-15.
\item \textsuperscript{35} Id. at 542, 489 A.2d at 1115.
\end{itemize}
state law applied only to handguns. The court noted that the handgun act passed by the legislature in 1972 included a clause "preempt[ing] the right of the political subdivisions to regulate said matters [of the Act]." Several provisions of the law imply that the legislature intended to regulate ammunition as well as handguns. Thus, the court concluded that it would be unreasonable to interpret the statute to cover only handguns.

C. Public Information Act

In Cranford v. Montgomery County, the Court of Appeals considered the standards applicable in deciding whether the Public Information Act (Act) exempts documents from disclosure. A newspaper sought documents relating to the construction of the Montgomery County Government Center. The county refused to disclose approximately 130 documents, claiming that they were within the agency memoranda exemption to the Act. The trial court agreed with the county, and the Court of Special Appeals affirmed.

The Court of Appeals first noted that "the bias of the Maryland

36. Id. at 543, 489 A.2d at 1115.
37. Id. Act of Mar. 27, 1972, ch. 13, § 6, 1972 Md. Laws 38, 54 states:
   SEC. 6. Be it further enacted, That all restrictions imposed by the law, ordinances or regulations of the political subdivisions on the wearing, carrying or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters.
38. 302 Md. at 543-47, 489 A.2d at 1115-17. For example, Md. Ann. Code art. 27, § 36B(a) states that the purpose of the law is to protect citizens from violent crimes caused by handguns. Id. § 36B(c)(1) provides some exceptions to the prohibition against handguns for prison guards, sheriffs, and other law enforcement officials, but does not require that the guns be unloaded. Id. § 36B(c)(3), however, specifically requires that guns in transport be carried unloaded.
39. 302 Md. at 547, 489 A.2d at 1117.
42. 300 Md. at 762, 481 A.2d at 222.
43. Id.
44. Md. State Gov't Code Ann. § 10-618(a) (1984) allows the custodian of certain public records, listed in id. § 10-618(b)-(f), to refuse inspection if the custodian believes that inspection would be contrary to the public interest. Id. § 10-618(b) provides that "a custodian may deny inspection of any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit."
45. 300 Md. at 763-64, 481 A.2d at 223.
46. Id. at 762, 481 A.2d at 222.
Act is toward disclosure."47 According to the court, the narrow agency memoranda exemption reflects this bias.48 The exemption has three elements: 1. ‘Interagency or intragency memorandums or letters’ 2. ‘which would not be available by law to a private party in litigation with the agency’ 3. ‘if disclosure to the applicant would be contrary to the public interest.’49 The first element protects the agency’s decisionmaking process, while the second and third elements limit the government’s ability to rely on this type of executive privilege.50

The court relied heavily on interpretations of the federal Freedom of Information Act (FOIA)51 to determine the meaning of these elements.52 First, only memoranda that truly concern decisionmaking are covered by the exemption.53 Any factual matters contained in these memoranda must be extracted to the extent possible.54 Second, documents that would be routinely discoverable do not fall within the exemption.55 Finally, if the documents do not meet the first two requirements for exemption, the potential harm to the public ordinarily will not justify a refusal to disclose them.56

The court imposed strict burdens on the custodian of the documents to justify nondisclosure.57 Again relying on cases

47. Id. at 771, 481 A.2d at 227. MD. STATE GOV’T CODE ANN. § 10-612(a) (1984) provides that “[a]ll persons are entitled to have access to information about the affairs of the government and the official acts of public officials and employees.” Id. § 10-613(a) requires custodians of public records to allow access to them at any reasonable time.

48. 300 Md. at 771 481 A.2d at 227.

49. Id. at 771-72, 481 A.2d at 227.

50. Id. at 772, 481 A.2d at 227.

51. 5 U.S.C. § 552 (1982 & Supp. 1984). Id. § 552(b)(5) exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”

52. See 300 Md. at 772-75, 778-79, 481 A.2d at 227-29, 230-31.

53. Id. at 774, 481 A.2d at 228. See, e.g., NLRB v. Sears Roebuck & Co., 421 U.S. 132, 150 (1975); EPA v. Mink, 410 U.S. 73, 89-91 (1973). The court also noted that this exemption covers attorney work product. 300 Md. at 773, 481 A.2d at 228.

54. 300 Md. at 774, 481 A.2d at 228.

55. Id. at 775, 481 A.2d at 229. See, e.g., Federal Open Market Committee v. Merrill, 449 U.S. 340, 362-63 (1979); EPA v. Mink, 410 U.S. 73, 92 (1973). The Court noted that title 2, chapter 400 of the Maryland Rules of Procedure govern discovery and thus, will ordinarily determine whether particular documents fall within the exemption. 300 Md. at 775, 481 A.2d at 229.

56. 300 Md. at 776, 481 A.2d at 229. The Act does provide special procedures if none of the exemptions apply. If the “custodian believes that inspection would cause substantial injury to the public interest, the official custodian may deny inspection temporarily.” MD. STATE GOV’T CODE ANN. § 10-619(a) (1984). The custodian must then petition the court to determine whether the denial should be continued. Id. § 10-619(b)-(d).

57. 300 Md. at 777, 481 A.2d at 230.
interpreting FOIA, the court held that the custodian must provide a
detailed analysis to the court explaining why documents should not
be disclosed.\textsuperscript{58} The court refrained from suggesting frequent \textit{in camera}
reviews, citing judicial economy, but encouraged such review
if necessary for a responsible determination.\textsuperscript{59}

In \textit{Cranford}, the court found that Montgomery County had
failed to meet its burden of establishing the need for exemption
from disclosure. Montgomery County's justifications were con-
clusory, and neither the county nor the lower courts had considered
the possibility of severability.\textsuperscript{60} Although the court chose to vacate
and remand the case to the circuit court for further proceedings,\textsuperscript{61}
the court sent a clear signal that the Act would be strictly construed.

\textit{Diane M. Lank}

\textsuperscript{58} \textit{Id.} at 778, 481 A.2d at 230. \textit{See}, e.g., Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.
\textsuperscript{59} 300 Md. at 779, 481 A.2d at 231.
\textsuperscript{60} \textit{Id.} at 780-81, 481 A.2d at 232.
\textsuperscript{61} \textit{Id.} at 791-92, 481 A.2d at 237.
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