Survey Developments in Maryland Law, 1985-86
### TABLE OF CONTENTS

#### I. ADMINISTRATIVE LAW

**A. Scope of Agency Power**

1. Authorization
   - a. Consumer Protection Division
   - b. Department of Health and Mental Hygiene
   - c. Baltimore County Board of Appeals
   - d. Police Trial Board
   - e. Public Service Commission

2. Preemption

3. Scope of Judicial Power
   - a. Comptroller of the Treasury
   - b. State Board of Education
   - c. Department of Health and Mental Hygiene
   - d. Insurance Commission

**B. Arbitration**

1. Collective Bargaining Agreements
2. Health Claims Arbitration

**C. Due Process**

1. Tax Refund Interception Program
2. Employment Discrimination

**D. Workers' Compensation**

1. Fees
2. Award Levels
3. Eligibility
4. Exclusivity Under the Act/Limitation on Other Remedies
   - a. Deliberate Intention Exception
   - b. Relation to PIP and UM
   - c. Employment Status under the Exclusive Remedy Doctrine

**E. Attorney Grievance Commission**

1. Neglect
2. Fees
3. Moral Turpitude
   - a. Misappropriating Client Funds
   - b. Tax Fraud

541
4. Mitigation ........................................... 581

F. Other Developments .................................. 583
   1. Freedom of Information .......................... 583
   2. Legislation ....................................... 585

II. Civil Procedure ...................................... 586
   A. Jurisdiction ........................................ 586
      1. In Personam ...................................... 586
      2. Subject Matter ................................... 590
   B. Final Judgments .................................... 590
      1. Lower Court's Erroneous Determination ....... 590
      2. Partial Summary Judgment ....................... 595
      3. Effect of Motion to Alter or Amend .......... 596
      4. Consent Decrees ................................ 596
      5. Consolidated Cases ............................. 597
      6. Revision of Judgments ......................... 599
   C. Statutes of Limitations ............................ 601
      1. Discovery Rule ................................... 601
      2. Soldier's and Sailor's Civil Relief Act ...... 602
      3. Defense Raised in Motion to Dismiss .......... 603
   D. Attorney's Fees ..................................... 605
      1. Decision to Award ................................ 605
      2. Local Court Rules ................................ 608
   E. Choice of Law ....................................... 609
   F. Other Developments ................................ 611
      1. Postjudgment Attachment Procedures .......... 611
      2. Inadequate Record Extract ...................... 614
      3. Forfeiture ........................................ 615
      4. Justiciability ..................................... 615
      5. Determination of Employment Relationship ... 616
      6. Abuse of Discretion ................................ 617
      7. Res Judicata ....................................... 619

III. Commercial Law ...................................... 620
   A. Debtors and Creditors .............................. 620
      1. Role of Mortgage Agents ......................... 620
      2. Correction of Default Prior to Institution of
         Foreclosure Proceedings ......................... 621
      3. Garageman's Lien as to Purchaser Without
         Notice ............................................ 622
      4. Liability of Cosignor of Installment Sales
         Contract .......................................... 623
5. Voidable Preferences ........................................ 624
6. Priority of Antecedent Perfected Security Interest .................................................. 626
7. Acceptance of Late Payments as Waiver ............................................. 628
8. Conversion on Repossession ............................................................. 630
9. Fraudulent Conveyances in Administration of Estates ........................................... 631
10. Subordination of Vendee's Lien Through Consent Clause .......................................... 631

B. Corporations and Associations ................................................................. 632
1. Termination Clause in Management Contract .................................................... 632
2. Beer Franchise Fair Dealing Act ........................................................................ 633

C. Insurance ........................................................................................................ 635
1. Method of Computing Period of Incontestability ................................................... 635
2. Distribution of Dividend to Former Mutual Policyholders ......................................... 637
3. Intended Damages Clauses .................................................................................. 639
5. Uninsured Motorist Coverage ................................................................................ 641

D. Uniform Commercial Code—Measure of Damages for Breach of Warranty of Title ................................................................. 642

E. Contracts—Failure of Condition ........................................................................ 642

F. Banking ............................................................................................................... 643
1. Conversion of Capital Stock Savings and Loan to Commercial Bank ......................... 643
2. Acquisition of Maryland Bank by Out-of-State Holding Company ............................ 644

G. Consumer Protection—Automotive Repair Facilities Law and Commercial Customers ................................................................. 644

IV. CONSTITUTIONAL LAW ..................................................................... 647
A. Maryland Constitutional Law .................................................................................. 647
1. Equal Rights Amendment ...................................................................................... 647
2. Power of Counties to Enact Ordinances ................................................................ 651
3. Conflict Between County Charter and Public General Law ................................... 653

B. Commerce Clause ............................................................................................. 655

C. Freedom of Speech—Public Employees ............................................................... 657

D. Due Process ......................................................................................................... 660

E. Equal Protection .................................................................................................... 663

F. Right to Jury Trial ................................................................................................. 669

535
G. Preemption ........................................ 673

V. CRIMINAL LAW ........................................ 675
A. Constitutional Issues ................................ 675
  1. Probable Cause ................................ 675
  2. Double Jeopardy ................................ 675
  3. Right to Counsel ................................ 678
  4. Miranda ....................................... 683
  5. Self-Incrimination ............................ 684
  6. Right to Jury Trial ........................... 685
  7. Right to Confrontation ..................... 689
  8. Identification Evidence .................... 689
  9. Search and Seizure ........................... 691
  10. Death Penalty ............................... 694
      a. Allocution ................................ 694
      b. "Death Qualified" Juries ............... 695
      c. Aggravating and Mitigating Factors .... 697
  11. Speedy Trial .................................. 700
B. Crimes ........................................... 701
  1. Elements ..................................... 701
      a. Criminal Attempt ........................ 701
      b. Assault .................................. 701
      c. Gambling ................................ 702
      d. Homicide ................................ 703
      e. Sexual Act ................................ 705
      f. Theft .................................... 705
  2. Defenses—Entrapment .......................... 706
C. Procedure ........................................ 706
  1. Indictments .................................. 706
  2. Discovery .................................... 707
  3. Injunctions .................................. 708
  4. Pretrial Motions ............................. 710
  5. Recusal ..................................... 711
  6. Judicial Conduct ............................ 711
  7. Illegal Sentence ............................. 712
D. Sentencing ....................................... 713
  1. Accessory After the Fact .................... 713
  2. Restitution .................................. 714
  3. Enhanced Punishment Statute ............... 715
  4. Probation .................................... 720
**VI. Evidence** .......................................................... 722

A. Relevance .......................................................... 722

B. Character and Reputation—Prior Bad Acts .............. 723

C. Hearsay ............................................................ 726
   1. Prior Recorded Testimony .................................. 726
   2. Business Records Exception ............................... 728
   3. Present Sense Impression Exception ..................... 729
   4. Excited Utterance Exception .............................. 730
   5. “Catch-All” Exception ..................................... 731

D. Failure to Preserve Evidence; Spoliation ................. 732

E. Qualification of Expert Witness ............................. 733

F. Sequestration ..................................................... 734

G. Testimonial Competence ....................................... 734

H. Arguing Law ....................................................... 735

**VII. Family Law** .................................................. 738

A. Monetary Award Under the Marital Property Act ....... 738
   1. Three-Step Process: General Provisions of the 
      Marital Property Act ...................................... 738
   2. Determination of Marital Property ....................... 741
      a. Definition of “Property” ............................... 741
      c. Separation Agreements and Marital 
         Property .................................................. 746
   3. Valuation of Marital Property ............................ 748

B. Alimony ............................................................. 750

C. Rosenberg v. Rosenberg ......................................... 751
   1. Monetary Award ............................................. 752
      a. Inclusion of Loans and Cash Advances ............... 752
      b. Valuation of Pension Plans and Retirement 
         Accounts .................................................. 753
      c. Trust Interest—Nonmarital Assets ................. 756
      d. Determining the Monetary Award .................... 757
      e. Computation of the Monetary Award ................. 761
   2. The Cross-Appeal ............................................. 761
   3. Alimony .......................................................... 762
      a. Indefinite Alimony ...................................... 762
      b. Amount of the Award .................................... 762
   4. Fees and Costs ................................................ 763

D. Child Support .................................................... 765
   1. Scope of Parental Duty ..................................... 765
   2. Support Agreements .......................................... 765
3. Enforcement of Support Obligations ........... 766

E. Custody and Visitation .................................. 767
   1. Custody .................................. 767
   2. Visitation ................................ 772

F. Adoption ............................................ 773

G. Enforceability of Private Agreements ........... 776
   1. Agreement Not to Litigate ...................... 776
   2. Unconscionability ............................ 777

H. Other Developments .................................. 778
   1. Subject Matter Jurisdiction ................... 778
   2. Infants .................................... 778
   3. Restitution ................................ 780

VIII. Health Care ........................................ 782
   A. Cost Containment—Certificates of Need ........ 782
   B. Medical Malpractice—Arbitration ............. 786
      1. Procedure ................................ 787
      2. Joint Tortfeasor Releases .................... 792
   C. Legislative Developments ....................... 794
      1. Cost Containment ............................ 794
      2. Medical Malpractice—Arbitration ............ 797
      3. Health Insurance—Policies—Nonduplication
          Provisions ................................. 799
      4. Developmental Disabilities Administration 800

IX. Property ............................................ 801
   A. Zoning and Planning ............................. 801
      1. Zoning Board of Appeals .................... 801
      2. Procedure—De Novo Hearings of Zoning
          Appeals ................................... 803
      3. Master Plans ................................ 803
   B. Takings ......................................... 804
      1. Standard ................................... 804
      2. Landowner’s Testimony ........................ 806
   C. Property Rights .................................. 807
      1. Adverse Possession .......................... 807
      2. Accretion .................................. 808
      3. Antenuptial Contracts ........................ 809
   D. Landlord-Tenant ................................ 810
      1. Security Deposits—Treble Damages ............ 810
      2. Smoke Detectors ............................. 812
   E. Estates .......................................... 813
1. Wills ............................................................. 813
2. Appeal by Personal Representative .... 815

F. Security Interests ........................................ 816
   1. Foreclosure Sale Price ............................ 816
   2. Mechanics' Liens .................................. 817

G. Power of Attorney ........................................ 818

H. The Washington Suburban Sanitary Commission .... 820

I. In Rem Actions ..................................... 821

J. Legislation—Chesapeake Bay Critical Areas .... 821

X. TAXATION ............................................... 824
   A. Income Tax ........................................... 824
      1. Domestic International Sales Corporations ... 824
      2. Valuation of Mineral Leases ................. 825
   B. Interest on Refunds .................................. 827
   C. Maryland Tax Court .................................. 829
      1. Statute of Limitations .......................... 829
      2. Exhaustion of Remedies ....................... 831
   D. Personal Property Tax .............................. 831
   E. Real Estate Taxes .................................. 833
      1. Property Tax Exemption ....................... 833
      2. Transfer Tax ..................................... 834
   F. Use and Retail Sales Tax ............................ 836

XI. Torts .................................................... 838
    A. Abuse of Process ................................... 838
    B. Damages ............................................ 839
       1. Cap .............................................. 839
       2. Punitive Damages ............................. 841
    C. Infliction of Emotional Distress ............... 842
       1. Intentional ...................................... 842
       2. Negligent ....................................... 844
       3. Damages ......................................... 845
    D. Invasion of Privacy ................................. 845
    E. Malpractice ......................................... 847
       1. Attorney ......................................... 847
       2. Medical .......................................... 849
          a. Statute of Limitations ...................... 849
          b. Burden of Proof .............................. 853
    F. Negligence ............................................ 854
       1. Duty .............................................. 854
       2. Contributory Negligence ..................... 858

539
G. Negligent Hiring ..................................... 859
H. Negligent Misrepresentation .......................... 862
I. Privilege and Immunity ............................... 863
   1. Immunity ...................................... 863
   2. Privilege ...................................... 867
J. Products Liability .................................... 870
K. Statutes of Limitations ............................... 877
   1. Generally ...................................... 877
   2. Latent Diseases .................................. 878
L. Workers’ Compensation ............................... 881
   1. Exclusive Remedy ................................ 881
   2. Wrongful Discharge ............................. 884

Table of Cases .............................................. 901
I. Administrative Law

A. Scope of Agency Power

An administrative agency is "[a] governmental body charged with administering and implementing particular legislation." The agency's power is derivative; a governmental body cannot authorize an agency to perform any function that, constitutionally or by charter, it could not perform itself. The enabling legislation sets forth, in general terms, an agency's powers. The agency then promulgates more specific rules and regulations. Furthermore, a state agency's power may be expressly or impliedly preempted by federal action in the same area. Thus, the scope of proper administrative power may involve complex matters of constitutional, statutory, or regulatory interpretation.

1. Authorization.—a. Consumer Protection Division.—In Consumer Protection Division Office of the Attorney General v. Consumer Publishing Co. the Court of Appeals addressed a broad array of issues involving the scope of enforcement powers held by the Consumer Protection Division Office of the Maryland Attorney General (Division). The Consumer Publishing Company, Inc. (company), which sold diet pills through the mails, appealed from the Division's cease and desist order directed at the company's allegedly false and deceptive advertisements. The circuit court vacated the Division's order and substituted a new order, allowing the Division to enforce terms of an agreement between the company and the United States Postal Service.

In 1938, in Board of Zoning Appeals v. McKinney, the Court of Appeals had held that certain administrative agencies acting in a nonadversarial, quasi-judicial capacity cannot appeal the reversal of their decisions by a circuit court, unless granted that power by statu-

1. BLACK'S LAW DICTIONARY 42 (5th ed. 1979).
2. B. SCHWARTZ, ADMINISTRATIVE LAW § 1.6 (2d ed. 1984).
3. Id. at § 1.12.
5. The Consumer Publishing Company, Inc. was incorporated in Ohio. Id. at 737, 501 A.2d at 51.
6. Id. at 737-38, 739-40, 501 A.2d at 52, 53. The company claimed that the diet pills promoted permanent weight loss. Two physicians disputed this contention at the administrative hearing. Id. at 738, 501 A.2d at 52.
7. Id. at 740-41, 501 A.2d at 53. The terms of this agreement were not detailed.
8. 174 Md. 551, 199 A. 540 (1938).
Despite this, the Court of Appeals preliminarily determined that the Division had the authority to seek review of circuit court decisions. Because the Division’s participation in litigation is essential to its role as protector of consumer and State interests, and because its regulations give the Division a civil prosecutorial role in Division-initiated cases, the Court of Appeals held that the McKinney doctrine did not preclude the Division’s powers to seek appellate review.

The Court of Appeals then held that the circuit court's substitution of the company/Postal Service agreement for the Division's final order constituted an invalid usurpation of the Division's determination. The court found that the replacement of the agency's order with an entirely distinct order exceeded the circuit court's modification powers.

The Court of Appeals also articulated its views on a number of other consumer protection enforcement issues, in response to the company's plea to uphold the circuit court's reversal of the Division's decision. First, the court found no violation of the fourteenth amendment's equal protection clause in the Division's failure to proceed against any other company that similarly marketed the same goods. The court held that even if there had been such market activity, conscious selectivity is not a per se constitutional violation;

9. Id. at 562-64, 199 A. at 545-46.
10. The court reasoned that since the Attorney General is a constitutional officer whose duties include prosecuting and defending cases on behalf of the State in order to promote the State's policies and protect its rights, the Division, as a part of the Attorney General's Office, is charged with the same mandate. 304 Md. at 744-45, 501 A.2d at 55.
11. Md. REGS. CODE tit. 2, § 01.02.14(B) (1986) provides that when the Division itself initiates an investigation, the Division is the party proponent. Md. REGS. CODE tit. 2, § 01.02.14(C) (1986) further provides that the party proponent has the obligation of demonstrating probable cause that a violation of the consumer protection laws has occurred.
12. 304 Md. at 746, 501 A.2d at 56. The Court of Appeals quoted from the following exception to the McKinney rule:

There are administrative boards and agencies, such as the State Tax Commission and the Public Service Commission, the functions of which are so identified with the execution of some definite public policy as the representative of the State, that their participation in litigation affecting their decisions is regarded by the Legislature as essential to the adequate protection of the State's interests.

McKinney, 174 Md. at 561, 199 A. at 545.
13. 304 Md. at 747, 501 A.2d at 56-57.
14. Md. STATE GOV'T CODE ANN. § 10-215(g)(3) (1984) gives circuit courts the power to "modify" an agency's decision. The Court of Appeals stated, however, that "the authority to 'modify' cannot be stretched to include replacing the agency's order with an entirely distinct one based on an agreement between the company and the Federal Government." 304 Md. at 747, 501 A.2d at 56.
rather, the company must prove that the Division deliberately based its selective enforcement on an unjustifiable standard or arbitrary classification. Second, the court found no merit in the company's claim that since the allegedly deceptive advertising practices were industry-wide practices, the Division made policy and should therefore have proceeded by rulemaking. Even if the company had proved an industry-wide practice, the court found no change in existing law that required a rulemaking proceeding. Finally, citing statutory authority and policy considerations, the court held that the Division had the authority to hold cease and desist order hearings in the absence of consumer complaints.

In response to the company's claim that collective procedural irregularities imposed by the Division constituted a violation of due process, the Court of Appeals further elucidated the guidelines and limits of consumer protection proceedings. The court approved the Attorney General's issuance of a press release announcing the charges against the company and the scheduling of hearings: timely public notification was necessary to prevent further gain from the unfair or deceptive practices. The press release may have demonstrated some prejudgment by the Attorney General, but only if the case's decisionmaker issued the actual prejudicial press release would there have been a possible due process violation. In addition, the court held that the conciliation provision of the Consumer Protection Act, requiring the Division to attempt to conciliate cases if it believes a violation has occurred, did not apply to the instant case, because the Division had itself initiated the complaint.

16. 304 Md. at 753, 756, 501 A.2d at 59-60, 61.
17. Id. at 756, 501 A.2d at 61.
18. Id. at 759, 501 A.2d at 63. Md. Com. Law Code Ann. § 13-403(c)(1) (1983) states that the Division may file an action in court to preserve the status quo "at any time after a complaint has been filed." The court found that the term "complaint" reasonably encompassed both a consumer complaint and a complaint filed by the Division itself. 304 Md. at 758, 501 A.2d at 62.
19. 304 Md. at 761, 501 A.2d at 64.
20. Id. at 764-65, 501 A.2d at 65-66.
21. Id. at 765-66, 501 A.2d at 66. In this case the court found no evidence that the Attorney General's press release revealed a prejudgment of facts. The court also pointed out that the Attorney General was not the actual decisionmaker in this case, and that there was no evidence that the hearing officer or the Chief of the Division was in any way pressured by the Attorney General or anyone else prosecuting the case. Id. at 766, 501 A.2d at 66.
23. 304 Md. at 768, 501 A.2d at 67.
Finally, the Court of Appeals upheld the Division's power to enter a general order of restitution without direct proof of purchaser reliance; however, it vacated the restitution provision in the instant case because the Division's order did not provide a procedure for processing individual consumer claims. In support of its determination, the court pointed out that some of those purchasing the company's products may not have relied on the false advertisement claims, that some of these consumers may not want refunds, and that other jurisdictions had adopted similar requirements for individual determination of consumer restitution claims.

b. Department of Health and Mental Hygiene.—In American Recovery Co. v. Department of Health and Mental Hygiene the Court of Appeals articulated the basis of civil penalties, for a violation of the State's hazardous waste laws, under certain statutory provisions subsequently amended and codified as amended. The Department of Health and Mental Hygiene (DHMH) issued four civil penalty assessments against American Recovery Company, Inc. (ARC) in 1982, alleging violations under former section 8-1416(d) of the Natural Resources Article. In response to ARC's contention that the statute required a showing of actual pollution before imposition of a civil penalty, the court stated that the assessment is based upon the violation itself, not upon the harm caused by the violation. The court relied on the statute's policy objective of pollution prevention in holding that the Department need not wait until environmental effects can be proven.

24. The court noted the difficulty in obtaining direct evidence of reliance on deceptive or misleading advertisements. Id. at 778, 781, 501 A.2d at 72, 74. In the instant case there was no direct evidence of consumer reliance, but the Division had determined that the company advertised in Maryland at the time sales were made, the pills were only available through mail order, and the company never contended that Maryland consumers purchased pills in any other way than from the advertisements in evidence. Id. at 780, 501 A.2d at 73-74.

25. Id. at 775, 501 A.2d at 71.


27. 306 Md. 12, 506 A.2d 1171 (1986).


31. 306 Md. at 15, 506 A.2d at 1172.

32. Id. at 18, 506 A.2d at 1174.

33. Id. at 18-19, 506 A.2d at 1174.
Consistent with this policy objective, the state legislature in 1983 amended the controlling statute, providing for "potential for harm" as a consideration in the DHMH's penalty assessment determination. The Court of Appeals held that this standard, although not expressly stated in the former statute, has always been implicit in the DHMH's power to assess fines for any statutory violations that by their nature pose potential environmental harm. Citing a consistent line of cases holding that a subsequent amendment of a statute is not controlling as to the meaning of the prior law, the court rejected ARC's contention that the statutory amendment, adding "potential harm" as a criterion, precluded DHMH's consideration of such a provision in its interpretation of the pre-amendment civil penalty statute.

ARC claimed that because DHMH's Assistant Secretary for Environmental Programs, the hearing officer in the ARC case, appeared as a witness before a congressional subcommittee and testified on the case prior to the final hearing before DHMH, ARC was denied an impartial decisionmaker in the administrative proceedings. The Court of Appeals disagreed. The testimony did not amount to a prejudgment of the merits of the case: the official did nothing more than recite the facts that supported the institution of a civil penalty proceeding.

c. Baltimore County Board of Appeals.—In Baltimore County v. Penn the Court of Special Appeals held that the Baltimore County Board of Appeals had jurisdiction to hear appeals concerning personnel and retirement matters. After the Board of Appeals authorized accidental disability retirement for two Baltimore County policemen, Baltimore County alleged that its own charter did not define personnel and retirement matters as falling within the juris-

35. 306 Md. at 18, 506 A.2d at 1174.
37. 306 Md. at 18, 506 A.2d at 1174.
39. Id. at 20-21, 24-25, 506 A.2d at 1175, 1177.
40. Id. at 25, 506 A.2d at 1177.
42. Id. at 206, 503 A.2d at 260.
d. Police Trial Board.—In *Walker v. Lindsey* an Anne Arundel County police officer sought to enjoin further investigation by the Anne Arundel County Police Department and the Police Trial Board into charges of excessive force in his arrest of a minor. The officer contended that because the complaint against him was signed by the aggrieved minor, the Board lacked jurisdiction pursuant to the applicable Maryland criminal statute. The statute limits the class of claimants eligible to file an action against police officers for brutality to: (1) the aggrieved person, (2) a member of the aggrieved person’s immediate family, (3) any person with firsthand knowledge obtained as a result of the presence at and observation of the alleged incident, or (4) the parent or guardian in the case of a minor child. The police officer first argued that the fourth category, when read in conjunction with the first, meant that if the aggrieved person was a minor, the complaint must be signed by a parent or guardian. The Court of Special Appeals disagreed and held that minors themselves are included in the class of those able to file complaints of brutality. First, the court reasoned that the word “or” carries its customary disjunctive meaning, as opposed to its conjunctive meaning. Since the minor in this case was the “aggrieved person,” he

43. *Id.* at 205, 503 A.2d at 260.
45. 66 Md. App. at 205-06, 503 A.2d at 260. The court viewed an adjudicatory order as “one that decides what the Administrative Procedure Act defines as a ‘contested case’—an agency proceeding that involves ‘a right, duty, statutory entitlement, or privilege of a person . . . .’” *Id.* at 205, 503 A.2d at 260 (citing and quoting *Md. State Gov’t Code Ann.* § 10-201(c)(1) (1984)).
47. *Id.* at 403, 500 A.2d at 1062.
49. *Id.*
50. 65 Md. App. at 407, 500 A.2d at 1064.
could swear to a complaint of brutality.

The court rejected the argument that the use of "or" in its disjunctive sense would render the fourth category of eligible complainants superfluous in light of the second category. A person may be a member of the aggrieved person's immediate family and not a parent or guardian.

Additionally, the court interpreted the legislative history of the statute to indicate an intent not to exclude the possibility of minors filing complaints, but to enable a parent or guardian to file a complaint in cases in which the minor is unable to do so. The legislative purpose behind subsequently expanding the class of eligible claimants to include "a member of the aggrieved person's immediate family" was to "cover all possibilities—broadly, expansively, and with anticipated overlapping."

e. Public Service Commission.—In Baltimore Gas and Electric Co. v. Public Service Commission the Court of Appeals upheld the adjudicatory powers of the Maryland Public Service Commission (Commission) by allowing the Commission in a utility rate determination case to apply a 1978 statutory interpretation that had evolved over a four-year period by way of further development and refinement in subsequent contested proceedings. In construing section 54F of the Public Service Commission Law, which governs the Commission in fuel rate adjustment proceedings, the Commission

51. Id. at 407-08, 500 A.2d at 1064. Walker, the police officer, cited Police Comm'r of Baltimore City v. Downling, 281 Md. 412, 379 A.2d 1007 (1977), in which the court remarked that: "Absent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory ...." 281 Md. at 419, 379 A.2d at 1011.

52. 65 Md. App. at 408, 500 A.2d at 1064. Spouses, sons, daughters, siblings, grandparents, and grandchildren, for instance, are all members of the immediate family, yet are not parents or guardians.

53. Id. at 409, 500 A.2d at 1065. The General Assembly initially created the "parent or guardian" category to provide "an avenue of complaint for an incapacitated minor, an infant of tender years, or a minor of intermediate age who might be either somehow incompetent or too intimidated to file a complaint directly." Id.

54. Id. To interpret the statute as Walker suggested would lead to absurd results, the court noted. For instance, the 17-year-old mother who, along with her child, had been brutalized by a police officer could file a complaint on her child's behalf, but not on her own. The possibility of such a result and others like it were clearly not intended by the General Assembly in enacting this statute. Id. at 409-10, 500 A.2d at 1065.


56. Id. at 165, 501 A.2d at 1317.


58. Formerly, changes in a utility company's expenses, including its fuel costs, were reviewed by the Commission as part of a lengthy base rate proceeding. To alleviate the
held in 1978 that its assessment of the validity of fuel rate adjustments would include consideration of relevant industry statistics as well as evidence concerning specific outages and other incidents of reduced generation at a utility company's plants. In the original Commission proceedings in which the statute was implemented, the Baltimore Gas and Electric Company (BG&E) applied for a Commission determination that the company had maintained the productive capacity of all its generating plants at a reasonable level, in compliance with section 54F(f)(4). The Commission based its approval of BG&E's application in part upon evidence that "the availability of the company's generating units is well above industry averages." The instant case arose when the Commission denied BG&E recovery of increased fuel costs incurred as a result of forced outages at one of its nuclear generating units. The Commission assessed the potential for avoiding increased costs by examining the individual performance of the plant experiencing the outage, as reasonableness of performance could not be based solely on satisfactory performance levels of the power production system as a whole, or on the basis of statistical comparison with the industry. The Commission acknowledged that the performance of BG&E's nuclear facility far exceeded the industry average; however, the Commission denied full recovery of the purchased power costs because BG&E had failed to implement cost-effective procedures that might have prevented such an outage at its nuclear facility. The Court of Appeals found no merit in BG&E's contention that the Commission's interpretation represented a significant de-

substantial regulatory lag between the time that changes in costs were incurred by the utility and the time those costs were reflected in customer rates, the General Assembly established a sliding scale for the automatic adjustment of changes. Fuel rate adjustment plans adopted by BG&E and other major Maryland utilities permitted a company to adjust its rates automatically, subject to later Commission approval, to reflect changes in fuel costs. Id. at 150-51, 501 A.2d at 1309-10; Md. Ann. Code art. 78, § 54F (1980).

59. 305 Md. at 163, 501 A.2d at 1316.
61. 305 Md. at 163, 501 A.2d at 1316.
62. Id. at 153, 501 A.2d at 1310-11. The forced outages occurred at the company's Calvert Cliffs Nuclear Power Plant in 1980 and 1981. The total cost of purchased power resulting from this forced outage was $6,327 million.
63. Id. at 164, 501 A.2d at 1316. This standard, applied by the Commission, followed the standard applied in proceedings involving similar fuel rate adjustment disputes before the instant case, but after the original 1978 statutory interpretation.
64. Id. at 163, 501 A.2d at 1316.
65. Id. at 172, 501 A.2d at 1321. The court upheld the Commission's finding that BG&E was entitled to recover only 25% of its purchased fuel costs from its customers.
parture from the 1978 standard; rather, the Commission's initial interpretation had developed and grown in a manner not inconsistent with the language and purpose of the statute. Accordingly, the court denied BG&E's contention that the standards imposed constituted an illegal promulgation of rules. It would be "patently unreasonable," the court held, to conclude that the mere explanation of the standards through which an agency applies a statute in a contested proceeding gave rise to a promulgation of rules, subject to the notice requirements of Title 7 of the State Government Article. Furthermore, the court upheld the Commission's decision to proceed in this case by way of adjudication, citing the well-settled principle of administrative law that requires deference to the informed discretion of the administrative agency in its choice between proceeding by rulemaking or by adjudication.

The court also considered, as a preliminary matter, the viability of these final orders, which the Commission issued long after the statutory time limit had run. Citing relevant parts of the Public Service Commission Law that provide rehearing and modification powers over original orders, the court upheld the final orders handed down after the deadline. In so doing, the court relied on the notion that the time limits contained within an integrated statutory scheme must be understood in that context and harmonized to the extent possible with the other provisions of the statutory scheme.

2. Preemption.—Section 220 of the Communications Act grants to the Federal Communications Commission (FCC) power to regu-

66. Id. at 165, 501 A.2d at 1317.
68. 305 Md. at 168, 501 A.2d at 1319.
69. Id. at 156, 501 A.2d at 1312. Md. Ann. Code art. 78, § 54F(c) (1980) required the Commission to issue its final order within 90 days of the filing of an application. The statute also divested the Commission of jurisdiction after 90 days, thereby rendering further Commission action ineffectual. While the Commission issued orders in each of the disputed cases within 90 days, subsequent final orders on the three proceedings at issue were issued 630 days, 266 days, and 294 days after BG&E's filing of application. 305 Md. at 154, 155, 501 A.2d at 1311, 1312. Effective July 1, 1983, the time limit was extended to 120 days. Md. Ann. Code art. 78, § 54F (Supp. 1986).
71. 305 Md. at 157, 501 A.2d at 1313.
72. Id.
late "depreciation rates." The FCC Preemption Order enunciated the FCC's position that section 220 preempts all state regulation of depreciation rates. The case of *Chesapeake & Potomac Telephone Co. v. Public Service Commission* presented the question whether section 220, coupled with the FCC Preemption Order, preempted Maryland's authority to establish depreciation rates for intrastate service.

The District Court for the District of Maryland granted the plaintiff, Chesapeake & Potomac (C&P), a preliminary injunction compelling the defendant, the Public Service Commission (PSC), to apply the FCC's prescribed depreciation rates in calculating intrastate charges for telephone services. The court considered several factors, including: (1) the likelihood of C&P's success on the merits of its case; and (2) the public's interest in the injunction.

Citing the Fourth Circuit's approval of Chief Justice (then Judge) Burger's statement that the Communications Act "must be construed in light of the needs for comprehensive regulations and the practical difficulties inhering in the state regulation of parts of an organic whole," the district court held that C&P's chances of eventually forcing PSC to apply the FCC's depreciation rates were good. The court also held that a uniform regulatory policy is in the public's best interest. For this proposition, the court found support in the congressional mandate contained in section 151 of the Communications Act "to make available . . . to all the people of the United States a rapid, efficient, nationwide, and world-wide . . . communications service with adequate facilities at reasonable

---

76. 560 F. Supp. at 845.
77. Id. at 849.
78. Id. at 847. In considering the propriety of granting a preliminary injunction, the court used the standard established in *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). According to *Blackwelder*, courts should consider (1) the likelihood of irreparable harm to the party seeking the injunction; (2) the likelihood that other parties will be irreparably harmed if an injunction is issued; (3) the injunction seeker's likelihood of success on the merits; and (4) the public interest. Both the district court and the Fourth Circuit held that each of these factors militated in favor of an injunction.
80. 560 F. Supp. at 849.
81. Id.
charges . . . .”

Citing similar cases from other jurisdictions, the Fourth Circuit upheld the district court’s finding that C&P was likely to succeed on the merits. The court also upheld the lower court’s holding that the public interest as embodied in section 151 of the Communications Act demanded a centralized regulatory authority. Since the FCC’s Preemption Order sought to achieve this goal, the Order similarly served the public interest.

Upon review the Supreme Court vacated and remanded for proceedings consistent with its recent holding in Louisiana Public Service Commission v. FCC. In Louisiana Public Service Commission the Court directly confronted the issue of whether section 220 of the Communications Act confers upon the FCC exclusive regulatory power over depreciation rates, intrastate or otherwise. The Court observed that Congress created the FCC to centralize regulatory power over communications and to accomplish the broad ends mandated by section 151 of the Communications Act; however, the Court held that section 152(b) of the same Act limits the FCC’s power, enabling it to regulate only interstate depreciation practices. Section 152(b) states: “[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service . . . .”

The Supreme Court rejected the argument that since section 220 expressly grants the FCC the power to prescribe depreciation rates, state depreciation regulations are automatically preempted. The section’s meaning is not “so unambiguous or straightforward as to override the command of § 152(b) that ‘nothing in this chapter shall be construed to apply or to give the Commission jurisdiction’ over intrastate service.”

84. 748 F.2d 879, 883 (4th Cir. 1984).
85. Id.
86. Id.
88. Id. at 1893.
89. Id. at 1899.
91. 106 S. Ct. at 1903. The Court also noted that the principle of statutory construction preferring specific terms over general did not apply in this case. Section 152(b)
Construing sections 151 and 152(b) so as to avoid conflict, the Court also held that Congress intended a dual regulatory system to achieve the national goal of a quick and economical phone system.\textsuperscript{92} Thus, state regulation is not inconsistent with a national policy.

Two of the Fourth Circuit's findings necessarily fall in the wake of \textit{Louisiana Public Service Commission}. On remand, the court will be forced to conclude that C&P's likelihood of success on the merits is nil, and that the public's interest lies in a system of dual regulatory power, rather than a completely centralized regulatory authority.\textsuperscript{93}

3. \textit{Scope of Judicial Power}.—Related to the issue of agency power is the issue of a court's power to review or modify administrative action. An administrative scheme should provide for some type of judicial review.\textsuperscript{94} But a party generally must comply with all administrative procedures before getting into court.\textsuperscript{95} The following cases concern a court's jurisdiction to hear an administrative dispute.

\textbf{a. Comptroller of the Treasury}.—In \textit{Comptroller of the Treasury v. Brand Iron, Inc.}\textsuperscript{96} the Maryland Tax Court had remanded to the Comptroller a taxpayer's appeal.\textsuperscript{97} The Court of Special Appeals reversed and dismissed the appeal because the taxpayer had failed to invoke the jurisdiction of the Tax Court by exhausting all reme-

\begin{itemize}
  \item addresses jurisdiction, and § 220 specifically deals with depreciation. While it is true that § 220 is more "specific" than § 152(b), "the sections are not general or specific with respect to each other." \textit{Id.} at 1902 n.5. Also, § 152(b) dictates how the entire statute should be read, including § 220, by stating that "nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service." 106 S. Ct. at 1902-03 n.5.
  \item 106 S. Ct. at 1899.
  \item 93. The issue then becomes whether a preliminary injunction is proper if it is neither supported by a likelihood of success on the merits nor in the public interest. In \textit{West Virginia Highlands Conservancy v. Island Creek Coal Co.}, 441 F.2d 232, 235 (4th Cir. 1971), the court addressed the import of the "likelihood of success" factor:

  While we express no opinion on the merits of the issues, we can say that their resolution is not immediately apparent. That is enough to say that Conservancy has not embarked on frivolous litigation, and thus interlocutory relief is not improper if Conservancy can also show a need for protection which outweighs any probable injury to the defendant.

  Thus, the court implied that there must be at least some question as to whether the plaintiff will succeed on the merits. If the plaintiff will certainly lose on the merits, a preliminary injunction should not be granted—especially if the injunction is not in the public's interest.

  \item 94. Board of Educ. of Dorchester Co. v. Hubbard, 305 Md. 774, 786, 506 A.2d 625, 631 (1986).
  \item 95. \textit{See id.} at 787, 506 A.2d at 631.
  \item 96. 65 Md. App. 207, 499 A.2d 1325 (1985).
  \item 97. \textit{Id.} at 209, 499 A.2d at 1325.
\end{itemize}
dies before the Comptroller. The appellate court held that the taxpayer's failure to appear before the Comptroller in an informal hearing, to explain this absence in writing as requested by the Comptroller, and to appear before a subsequently scheduled formal hearing rendered the Comptroller's conclusion final and correct. The court's reasoning rested on the legislative policy that the exhaustion of administrative remedies before the Comptroller affords expert and potentially final pre-judicial determination of tax issues as well as a shield for the courts from the complexity and volume of such cases. Fully exploring the administrative process is a condition precedent to Tax Court jurisdiction. The Court of Special Appeals therefore held that the Tax Court lacked any authority beyond dismissing the taxpayer's appeal, leaving the taxpayer with no other recourse.

b. State Board of Education.—The Court of Appeals in Board of Education of Dorchester County v. Hubbard held that the circuit court lacked jurisdiction to decide whether the issues of teachers' certifications and kindergarten class sizes were arbitrable, since such a decision involves an interpretation of the Education Article of the Maryland Code. The General Assembly expressly limited such interpretive power to the State Board of Education.

The court wrote that:

98. Id. at 212, 499 A.2d at 1327. Md. Ann. Code art. 81, § 230 (1980) provides that an appeal to the Maryland Tax Court will be permitted only if a taxpayer "has exhausted his remedies before the appropriate assessing or taxing authority . . . ."

The case stemmed from an assessment levied by the Comptroller for unpaid sales or use taxes due against Brand Iron, Inc. Before the Court of Special Appeals, the Comptroller of the Treasury, Retail Sales Division, challenged a circuit court order remanding this case to the Maryland Tax Court. The Comptroller asserted that this action merely compounded the Tax Court's error in not dismissing Brand Iron's appeal to the Tax Court. For, the Comptroller contended, Brand Iron failed to exhaust the prescribed remedies for a taxpayer seeking revision of a retail sales or use tax assessment.


101. 65 Md. App at 211-12, 499 A.2d at 1327.

102. Id. at 212, 499 A.2d at 1327.

103. 305 Md. 774, 506 A.2d 625 (1986).

104. Id. at 792, 506 A.2d at 634. Md. Educ. Code Ann. §§ 6-401 to 6-514 (1985) authorizes collective bargaining between public schools and public school employees. Md. Educ. Code Ann. §§ 6-402(a), 6-408(b) (1985) limit the union's authority and the school's authority to "all matters that relate to salaries, wages, hours, and other working conditions."

[w]hen the Legislature enacts a comprehensive remedial scheme in which a claim is to be determined by an administrative agency... it establishes, as public policy, that such a procedure produces the most efficient and effective result. In order to effectuate this public policy, trial courts generally should not act until there has been compliance with the statutory comprehensive remedial scheme.\textsuperscript{106}

In so holding, the court recognized the Board of Education’s primary jurisdiction and therefore reversed and remanded the case.\textsuperscript{107}

c. Department of Health and Mental Hygiene.—In \textit{Browning-Ferris, Inc. v. Baltimore County}\textsuperscript{108} the owner and operator of a sanitary landfill, Browning-Ferris, Inc. (BFI), applied for and was denied a renewal of its landfill permit by the Maryland Department of Health and Mental Hygiene (DHMH).\textsuperscript{109} BFI challenged the denial in federal court, alleging that DHMH acted in accord with “improper political or personal motives.”\textsuperscript{110} The United States District Court for the District of Maryland dismissed BFI’s claim without prejudice under the doctrine of \textit{Burford v. Sun Oil Co.}\textsuperscript{111}

In \textit{Burford} the United States Supreme Court held that federal courts should not interfere with a “complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded.”\textsuperscript{112} The underlying concerns of the \textit{Burford} doctrine are federalism and the preservation of a state’s independence in circumstances in which the state is particularly well-suited to resolve complex problems of domestic policy.\textsuperscript{113}

\textit{Md. Educ. Code Ann. 4-205(c) (1985)} requires that appeals from decisions construing the Education Article be taken to the State Board of Education.
\textsuperscript{106} 305 Md. at 787, 506 A.2d at 631 (citing Secretary, Dep’t of Human Resources v. Wilson, 286 Md. 639, 645, 409 A.2d 713, 717 (1979)).
\textsuperscript{107} \textit{Id.} at 792, 506 A.2d at 634.
\textsuperscript{108} 774 F.2d 77 (4th Cir. 1985).
\textsuperscript{109} \textit{Id.} at 78.
\textsuperscript{110} \textit{Id.} at 77. In an agreement between BFI, the State of Maryland, and Baltimore County, BFI was granted a landfill operation permit. The State contended that the permit’s renewal was conditioned upon the execution of a contract of sale of BFI’s landfill property. Because BFI did not execute this contract, it lost its right to renewal of the permit. BFI claimed, however, that the land title transfer was to occur either when the landfill reached its capacity or four years from the date of the execution of the agreement. Since neither had come to pass, BFI alleged that it had not breached the contract and was therefore entitled to a renewal of its permit. \textit{Id.} at 78.
\textsuperscript{111} 319 U.S. 315 (1943).
\textsuperscript{113} 319 U.S. at 318.
Applying Burford, the district court abstained from the matter because: (1) Maryland's statutes concerning the operation of landfills indicate a policy to closely oversee such operations; (2) the regulations governing permit approval involve complex scientific questions; and (3) landfill issues have been of particular concern to state and local governments, rather than the federal government.114 The district court decision effectively upheld the permit denial.

d. Insurance Commission.—In Insurance Service Management, Inc. v. Muhl115 the Court of Special Appeals upheld the circuit court's power to modify and then to affirm as modified an order of the Insurance Commissioner.116 The Court of Special Appeals construed the controlling statutory provision, section 40(5) of the Insurance Code,117 as giving the circuit court the option to affirm, reverse, modify, or choose any combination thereof.118 The appellant had claimed that the circuit court's modification of three out of six of the Commissioner's findings compelled a remand of the case to the Commissioner.119 In response, the Court of Special Appeals cited section 40(4) of the Insurance Code, which calls for a de novo hearing before the circuit court.120 This section, the court contended, supplied a basis for a broadened scope of review.121 Liking the section 40(4) proceeding to the expanded scope of judicial

114. 774 F.2d at 79. The court noted that even if this action could be characterized as contractual in nature, the federal court would still have to address the complexities of state land use control. Id. Thus, abstention was proper.
116. Id. at 218, 500 A.2d at 298.
117. Md. Ann. Code art 48A, § 40(5) (1986) provides that “[t]he court may affirm the decision of the Commissioner or remand the case for further proceedings; or it may reverse or modify the decision . . . .”
118. 65 Md. App. at 224, 500 A.2d at 301.
119. Id. at 225, 500 A.2d at 301.
   Upon receipt of such transcripts and evidence the court shall hear the matter de novo as soon as reasonably possible thereafter. Upon the hearing of the appeal, the court shall consider the evidence contained in the transcript, exhibits, and documents therein filed by the Commissioner, together with such additional evidence as may be offered by any party to the appeal.
121. The court noted that had the appellants' proceeding fallen under the Administrative Procedure Act, Md. State Gov't Code Ann. §§ 10-101 to -405 (1984), in which judicial review is predominantly limited to deciding the issues raised in the appeal strictly on the basis of the record made before the agency, see id. at § 10-215, their argument for a remand to the Commissioner would have been more persuasive. Cf. Insurance Comm'r v. National Bureau of Cas. Underwriters, 248 Md. 292, 236 A.2d 282 (1967) (comparing and contrasting the two types of judicial review).
review under workers' compensation proceedings, the Court of Special Appeals granted the circuit court discretion to determine whether the Commissioner's initial decision remained appropriate in light of revised findings.

B. Arbitration

Binding arbitration is an increasingly popular alternative to the judicial system. Many arbitrable disputes end up in court, however, when one party questions the arbitrator's decision or authority to decide. Maryland appellate cases in the past year addressed the issue of arbitration in the contexts of private agreements and public institutions.

1. Collective Bargaining Agreements.—In Amalgamated Transit Union, Division 1300 v. Mass Transit Administration an arbitrator re-instated a discharged Mass Transit Administration (MTA) employee whose breath had smelled of alcohol while on duty. The Court of Appeals upheld the reinstatement on the ground that Maryland's public policy against drunk driving is not so strong as to warrant undermining an arbitrator's solution.

On November 26, 1983, Andrew Smith, an MTA bus driver, was involved in an accident while on duty. MTA supervisors arrived shortly after the accident and smelled alcohol on Smith's breath. MTA police requested that Smith take a breathalyzer test, but he refused. After an interview with a supervisor, Smith was suspected of driving under the influence of alcohol at the time of the accident; because of those suspicions, he was thereafter discharged.

Under MTA's collective bargaining agreement with the union employees could be discharged only for just cause, and unsettled grievances were to be finally resolved by an arbitrator's binding de-

123. 65 Md. App. at 327, 500 A.2d at 302.
125. Id. at 385, 504 A.2d at 1134.
126. Id. at 390, 504 A.2d at 1137.
127. Id. at 382, 504 A.2d at 1133. While his bus was stopped, a truck smashed its left rearview mirror.
128. Id. at 383, 504 A.2d at 1133. Smith refused the test on the advice of a union steward at the scene.
129. Id. at 383-84, 504 A.2d at 1133-34. Smith's discharge followed a hearing before a superintendent and further review by MTA's Manager-Divisions. Id.
cision. Smith eventually resorted to arbitration. The arbitrator found that the "Sniffer's Test," which the supervisor had administered, amounts only to suspicion, and that "suspicion is not tantamount to proof." The arbitrator thus awarded reinstatement, but denied backpay or benefits.

Despite the ruling and the collective bargaining agreement, MTA did not reinstate Smith; therefore, the union filed a complaint for specific performance in circuit court. Collective bargaining agreements, however, are not enforceable if they are contrary to public policy. MTA thus argued that the arbitrator's decision violated Maryland's strong public policy against drunk driving. The circuit court agreed with MTA, invalidating the decision and rendering the collective bargaining agreement unenforceable.

The Court of Appeals reversed and consequently deemed the arbitration agreement to be binding. The court noted that it was obliged to accept the facts as found by the arbitrator. Of particular importance was the arbitrator's finding that Smith did not operate the bus while under the influence of alcohol, but rather only had the smell of alcohol on his breath. Hence, the court declared that Maryland's public policy did not justify discharging a bus driver on such weak grounds.

The court relied on prior arbitration decisions involving MTA, which indicate that for drivers to be discharged for alcohol use, they must have either been driving while under the influence or consumed alcohol while on duty. While the Sniffer's Test may some-
times be sufficient evidence to support a finding that an individual has driven while under the influence of alcohol, it is not always so. Therefore, no public policy mandates the discharge of a public bus driver if his or her breath smells of alcohol.\textsuperscript{144}

The court also looked to legislative enactments. The General Assembly has made no policy pronouncements that would indicate that the mere odor of alcohol on one's breath rebuts the presumption of innocence.\textsuperscript{145} It is true that pursuant to the Transportation Article, a police officer may administer a chemical test for alcohol if there are reasonable grounds for believing that an individual was driving while intoxicated or while under the influence of alcohol.\textsuperscript{146} It is also true that the Sniffer's Test may furnish reasonable grounds to administer a chemical test.\textsuperscript{147} The Sniffer's Test, however, is in no case determinative evidence of intoxication or alcoholic influence. The subjective test serves only to furnish reasonable suspicion so that the dispositive objective test may be administered. It is entirely possible to have "failed" the Sniffer's Test and yet be innocent.\textsuperscript{148}

Since the General Assembly has little confidence in the ability of police officers' noses to definitively indicate levels of alcohol use, it is unlikely that the General Assembly granted mass transit authorities such power and discretion.\textsuperscript{149} In sum, Maryland's public policy stands firmly against driving while intoxicated or under the influence of alcohol, but not so firmly against driving with alcohol on one's breath. Consequently, the arbitrator's decision was held to be enforceable, and Mr. Smith was reinstated.\textsuperscript{150}

The \textit{Amalgamated} decision is important for a number of reasons. First, it illustrates judicial deference to a collective bargaining agreement concerning binding arbitration; arbitration is a viable alternative method of dispute resolution only to the extent that courts will

\begin{footnotesize}
\begin{enumerate}
\item Id. at 391, 504 A.2d at 1137.
\item Id. at 392, 504 A.2d at 1138. The court stated that the history of prior decisions "is inconsistent with the existence of a public policy which mandates the discharge and nothing less, of any public bus driver who bears the odor of alcohol while on duty." Thus, one may assume, there is no such policy.
\item Id. at 394, 504 A.2d at 1139.
\item 395 Md. at 393, 504 A.2d at 1138.
\item Id. at 394, 504 A.2d at 1139.
\item Id. Mass Transit authorities are even less capable of administering an accurate Sniffer's Test, as police officers deal with cases of public drunkenness on a daily basis, while drunken bus drivers fortunately are few. \textit{See id.}
\item Id.
\end{enumerate}
\end{footnotesize}
enforce such agreements. Second, the case analyzes the legal significance of the "Sniffer’s Test." There is an interesting tension at work here: the desire to avoid attaching too much weight to a subjective test versus the recognition that alcohol is like Justice Stewart’s description of pornography—you know it when you smell it. The court seeks to balance these concerns by acknowledging that the subjective Sniffer’s Test may form the basis for administering a more objective test, but will not of itself provide proof of drunkenness.

2. Health Claims Arbitration.—In McClurkin v. Maldonado the Court of Appeals held that a single panel chairman lacked the authority to dismiss an action brought under the Health Claims Arbitration Act. The plaintiff, Josepha McClurkin, filed a medical malpractice claim under the Act with the director of the Health Claims Arbitration Office (HCAO). Before a full arbitration panel was appointed to hear Ms. McClurkin’s claim, as required by statute, a panel chairman, Mr. Carey, granted a motion to dismiss because of the plaintiff’s failure to complete discovery.

The court observed that the General Assembly purposely fashioned the Health Claims Arbitration Act to provide a “‘balanced decision-making tribunal,’ ” consisting of three arbitrators: an attorney, a health care provider, and a member of the general public who is neither an attorney nor a health care provider. The language of the statute reflects this purpose by exclusively vesting the power to make binding decisions of law and fact in the panel, and not in any specific individual.

Since the proper decisionmaking procedures were not fol-

151. Id. at 388, 504 A.2d at 1135-36.
153. Id. at 234, 498 A.2d at 631.
155. 304 Md. at 227, 498 A.2d at 627.
156. “All issues of fact and law raised by the claim 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 issues of liability with respect to a claim referred to it.” Id. at § 3-2A-05(d) (emphasis added).
157. 304 Md. at 227, 498 A.2d at 627. Initially, the plaintiff failed to respond to the doctor’s discovery requests. Thereafter, the panel chairman, Mr. Carey, granted the doctor’s motion to compel discovery as well as the plaintiff’s request for an extension of time to comply. Approximately three months later, discovery still was not completed. Id.
158. Id. at 231-32, 498 A.2d at 629-30 (quoting and citing Stifler v. Weiner, 62 Md. App. 19, 24, 488 A.2d 192, 194, cert. denied, 304 Md. 96, 497 A.2d 819 (1985)).
ollowed, the court vacated the dismissal of the plaintiff's claim and
remanded the case for consideration by a full arbitration panel.\(^{160}\)

In \textit{Mitcherling v. Rosselli}\(^{161}\) the Court of Appeals, in a four to
three decision, upheld the adequacy of a rejection notice\(^{162}\) filed fol-
lowing an award entered by a health claims arbitration panel.\(^{163}\)
While section 3-2A-06 of the Courts and Judicial Proceedings Article
requires a filing "with the Director [of the Health Claims Arbitra-
tion Office] and the arbitration panel,"\(^{164}\) the court found adequate
a filing with the Director alone.\(^{165}\) The court construed a 1979
amendment\(^{166}\) to section 3-2A-06 as an attempt to centralize the fil-
ing of important documents with the Director; that the present stat-
utory language mistakenly fails to reflect this intent is an apparent
oversight.\(^{167}\) The court further relied upon the codification of
award rejection regulations, in which a filing with the Director alone
is held adequate\(^{168}\) and the intent of procedural simplification is
expressed.\(^{169}\)

\textbf{C. Due Process}

A common issue in administrative law is whether certain admin-
istrative procedures comply with the due process clause of the fifth
or fourteenth amendment.\(^{170}\) Any due process claim must be ana-

\begin{itemize}
\item 160. 304 Md. at 236, 498 A.2d at 632. The court vacated the chairman's decision even though subsequent legislation empowered a chairman to act alone in dismissing a case for failure to comply with a discovery order. See Act of April 9, 1985, ch. 104, 1984 Md. Laws 1245 (codified at Md. Cts. & Jud. Proc. Code Ann. § 3-2A-05(a) (Supp. 1986)). The amendment will apply on remand, but the case is not moot. For after the panel chairman dismissed the claim, the plaintiff tendered some discovery materials. 304 Md. at 228, 498 A.2d at 628.
\item 161. 304 Md. 363, 499 A.2d 476 (1985).
\item 162. Md. Cts. & Jud. Proc. Code Ann. § 3-2A-06(a) (1984) provides that, to pursue a claim in circuit court, "notice of rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party." The appellees, who had appealed to the circuit court, filed a timely notice of rejection with the Director and served a copy on the appellant, but did not file a copy with any member of the arbitration panel. 304 Md. at 365, 499 A.2d at 477.
\item 163. 304 Md. at 368, 499 A.2d at 478.
\item 165. 304 Md. at 368, 499 A.2d at 478.
\item 167. 304 Md. at 368, 499 A.2d at 478.
\item 169. 304 Md. at 366, 499 A.2d at 477.
\item 170. U.S. Const. amend XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.")
\end{itemize}
analyzed in two steps: (1) does due process attach? and (2) what process is due? The first question concerns whether there is a life, liberty, or property interest affected that would trigger the constitutional guarantee. The second question concerns the type of administrative procedure that will adequately protect the individual’s interest.\(^\text{171}\)

The Supreme Court, in *Mathews v. Eldridge*,\(^\text{172}\) articulated a three-part test for determining what process is due. A court must balance:

- First, the private interest that will be affected by the official action;
- Second, the risk of an erroneous deprivation of such interest through the procedure used, and the probative value, if any, of additional or substitute procedural safeguards;
- And finally, the Government’s interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.\(^\text{173}\)

Both of the following cases apply *Mathews* in upholding Maryland statutory procedures as constitutional.

1. **Tax Refund Interception Program.**—Under section 6402(c) of the Internal Revenue Code, states must establish a mechanism to withhold from state income tax refunds a sum equal to the taxpayer’s delinquent, court-ordered child support payments.\(^\text{174}\) The Maryland Statutory Tax Refund Interception Program (TRIP)\(^\text{175}\) is one such mechanism. In *McClelland v. Massinga*\(^\text{176}\) the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of TRIP.\(^\text{177}\) The court also held that “non-obligated spouses”—the spouses of taxpayers delinquent in their court-ordered child support payments—had no standing to contest the validity of intercept proceedings if they had not contributed to the income taxes paid.\(^\text{178}\)

TRIP permits the Administrator of the Child Support Enforcement Administration (Administration) annually to certify to the Comptroller of the Treasury persons delinquent in their child sup-

\(^{171}\) *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

\(^{172}\) 424 U.S. 319 (1976).

\(^{173}\) *Id.* at 334-35.


\(^{176}\) 786 F.2d 1205 (4th Cir. 1986).

\(^{177}\) *Id.* at 1216.

\(^{178}\) 786 F.2d at 1210.
port payments. The Administration must notify the obligated parent of the certification and of his or her right to an investigation of the arrearage if the parent deems the certification inaccurate. If the parent requests an investigation and if an error is found, the Administration must correct the amount of the reported arrearage or withdraw the certification. Otherwise, the Administration must forward the certification to the Comptroller. The Comptroller must then withhold any tax refund due the obligated parent. The parent must be notified within fifteen days of the intercept of the refund check, and of the right to appeal.

In McClelland the plaintiffs brought suit in federal district court against the Secretary of Human Resources and the Comptroller of the Treasury. The TRIP program, the plaintiffs charged, violated the due process clause of the fourteenth amendment by failing to provide a hearing before interception of tax refunds. Additionally, they contended that failure to give notification of certification to the obligor's spouse, when a joint tax return is filed, is a violation of the spouse's due process rights. The district court found for the plaintiffs on both counts.

On appeal the defendants first contended that because the non-obligated spouses had made no contributions to income taxes paid and thus did not have claims to refunds on these tax payments, they lacked standing to contest the validity of intercept proceedings. The plaintiffs responded that a tax refund resulting from the filing of a joint return qualifies as property of both spouses as tenants by the entireties. The spouses, they maintained, consequently had a property interest in the tax refunds and should have been notified of

---

179. Md. Fam. Law Code Ann. § 10-113(a) (1984). A person is delinquent if he or she is "more than 60 days in arrears of support payments under the most recent court order." Id.
180. Id. at § 10-113(b).
181. Id. at § 10-113(d)(2)(ii).
182. Id. at § 10-113(d)(1).
183. Md. Regs. Code tit. 7, § 07.02.03E (1986). If the obligor appeals, he or she is accorded a hearing before an impartial review officer. The obligor also has the right of judicial review from an adverse decision. Id. at § 07.02.05D.
184. 786 F.2d at 1206.
185. Id. at 1207.
186. Id.
187. Id. at 1208.
188. Id.
189. Id. A tenancy by the entireties is one in which a husband and wife together "hold title to the whole with right of survivorship." Black's Law Dictionary 1314 (5th ed. 1979). Maryland has long recognized such a tenancy. See, e.g., Jones v. Jones, 259 Md. 336, 339, 270 A.2d 126, 128 (1970).
the intercept procedure.\textsuperscript{190}

The appeals court held for the defendants. Under Maryland law\textsuperscript{191} an estate by the entireties arises only if there has been a "manifest intention by the parties or one of them, to create such an estate."\textsuperscript{192} In this case, however, the husbands did not intend "to create an interest in any possible overpayment in favor of the wives as tenants by the entireties."\textsuperscript{193} In addition, federal tax decisions\textsuperscript{194} have consistently held that the filing of "a joint income tax return does not create new property interests for a husband or wife in each other's income tax overpayment."\textsuperscript{195}

The second issue was the plaintiffs' claim that they were entitled to a hearing before interception of their tax refund checks. The court acknowledged that the plaintiffs have a property interest in the refunds,\textsuperscript{196} and "that some form of hearing is required before an individual is finally deprived of a property interest."\textsuperscript{197} This hearing, however, need not always take place before the deprivation of property. For, the Supreme Court has stated, "[T]he fundamental requirement of due process is the opportunity to be heard... 'at a meaningful time and in a meaningful manner.'"\textsuperscript{198}

\textit{Goldberg v. Kelly}\textsuperscript{199} is the only case in which the Supreme Court interpreted a "meaningful time" and a "meaningful manner" as requiring a full adversarial hearing before adverse government action.\textsuperscript{200} Since \textit{Goldberg}, the Court has taken a liberal approach in

\begin{itemize}
\item \textsuperscript{190} 786 F.2d at 1208.
\item \textsuperscript{191} To determine the existence of a property interest, the court must look to the applicable state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
\item \textsuperscript{192} 786 F.2d at 1209; see Diamond v. Diamond, 298 Md. 24, 467 A.2d 510 (1983).
\item \textsuperscript{193} 786 F.2d at 1209.
\item \textsuperscript{194} Maryland tax law, according to the court, "was written 'with both eyes on the federal tax laws.'" \textit{Id.} at 1209-10 (quoting Comptroller of the Treasury v. The Chesapeake Corp. of Va., 54 Md. App. 208, 218, 458 A.2d 459, 466 (1983)).
\item \textsuperscript{195} \textit{Id.} at 1209 (quoting Rosen v. United States, 397 F. Supp. 342, 344 (E.D. Pa. 1975)).
\item \textsuperscript{196} 786 F.2d at 1211.
\item \textsuperscript{197} \textit{Id.} (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (emphasis in \textit{McClelland})).
\item \textsuperscript{199} 397 U.S. 254, 266-71 (1970). \textit{Goldberg}, which concerned termination of welfare benefits, can be distinguished from \textit{McClelland}. Termination of welfare benefits before a determination of ineligibility could deprive an eligible recipient of the only means of subsistence. \textit{Id.} at 266. Interception of a tax refund ordinarily would not pose such a drastic threat. \textit{See} 786 \textit{McClelland} F.2d at 1214.
\item \textsuperscript{200} 786 F.2d at 1211 (citing \textit{Mathews}, 424 U.S. at 343 (1976) and Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985)); \textit{cf. Mathews}, 424 U.S. at 343 ("in general, 'something less' than a full evidentiary hearing is sufficient").
\end{itemize}
determining "meaningful time" and in deciding when a predeprivation hearing is required.201 The McClelland court opined that "it is particularly unnecessary to provide a party with a pre-deprivation administrative hearing, if there is some informal procedure . . . available before deprivation."202

After weighing the Mathews v. Eldridge factors,203 the court concluded that the procedures specified in the TRIP program do not violate the due process clause.204 Procedural safeguards, including most notably the delinquent spouse's right to demand a prompt investigation before interception, protect due process rights.205 The parent in McClelland was not in the same dire need as, for example, the welfare recipients in Goldberg or the recipient of disability benefits in Eldridge.206 The high administrative cost of providing predeprivation hearings further justified the procedural framework of the TRIP program.207

In conclusion, the court balanced the needs of society to provide support payments to children from their obligated parents against the need to protect the obligor's due process rights. On the strength of the Supreme Court's due process decisions, the Fourth Circuit held that "the Maryland procedure is fair and does not offend the parent's due process rights."208

---

201. See, e.g., Mathews, 424 U.S. at 349 (evidentiary hearing not required prior to termination of Social Security disability payments); Bell v. Burson, 402 U.S. 535, 540 (1971) (prior to revoking driver's license, state need only conduct a "probable cause" hearing, not a full adjudication of liability).
202. 786 F.2d at 1213; see Loudermill, 470 U.S. at 547-48; Parratt, 451 U.S. at 543-44.
203. See supra notes 172-173 and accompanying text.
204. 786 F.2d at 1213-14.
205. Id. at 1213. A parent must be in arrears for at least 60 days before his name is prepared for certification. Md. Fam. Code Ann. § 10-113(a) (1984). Upon certification, the parent is notified and given an opportunity to dispute the certification by requesting an investigation into the accuracy of the allegation. Id. at § 10-113(b), (d). The State must complete this investigation within 30 days. Md. Regs. Code tit. 7, § .07.02.04D (1986). After intercept the parent is entitled to a full hearing as well as judicial review. Id. at § .07.02.05D.
206. 786 F.2d at 1214.
207. Id. at 1215. The court remarked:

If . . . the procedure were revised to require the certified parent to request and have a hearing on his delinquency even before he knows whether he is entitled to a refund, the State would be forced to offer hearings and, in many cases presumably, to hold hearings even though it would later be found that no refund was due the particular parent. Such a procedure would represent an intolerable and unnecessary burden on the State, a factor said to be of great importance in this connection, under the standards stated in Mathews.

Id. (footnote omitted).
208. Id. at 1216.
2. Employment Discrimination.—In Vavasori v. Commission on Human Relations\textsuperscript{209} the Court of Special Appeals was confronted with a constitutional challenge to article 49B,\textsuperscript{210} which establishes the procedural guidelines for employment discrimination cases in Maryland.

The plaintiff was fired from his job in July 1978 and filed a timely complaint with the Maryland Commission on Human Relations, alleging employment discrimination.\textsuperscript{211} He was notified over a month in advance that the Commission would conduct a fact-finding conference.\textsuperscript{212} Both the plaintiff and his counsel attended the conference and presented the facts of their case.\textsuperscript{213} The Commission ultimately entered a judgment against the plaintiff, finding that discrimination was not the probable cause for his release from employment.\textsuperscript{214} The plaintiff then filed a motion for reconsideration, submitting new documentation for review together with the record of the original proceeding.\textsuperscript{215} The Commission denied his motion.\textsuperscript{216}

The Court of Special Appeals, having found that the plaintiff was entitled to due process,\textsuperscript{217} first addressed the adequacy of notice of the fact-finding conference. Quoting Bernstein v. Board of Education,\textsuperscript{218} a prior Court of Appeals case, for the proposition that "[a]dequacy of the notice must be determined in light of the particu-

\textsuperscript{211} 65 Md. App. at 241, 500 A.2d at 309. Vavasori was employed as a brake operator for Vulcan-Hart Corporation from May 1967 until being laid off in July 1978. During this time Vavasori suffered back ailments resulting from a spinal fusion. The complaint alleged that his inability to work more than 40 hours a week and to work 10-hour shifts was the basis for his dismissal. Vulcan-Hart, he alleged, honored similar work restrictions for other employees. \textit{Id.}
\textsuperscript{212} \textit{Id.} at 242, 500 A.2d at 310.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.} at 243, 244, 500 A.2d at 309. The court’s analysis of the due process clause of article 24 of the Maryland Declaration of Rights mirrors the Supreme Court’s interpretations of the fourteenth amendment of the United States Constitution, since the two clauses have the same meaning. Department of Transp. v. Armacost, 299 Md. 392, 474 A.2d 191 (1984). Accordingly, before a violation of procedural due process could be demonstrated, one must show that he or she has been deprived of a property interest. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). An interest in a claim of employment discrimination is a property interest protected by the due process clause of the fourteenth amendment. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
\textsuperscript{218} 245 Md. 464, 266 A.2d 243 (1967).
lar circumstances," the court concluded that notice more than one month in advance of the fact-finding conference was reasonable and fair, as it gave the plaintiff ample time to prepare his case.

The court next considered whether the evidentiary conference provided an adequate opportunity to be heard. Applying *Mathews v. Eldridge*, the court balanced Vavasori's interest in being heard against the government's interest in administrative ease and the likelihood that substitute procedures would produce significantly better results than the current scheme. On this basis, the Court of Special Appeals held that the plaintiff received due process. He had two opportunities to obtain a remedy for the alleged discrimination, one at the fact-finding conference and the other in his appeal for reconsideration. "Nothing in the due process clause requires that all claims be afforded a full evidentiary hearing on the merits." And in light of the State's legitimate interest in having discrimination cases expeditiously conducted or promptly dismissed, the balance tipped in favor of the procedures used.

Hence, article 49B comports with due process because it provides an opportunity to be heard "at a meaningful time and in a meaningful manner." The Court of Special Appeals thus dismissed Mr. Vavasori's claim.

### D. Workers' Compensation

Maryland courts considered a number of cases dealing with the administration of the workers' compensation system. Issues considered included the reach of the Workers' Compensation Commission's approval and modification powers over fees stemming from the proceeding, award levels granted by the Commission, eligibility for benefits, employment status under the exclusive remedy doctrine, and the reach of circuit court jurisdiction.

219. 65 Md. App at 250, 500 A.2d at 314.
220. Id.
222. 65 Md. App. at 250-51, 500 A.2d at 314.
223. Id. at 251, 500 A.2d at 314.
224. Id.
225. Id. at 248, 500 A.2d at 313.
226. Id. at 251, 500 A.2d at 314.
228. 65 Md. App. at 251-52, 500 A.2d at 314.
1. Fees.—In *Mitchell v. Goodyear Service Store*\(^{229}\) the Court of Appeals held that an appeal to the circuit court of the amount of the attorney’s fee in a workers’ compensation case is not to be tried de novo.\(^{230}\) Mitchell’s counsel cited statutory language pertaining to attorney’s fee appeals “in like manner as awards for compensation under this article.”\(^{231}\) The attorney reasoned that because appeals as to compensation are heard de novo, appeals as to attorney’s fees must also be so heard.\(^{232}\) The Court of Appeals rejected this contention, stating that the proper action by the circuit court is to remand the case to the Workers’ Compensation Commission for reconsideration of the fee in light of the court’s conclusions of law.\(^{233}\) The court reasoned that the Commission’s fee-setting expertise should not be undermined and that a potential jury trial was an inappropriate setting for an attorney’s fee determination.\(^{234}\)

The Court of Appeals also held that the Commission was entitled to appear as an appellee in the circuit court and in any appellate court.\(^{235}\) In reversing the Court of Special Appeals, which held that the Commission was devoid of standing and was an interloper in such an appeal,\(^{236}\) the court relied in part upon recognition of the Commission as the single and essential provider of claimant protection against excessive fees.\(^{237}\)

The Commission’s claimant protection role was also expanded in *Shauder v. Brager*.\(^{238}\) In that case the Court of Appeals held that the Commission may approve and modify fees of physicians and others who evaluate a claimant in preparation for trial, and who ap-

\(\text{\textsuperscript{230}}\) Id. at 34, 506 A.2d at 1182.
\(\text{\textsuperscript{231}}\) MD. ANN. CODE art. 101, § 57 (1985).
\(\text{\textsuperscript{232}}\) 306 Md. at 31, 506 A.2d at 1180.
\(\text{\textsuperscript{233}}\) Id. at 34, 506 A.2d at 1182. This procedure first appeared in Mayor and City Council of Baltimore v. Bowen, 54 Md. App. 375, 387, 458 A.2d 1242, 1249 (1983).
\(\text{\textsuperscript{234}}\) 306 Md. at 34, 506 A.2d at 1182.
\(\text{\textsuperscript{235}}\) Id. at 36, 506 A.2d at 1183. The court reserved the question as to whether the Commission appearing as an appellee in the circuit court could be an appellant in the Court of Special Appeals. Id. at 36 n.2, 506 A.2d at 1183 n.2.
\(\text{\textsuperscript{237}}\) Id. at 35, 36, 506 A.2d at 1183. The Court of Appeals further relied upon two other findings. First, MD. ANN. CODE art. 101, § 56(c) (1985) provides that the Attorney General must represent the Commission in all proceedings whenever so requested by any of the Commissioners. The court found it significant that this language is found in the section pertaining to appeals. Id. at 35, 506 A.2d at 1183. Second, the court cited numerous instances in which it had permitted other boards and agencies to appear as appellees. Id.
\(\text{\textsuperscript{238}}\) 303 Md. 140, 492 A.2d 630 (1985).
pear for a claimant at trial. On an appeal brought by the plaintiff physicians and psychologists, whose fees the Commission reduced, the circuit court found that the Commission had no statutory authority to regulate fees of evaluating physicians. The Court of Appeals reversed, reasoning that the fees in question arose from the preparation and presentation of the claimant's case, without which claimant could not effectively present his case, such fees therefore fit within the statutory category of "compensation for legal services," which the Commission has long regulated.

2. Award Levels.—In Lucky Stores, Inc. v. Street the Court of Special Appeals held that the statute governing serious disability awards did not permit the merger of disability benefits for accidental injury with awards for occupational disease. The court had previously held that a merger of pre-existing impairment and accidental injury claims could not qualify for serious disability. Occupational disease is analogous to a pre-existing impairment in that there is no prior incapacity until the occurrence of the accidental injury; therefore, the court rejected the occupational/accidental disease merger of claims. The court also relied on the legislative intent of serious disability provisions, noted in Barbee v. Hecht Co.; the General Assembly, the Barbee court reasoned, attempted to achieve only parity of benefits for certain severe injuries by crea-

239. Id. at 149, 492 A.2d at 634.
240. Id. at 143, 492 A.2d at 632. The circuit court relied on Harris v. Janco Enterprises, 53 Md. App. 674, 455 A.2d 453 (1983), in which the Court of Special Appeals ruled that the Commission had no authority under Md. ANN. CODE art. 101, § 37 (1985) to regulate the fees of evaluating physicians. 53 Md. App. at 677, 455 A.2d at 454-55.
241. 303 Md. at 148, 492 A.2d at 634.
242. MD. ANN. CODE art. 101, § 57 (1985) provides in pertinent part: "No person shall charge or collect any compensation for legal services in connection with any claims arising under this article, . . . unless the same be approved by the Commission."
243. 303 Md. at 149, 492 A.2d at 634. The court also relied on the need for claimant protection, id. at 147-48, 492 A.2d at 634, as well as long-standing administrative practice, whereby forms for a petition for attorney's fees also include provisions for medical fees, id. at 146, 149, 492 A.2d at 633, 634.
246. 63 Md. App. at 664, 493 A.2d at 431.
248. 63 Md. App. at 675, 493 A.2d at 436.
250. Before the passage of the serious disability statute, a claimant who was totally and permanently disabled received $30,000 in benefits, while a claimant who was 99% disabled received only $12,500. The purpose of the statute was to eliminate this disparity by providing an additional award in the form of a payment for serious disability. Id. at 362, 486 A.2d at 788.
tion of a fund, the liability of which should be narrowly interpreted.\footnote{251}

3. Eligibility.—In \textit{Adams v. Western Electric Co.}\footnote{252} the Court of Special Appeals explained the eligibility standards for benefits due to occupational disease. The court found little dispute that the claimant had developed an occupational disease during and as a result of employment with Western Electric.\footnote{253} Her claim for permanent partial disability centered on an inability to perform her original job, despite her return to work in another job within the same job classification, at the same labor grade, and at the same or higher wage rate.\footnote{254}

The Court of Special Appeals held that a claimant is not disabled simply because of her inability to perform a particular job.\footnote{255} Nor is she to be regarded as not disabled merely because of an ability to work at some other job with no actual wage loss.\footnote{256} Rather, the analysis should focus on the last occupation in which the claimant was injuriously exposed to the hazards of her occupational disease, and whether by reason of that occupational disease the claimant was disabled from performing work in that occupation.\footnote{257}

Finally, the court implied that the evidentiary record must be thoroughly developed; for only then can courts or the Commission determine how the occupation may be defined and how much of the range of activity fairly included within the occupation is in fact foreclosed to the claimant.\footnote{258} Because the factual record was inadequate, the court remanded.\footnote{259}

4. Exclusivity Under the Act/Limitation on Other Remedies.—a. Deliberate Intention Exception.—Generally, an employee injured in his or her employment must seek relief through the Workers' Compensa-

\footnote{251. \textit{Id.} at 363, 486 A.2d at 788.}
\footnote{252. 63 Md. App. 587, 493 A.2d 392, cert. denied, 304 Md. 301, 498 A.2d 1186 (1985).}
\footnote{253. \textit{Id.} at 589, 493 A.2d at 393. The claimant, an air gun operator, developed ulnar neuropathy and nerve palsy in the arm and hand used to operate the gun.}
\footnote{254. \textit{Id.} The claimant's new job involved washing parts and required no hand-squeezing functions. \textit{Id.} at 590, 493 A.2d at 393.}
\footnote{255. \textit{Id.} at 593, 493 A.2d at 395.}
\footnote{256. \textit{Id.}}
\footnote{257. \textit{Id.} In the final analysis, the court's focus was: "If, indeed, the claimant is able to continue to perform reasonably analogous work within the same occupational classification at the same or higher wages, he is not incapacitated 'from performing his work in the last occupation.' " \textit{Id.} (quoting Md. Ann. Code art. 101, § 22(a) (1985)).}
\footnote{258. \textit{Id.} at 593-94, 493 A.2d at 395.}
\footnote{259. \textit{Id.} at 594, 493 A.2d at 395.}
tion laws. But if the employee's injury results from "the deliberate intention of his employer to produce such injury," the employee may opt out of this administrative network and sue generally in tort. In Johnson v. Mountaire Farms of Delmarva, Inc. the Court of Appeals rejected the argument that "deliberate intention" means that the employer intended to do the act that happens to cause the injury, or that the employer undertook reckless conduct with appreciation of the great risk it poses to another. Such a reading of the statute would broaden the exception to an "intentional tort" exception and ignore the distinct legal concept of deliberate intent.

Rather, the exception requires proof of "an intentional or deliberate act by the employer with a desire to bring about the consequences of the act."

b. Relation to PIP and UM.—Sections 539 and 541 of the Insurance Code require that every motor vehicle liability policy issued, sold, or delivered in Maryland must contain personal injury protection (PIP) and uninsured motorist (UM) coverage. The Code also provides that benefits paid under these coverages "shall be reduced to the extent that the recipient has recovered benefits under workmen's compensation laws of any state or the federal government."

In Hines v. Potomac Electric Power Co. the Court of Appeals applied this provision in denying PIP and UM benefits to a claimant who had already received workers' compensation benefits in excess of the total amount of PIP and UM coverage available to him. The court defended its holding as consistent with a general policy to compensate injured persons.

c. Employment Status Under the Exclusive Remedy Doctrine.—Maryland appellate courts handed down several opinions involving the statutory employer doctrine. This doctrine, which derives from sec-

261. Id. at § 44 (emphasis added).
262. 305 Md. 246, 503 A.2d 708 (1986).
263. Id. at 254-55, 503 A.2d at 712.
264. Id. at 255, 503 A.2d at 712.
265. Id.
267. Id. at § 543(d).
268. 305 Md. 369, 504 A.2d 632 (1986).
269. Id. at 376-77, 504 A.2d at 635-36. The employee had received $35,000 in workers' compensation benefits. The total PIP and UM coverage provided him through his employer was $27,500. Id. at 371, 504 A.2d at 633.
270. Id. at 374, 504 A.2d at 634-35.
tion 62 of article 101, provides that a principal contractor is the "statutory employer" of its subcontractor's employees. Where applicable, the doctrine bars recourse for injured workers except under the provisions of the Workers' Compensation Act.

In Honaker v. W.C. & A.N. Development Co. the Court of Appeals had previously enumerated a four-part test for the doctrine's applicability. To invoke the statutory employer doctrine, there must be:

1. a principal contractor
2. who has contracted to perform work
3. which is a part of his trade, business or occupation; and
4. who has contracted with any other party as a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.

In Wyatt v. Potomac Electric Power Co. the Court of Special Appeals reinterpreted the third part of the test to require that the subcontracted work be an essential or integral part of the principal contractor's business. Applying this test, the court held that the claimant, a subcontractor's employee injured while revamping and retrofitting the electrical control system at the principal contractor's power production facility, engaged in a function essential to the principal contractor's business of providing electricity. The court therefore granted statutory employer status to the principal contractor, precluding compensation for the claimant except under the Workers' Compensation Act.

The court's decision provided that the subcontracting of work essential to the operation of a principal contractor's facility, which in turn is engaged in the actual service or supply of goods, satisfies the

---

272. Id.; see State v. Bennett Bldg. Co., 154 Md. 159, 162, 140 A. 52, 53 (1928). Two justifications have been offered for the doctrine. First, it resolves "the sometimes complex question" of who was the employer. Honaker v. W.C. & A.N. Miller Dev. Co., 278 Md. 453, 454, 365 A.2d 287, 288 (1976). Second, it prevents the principal contractor from shifting liability for the costs of accidents on to subcontractors, who might not be able to bear those costs. Bennett, 154 Md. at 161, 140 A. at 53.
274. Id. at 459-60, 365 A.2d at 291. The court added that the term "principal contractor" is not synonymous with the term "general contractor." Id. at 460 n.4, 365 A.2d at 291 n.4.
276. Id. at 617, 498 A.2d at 280.
277. Id. at 619, 498 A.2d at 280-81.
278. Id.
"essential part" test for granting statutory employer status. Fulfillment of the test also stemmed from the court’s finding that the principal contractor’s compliance with federal and state pollution laws depended upon the revamping.

In a case of first impression, the Court of Special Appeals in Anderson v. Bimblich held that an apartment building owner was a principal contractor within the meaning of the Workers’ Compensation Act and thus the statutory employer of a maintenance man hired by the apartment building’s management company. The third or “essential part” prong of the Honaker test was satisfied: the custodial work that the claimant was hired to perform qualified as an essential or integral part of the business of an apartment owner.

In Whitehead v. Safway Steel Products, Inc. the Court of Appeals held that a worker employed by a temporary services agency was also an employee of the company to which he was provisionally assigned (the utilizing employer). This precluded the employee’s action in tort against the utilizing employer and relegated him to his remedies under the workers’ compensation laws. The court mentioned the five traditional criteria for determining whether an employee/employer relationship existed between the parties; however, it relied exclusively on the criterion relating to whether the employer had power to control the employee’s on-the-job conduct. That the utilizing employer assigned and supervised the worker’s activities, instructed him, and held the power to reassign or dismiss him constituted unequivocal, undisputed, and exclusive con-

279. *Id.* The “essential part” test has been applied in State, Use of Reynolds v. City of Baltimore, 199 Md. 289, 86 A.2d 618 (1952), in which the work of erecting hoists was determined to be an essential part of the actual excavation of a water tunnel and therefore an essential part of the defendant’s business, and Honaker v. W.C. & A.N. Miller Dev. Co., 285 Md. 216, 401 A.2d 1013 (1979), which held that subcontracting for the building of a roof constituted an essential part of the business of a defendant who had contracted to build a house.

280. 64 Md. App. at 619, 498 A.2d at 281.
282. *Id.* at 613, 508 A.2d at 1014.
283. *Id.* at 620, 508 A.2d at 1017.
285. *Id.* at 79, 497 A.2d at 809.
286. *Id.*
287. *Id.* at 79, 497 A.2d at 808. These criteria, developed from the common-law standard for determining the master/servant relationship include (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee’s conduct, and (5) whether the work is part of the regular business of the employer. See Sun Cab Co. v. Powell, 196 Md. 572, 577-78, 77 A.2d 783, 785 (1951).

288. 304 Md. at 78, 497 A.2d at 809.
trol sufficient to establish an employer/employee relationship as a matter of law.\textsuperscript{289}

The Court of Appeals also noted that the utilizing employer indirectly contributed to the worker's insurance protection, as a result of the difference in money paid to the temporary services agency and that paid to the worker.\textsuperscript{290} Citing the strong likelihood that the agency used part of this extra money to pay for the employee's unemployment and workers' compensation insurance, the court found an employer/employee relationship in which the utilizing employer "actually contributed to the insurance protection of one of its employees."\textsuperscript{291}

In Leonard v. Fantasy Imports, Inc.\textsuperscript{292} the Court of Special Appeals used more than one of the five traditional criteria in determining

\begin{flushleft}
\textsuperscript{289} Id. at 79, 497 A.2d at 809. Whitehead invoked the following language from L. & S. Constr. Co. v. State Accident Fund, 221 Md. 51, 59, 155 A.2d 653, 659 (1959):

The fact that control over details as to what work is to be done and the way in which it is to be done may be exercised by the person to whom the employee is sent, will not of itself cause the employee to become the servant of the person to whom he is sent.

In response, the Whitehead court initially attempted to distinguish L. & S. Constr. First, Safway exercised far greater control over Whitehead than L. & S. Constr. had exercised over its putative employee. 304 Md. at 81-82, 497 A.2d at 810-11. Second, the court suggested that L. & S. Constr. applied only in cases involving "lent employees," not temporary employees. See id. at 82, 497 A.2d at 811. Third, the court pointed out that even the L. & S. Constr. court had envisioned a situation, such as this, in which one party had the power to hire and fire an employee, but another had the power to control the employee while he was in its employ. Id. (citing L. & S. Constr., 221 Md. at 56, 155 A.2d at 656). Finally, however, the court found it necessary to overrule L. & S. Constr. to the extent that the prior case suggested that in the absence of conflicting inferences, the issue of control was a question of fact for the jury, rather than a question of law for the court. Id.

\textsuperscript{290} 304 Md. at 79, 497 A.2d at 809.

\textsuperscript{291} Id. In dissent, Judge Eldridge cited the court's use, in previous cases, of the other four criteria in the traditional test of employer/employee status. Id. at 87, 497 A.2d at 813-14 (Eldridge, J., dissenting). He argued that the agency's hiring of the worker, payment of wages to the worker, and power to fire the worker led to the inference that the agency, and not the utilizing employer, was the worker's employer. Had these other factors been applied, conflicting inferences would have arisen. The case could then have gone to the jury. Id. at 91-93, 497 A.2d at 815-17.

The dissent further asserted that if the majority correctly construed the case as presenting a question of law, the majority opinion would remain incorrect. For the majority failed to consider whether the worker was a casual employee of the utilizing employer, a factor that would preclude the applicability of workers' compensation provisions. Id. at 93-94 n.3, 497 A.2d at 817 n.3 (citing Wood v. Abell, 268 Md. 214, 300 A.2d 665 (1973), which held that an employee hired for various odd jobs not to exceed one or two weeks with no promise of future or continuous employment was, as a matter of law, a casual employee).

\textsuperscript{292} 66 Md. App. 404, 504 A.2d 660 (1986).
\end{flushleft}
whether an employer/employee relationship existed. Leonard had been an equal partner with Fantasy in a sportswear business run within Fantasy's separate import car dealership. After abandoning the sportswear venture, Leonard was injured while working on a car owned by a customer of the dealership. Alleging casual employment status, Leonard sought an extension of remedies beyond the Workers' Compensation Act to include a civil tort action against Fantasy. In assessing whether Leonard qualified as a regular or casual employee, the court found no factual dispute as to the arrangement between the parties and therefore made a legal determination of casual employment status. The court relied primarily on an analysis of employer control over the employee, but, notably, the court also based its finding on the scope and duration of the hiring as well as the nature of remuneration.

E. Attorney Grievance Commission

Until the adoption effective January 1, 1987, of the Maryland Rules of Professional Conduct, lawyer conduct in Maryland was regulated by the Maryland Code of Professional Responsibility. Although the Code of Professional Responsibility has been replaced, decisions that interpreted it remain relevant. This is so because many of the rules in the new Rules of Professional Conduct are similar to the rules under the now superseded Code.

The Attorney Grievance Commission was, under the Code, and remains under the new Rules, the administrative body charged with applying the rules to Maryland lawyers. Appeals from the Commission were, and are, heard in the Maryland Court of Appeals. Among the most litigated disciplinary rules under the Code were those providing that a lawyer cannot lie on the bar application.

293. Id. at 415-16, 504 A.2d at 666.
294. Id. at 407-08, 504 A.2d at 662.
296. Id. at 406-07, 504 A.2d at 661. Casual employee status precludes recovery under the Workers' Compensation Act. Md. Ann. Code art. 101, § 21(c)(4) (1985). Thus, the casual employee has the same remedy in tort law as any private citizen.
297. Id. at 414-15, 504 A.2d at 665.
298. Id. at 415, 504 A.2d at 666. At the time of the injury Mr. Leonard was under no obligation to perform clerical or mechanical work, though in the past he had done such work. He was "hired" for brief jobs and was not paid for his work until 10 months later. Id.
299. See Md. R. 1230 and Appendix.
301. See Md. R. Subtitle BV, Discipline and Inactive Status of Attorneys.
engage in fraudulent conduct,\textsuperscript{303} neglect a client's legal interests,\textsuperscript{304} charge an excessive fee,\textsuperscript{305} misappropriate client funds,\textsuperscript{306} or commit a crime of moral turpitude.\textsuperscript{307} The Court of Appeals in 1985-86 considered each of these rules as well as the mitigating effect of drug or alcohol addiction in cases of attorney misconduct.

1. **Neglect.**—In *Attorney Grievance Commission v. Sinclair*\textsuperscript{308} the court considered an attorney's neglect of his client's interests. John Sinclair was retained by Rick Griffith in October of 1981 to represent him in a contract claim. On April 27, 1982, the defendants to the suit filed a counterclaim for damages amounting to $100,000.\textsuperscript{309} Mr. Sinclair failed to respond to the counterclaim in a timely fashion.\textsuperscript{310} Despite this failure, a default judgment against Sinclair's client was stricken.\textsuperscript{311} Mr. Sinclair next failed to respond adequately to interrogatories after a Motion to Compel Answers to Interrogatories had been granted.\textsuperscript{312} Thus, a default judgment was eventually entered against Griffith for $100,000.\textsuperscript{313} The court held that such neglect resulting in default judgment, coupled with Mr. Sinclair's history for neglecting legal matters,\textsuperscript{314} warranted disbarment.\textsuperscript{315}

2. **Fees.**—Many cases are handled by lawyers on a contingency basis, whereby payment of the fee is contingent upon the lawyer's ability to win the case. The lawyer's right to claim a percentage of the recovery is deemed fair when balanced against the risk that he or she may lose and receive nothing; the risk validates the process.\textsuperscript{316}

\textsuperscript{303} Id. at DR 1-102(A)(4).
\textsuperscript{304} Id. at DR 6-101(A)(3).
\textsuperscript{305} Id. at DR 2-106(A).
\textsuperscript{306} Id. at DR 9-102(B).
\textsuperscript{307} Id. at DR 1-102(A)(3).
\textsuperscript{308} 305 Md. 430, 505 A.2d 106 (1986).
\textsuperscript{309} Id. at 433, 505 A.2d at 108.
\textsuperscript{310} Id. at 432, 505 A.2d at 107.
\textsuperscript{311} Id., 505 A.2d at 107-08.
\textsuperscript{312} Id. at 433, 505 A.2d at 108.
\textsuperscript{313} Id.

\textsuperscript{314} Sinclair had been suspended for neglect in *Attorney Grievance Comm'n v. Sinclair*, 302 Md. 581, 490 A.2d 236 (1985), and had received a reprimand in *Attorney Grievance Comm'n v. Sinclair*, 299 Md. 644, 474 A.2d 1338 (1984), for neglecting legal matters. 305 Md. at 435, 505 A.2d at 109.

\textsuperscript{315} 305 Md. at 435, 505 A.2d at 109. Former Maryland Code of Professional Responsibility DR 6-101(A)(3), the principle provision then applicable, provided: "A lawyer shall not . . . [n]eglect a legal matter entrusted to him. DR 6-101(A)(3) has been superseded by Md. R. of PROF. CONDUCT 1.1, which requires that a lawyer provide competent representation, and Md. R. of PROF. CONDUCT 1.3, which requires that a lawyer act with reasonable diligence and promptness in representing a client.

Disputes arise, however, if the client's right to recover is not really in question, yet the lawyer calculates the fee on a contingency basis.

In *Attorney Grievance Commission v. Kemp*\(^{317}\) the Court of Appeals held that a contingency fee calculated in part from the undisputed proceeds from a client's medical payments insurance coverage\(^{318}\) was excessive and therefore in violation of the former Maryland disciplinary rules.\(^{319}\)

The court applied the conclusions reached by the Ethics Committee of the Maryland State Bar Association.\(^{320}\) The Committee concluded that "it would be unethical, in virtually all cases, for a lawyer to charge a contingent fee for collecting a claim against his client's own insurance under [personal injury protection (PIP)] coverage . . . ."\(^{321}\) More generally, the Committee found it "unreasonable and unconscionable" to charge a contingent fee for collections that result from mandatory statutory obligations, rather than from the attorney's professional skills.\(^{322}\)

While medical payments insurance, unlike PIP coverage, is not statutorily mandated, recovery on the policy is generally automatic regardless of fault, so long as standard forms are filed.\(^{323}\) Thus, the attorney's service of filing the proper and routine form in each case is perfunctory in nature. The collection of medical payments insurance benefits rarely depends on the professional skills of the attorney handling the case,\(^{324}\) and since the risk and uncertainty of recovery are low, the attorney should not use these payments in calculating a contingent fee.\(^{325}\)

---

317. 303 Md. 664, 496 A.2d 672 (1985).
318. Medical payments insurance covers the insured's medical bills in the event that the insured requires medical attention. The extent and nature of coverage are clearly set forth in the insurance policy.
319. Former Maryland Code of Professional Responsibility DR 2-106(A) provided that "[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Md. R. of Prof. Conduct 1.5(a) is substantially similar to the former DR.
320. 303 Md. at 676-77, 496 A.2d at 678-79.
322. *Id.* The Committee asserted that "when there is virtually no risk and no uncertainty, contingent fees represent an improper measure of professional compensation." *Id.*
323. 303 Md. at 677, 496 A.2d at 678-79.
324. *Id.*, 496 A.2d at 679.
325. *Id.* at 677, 496 A.2d at 679. The court noted, however, that an attorney may bill to a client a minimal charge for the trouble of filing the appropriate papers. *Id.*
3. Moral Turpitude.—Former Maryland Code of Professional Responsibility DR 1-102(A)(3) provided that “[a] lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude.” A violation of the rule could be proved by a criminal conviction for the underlying offense. A violation of other disciplinary rules, such as those concerning client funds, could also form the basis of a moral turpitude charge. In either event, disbarment was the appropriate sanction.326

The new Maryland Rules of Professional Conduct omit the term “moral turpitude.” New rule 8.4(b), however, does provide that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”327 The comment to rule 8.4 suggests that the new rule represents an attempt to continue and to clarify the traditional distinction between crimes involving moral turpitude and other crimes.328 Hence, cases construing the term “moral turpitude” should remain persuasive authority under the new rule.

a. Misappropriating Client Funds.—Very strict rules govern how an attorney may handle funds, particularly those of a client. The attorney should open separate deposit accounts330 and maintain detailed records of any transactions involving these funds.331 “Misappropriation” is the use of client funds for personal benefit.332 If improper accounting amounted to intentional, rather than merely negligent, misappropriation of client funds, the conduct involved moral turpitude under the former disciplinary rules; such conduct may also constitute professional misconduct under the new Maryland Rules.333

In Attorney Grievance Commission v. Parker334 Mr. Parker, a member of the Maryland bar, became the investment advisor for Mrs.

328. MD. R. OF PROF. CONDUCT 8.4(b).
329. Id. (comment).
Dianeray Chanudet. He received $39,000 to invest as he saw fit. Mr. Parker first deposited the capital into an escrow account, but then invested all but $500 in high-interest loans. The remaining $500 was kept in his safe. Though he did not keep records of these financial transactions, he created bogus records in response to an inquiry by Mrs. Chanudet’s attorney. He also cashed interest checks arising from these loans without depositing them in Mrs. Chanudet’s escrow account.

The trial court first held Mr. Parker in violation of article 10, section 44 of the Maryland Annotated Code which requires an attorney expeditiously to deposit any entrusted funds into a separate account. His deposits into an escrow account of the capital sums satisfied the statute, but his handling of the interest payments did not. This statutory violation constituted attorney misconduct under the former Maryland disciplinary rules. The court also held that Mr. Parker’s failure to keep adequate records of the loan transactions was incompetent and neglectful in violation of the former disciplinary rules.

335. Id. at 38-39, 506 A.2d at 1184-85. Mrs. Chanudet, a Belgian woman, “was looking for the American equivalent of a ‘l’homme d’affaires’ in her native land.” Id. at 38, 506 A.2d at 1185.
336. Id. at 39-40, 506 A.2d at 1185.
337. Id. at 41, 506 A.2d at 1186.
338. Id. He regarded the $500 in his safe as money to use as he wished, but it remained there until these proceedings began. Id. at 40-41, 506 A.2d at 1185-86.
339. Id. at 40-41, 506 A.2d at 1186. That attorney, Mr. Munday, reported Mr. Parker to the Attorney Grievance Commission. Id.
340. Id. at 41, 506 A.2d at 1186. According to testimony at trial, Mrs. Chanudet thought Mr. Parker would deposit any interest received into her escrow account. Mr. Parker believed he was to hold the interest payments and reinvest them if appropriate. Id.
341. Id. at 42, 506 A.2d at 1186; see Md. ANN. CODE art. 10, § 44 (1987).
342. 306 Md. at 42, 506 A.2d at 1186.
343. Id. The trial court determined that the failure to expeditiously deposit Mrs. Chanudet’s interest payments constituted a violation of three subsections of the former Maryland Code of Professional Responsibility, namely, DR 1-102(A)(3), (4), (6). These subsections stated respectively that a lawyer should not “engage in illegal conduct involving moral turpitude,” “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” or “engage in any other conduct that adversely reflects on his fitness to practice law.” Rules 8.4(b) and (c) of the Maryland Rules of Professional Conduct superseded DR 1-102(A)(3), (4). DR 1-102(A)(6), however, appears not to have a direct counterpart in the new rules.
344. 306 Md. at 42-43, 506 A.2d at 1187. Maryland Code of Professional Responsibility DR 6-101 provided in pertinent part:
(A) A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle . . . ;

(3) neglect a legal matter entrusted to him.
The trial court found that despite both parties' denials, an attorney-client relationship existed between Mr. Parker and Mrs. Chanudet. This relationship triggered further provisions of the former disciplinary rules. The court concluded that Mr. Parker did not intentionally fail to zealously represent his client, as the evidence indicated that he tried to do his very best for Mrs. Chanudet within his abilities. But even though upon request he promptly paid any funds in his possession, he did fail to preserve the identity of a client's funds; for he maintained no records of the interest payments.

The Court of Appeals held that the conclusions drawn by the trial judge from the evidence before him were not clearly erroneous. Therefore, the court overruled exceptions filed by both litigants. Because the trial judge's findings did not indicate that Mr. Parker actually misappropriated the funds, disbarment was not the mandated sanction. Nonetheless, Mr. Parker's violation of the statute and his failure to maintain records was worrisome. Accordingly, the court suspended him for ninety days.


345. 306 Md. at 43, 506 A.2d at 1187. Note that neither the attorney nor the client thought the relationship existed, there was no retainer or agreement as to a fee, id., and Mrs. Chanudet had another attorney draft her will after initiating her relationship with Mr. Parker, id. at 40, 506 A.2d at 1186.

346. Id. at 44, 506 A.2d at 1187. An attorney's duty to zealously represent his client's interests previously was set forth in Maryland Code of Professional Responsibility DR 7-101. This duty is now embodied in MD. R. OF PROF. CONDUCT 1.2, 1.3.

347. 306 Md. at 44, 506 A.2d at 1188. Former Maryland Code of Professional Responsibility DR 9-102(B)(3) required lawyers to “[m]aintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.” DR 9-102(B)(4) was the prompt payment provision in the Code of Professional Responsibility. These provisions have now been superseded by MD. R. OF PROF. CONDUCT 1.15(a)-(b).

348. 306 Md. at 45, 506 A.2d at 1188.

349. Id. Mr. Parker filed seven exceptions that could be categorized as three basic objections: (1) that there was no attorney-client relationship between himself and Mrs. Chanudet; (2) that he did not misrepresent records to Mrs. Chanudet's attorney; and (3) that he did not fail to deposit properly, account for, or pay the funds of a client. Id. at 45-46, 506 A.2d at 1188. The Bar Counsel, apparently seeking disbarment, excepted to the trial judge's failure to find a misappropriation of funds, or dishonesty under former Maryland Code of Professional Responsibility DR 1-102(A)(4). 306 Md. at 45, 506 A.2d at 1188.

350. Id. at 46, 506 A.2d at 1188.

351. Id., 506 A.2d at 1189.

352. Id.
b. Tax Fraud.—The Court of Appeals held in Attorney Grievance Commission v. Osburn\(^3\) that when an individual has been convicted for violating the Maryland Income Tax Law,\(^4\) deliberately providing inaccurate information on a Maryland State income tax return, and submitting a fraudulent return, that individual has committed a crime of moral turpitude.\(^5\) Citing cases in which an attorney has been disbarred for filing fraudulent federal tax returns,\(^6\) the court noted that whether the return is filed at the state or federal level does not affect its fraudulent nature; disbarment is still the proper sanction.\(^7\) In response to Mr. Osburn’s contention that newly discovered evidence would prove his innocence of the criminal charges, the court declined to review findings made in the underlying criminal proceeding and accepted the conviction as proper.\(^8\)

In Attorney Grievance Commission v. Jacob,\(^9\) the Court of Appeals found that Felix Jacob, a member of the Maryland Bar, failed to report $2788.32 of taxable income for the 1975 tax year.\(^10\) Jacob issued checks to clients, who in turn endorsed the checks back to Jacob. This “practice was intended to, and resulted in, a reduction in the amount of legal fee income on the books and records of the law firm . . . .”\(^11\)

Jacob first contended that before disbarment he was entitled to an evidentiary hearing.\(^12\) But Maryland Rule BV6.b.1b clearly indicated that such a hearing is not required if a court has previously convicted the individual for a crime that is the basis for the discipli-

---

\(^3\) 304 Md. 179, 498 A.2d 276 (1985).
\(^4\) Md. ANN. CODE art. 81, §§ 221, 302(a) (1980).
\(^5\) 304 Md. at 181, 498 A.2d at 277. Former Maryland Code of Professional Responsibility DR 1-102(A)(3) prohibited a lawyer from engaging in “illegal conduct involving moral turpitude.” Similarly, Maryland Rule of Professional Conduct 8.4(b) provides that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

\(^7\) 304 Md. at 181, 498 A.2d at 277.
\(^8\) Id. at 182, 498 A.2d at 278. Note that under Md. R. BV10.e.1 Osburn’s conviction was “conclusive proof” of his guilt. The Court of Appeals previously reviewed the criminal case against Osburn in Osburn v. State, 301 Md. 250, 482 A.2d 405 (1984).
\(^10\) Id. at 174, 492 A.2d at 906. The court based its finding on Jacob’s conviction by the United States District Court for the District of Maryland for subscribing a false federal income tax return.
\(^11\) Id. at 175, 492 A.2d at 906.
\(^12\) Id. at 177, 492 A.2d at 907.
nary proceeding.\textsuperscript{363} Other Maryland cases have so interpreted the rules.\textsuperscript{364}

Jacob next contended that disbarment was an unjustly harsh sanction since, as a matter of fact, Jacob's tax liability turned out to be approximately that which he indicated on his return.\textsuperscript{365} The court noted, however, that Jacob's conviction was based on fraud, for having "falsely sworn under the penalties of perjury to a tax return,"\textsuperscript{366} not on the incidental results flowing therefrom.\textsuperscript{367} The court concluded that such an offense involves moral turpitude,\textsuperscript{368} necessitating disbarment as a matter of course.\textsuperscript{369}

4. Mitigation.—In Attorney Grievance Commission v. Shaffer\textsuperscript{370} the Court of Appeals addressed charges that an attorney violated the former Maryland disciplinary rules by handling a legal matter beyond his expertise and by engaging in fraudulent conduct.\textsuperscript{371} The court found in Shaffer's favor on the first charge,\textsuperscript{372} but not the second.\textsuperscript{373}

\textsuperscript{363} Md. R. BV6.b.1 provides in relevant part: "An Inquiry Panel proceeding is not required in a case where . . . (b) The complaint is . . . (i) that there has been a final judgment of conviction as defined by Rule BV10.e.1 of a crime punishable by imprisonment for more than one year; . . . ." Md. R. BV10.e.1 provides: "In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime . . . ."


\textsuperscript{365} 303 Md. at 180, 492 A.2d at 909.

\textsuperscript{366} Id. Jacob violated 26 U.S.C. § 7206(1) (1982), which prohibits the willful filing of a false federal income tax return.

\textsuperscript{367} 303 Md. at 180, 492 A.2d at 909.

\textsuperscript{368} Id. Note that the Maryland Rules of Professional Conduct have rendered obsolete the term "moral turpitude." It is likely, however, that Jacobs would be found to have engaged in professional misconduct under Md. R. of Prof. Conduct 8.4(b). Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

\textsuperscript{369} 303 Md. at 181, 492 A.2d at 909.

\textsuperscript{370} 305 Md. 190, 502 A.2d 502 (1986).

\textsuperscript{371} Former Maryland Code of Professional Responsibility DR 6-101(A)(1) prohibited an attorney from handling a legal matter that the attorney knows or should know he or she is not competent to handle. Md. R. of Prof. Conduct 1.1, which requires an attorney to provide competent representation, has superseded DR 6-101(A)(1). Former Maryland Code of Professional Responsibility DR b-102(A)(4) prohibited attorneys from engaging in dishonest, fraudulent, deceitful, or misrepresentative conduct. Md. R. of Prof. Conduct 8.4 continues this prohibition.

\textsuperscript{372} 305 Md. at 201, 502 A.2d at 508.

\textsuperscript{373} Id. at 203-04, 502 A.2d at 509.
A trial judge from the Fourth Judicial Circuit found that Shaffer should have requested assistance from a competent associate to handle a legal matter that he knew or should have known was beyond his own expertise. Shaffer's improper conduct included his failures to call a witness to the stand despite his client's urging, to cross-examine competently, and to conduct a pretrial factual investigation. The trial judge deemed these shortcomings to be substantially attributable to Shaffer's inexperience as an attorney.

The Court of Appeals held that to warrant disciplinary action, the need for more experienced counsel must be manifest at the outset of proceedings. Shaffer's failure to recognize the complexity and intricacies of litigation practice was not enough for the court to find him in violation of the disciplinary rule.

The court did, however, sustain the trial court's finding that Shaffer violated a second disciplinary rule by engaging in misrepresentative conduct, as evidenced by a prior criminal case in which he pled guilty to writing bad checks. By entering such a plea, he was deemed to have known of the insufficiency of funds.

The trial court had found a causal link between Shaffer's alcohol abuse and his misconduct. Recognizing that "'the purpose of a disciplinary proceeding is to protect the public rather than punish the erring attorney,'" and accepting the premise that alcoholism is a disease not impossible to overcome, the Court of Appeals suspended Shaffer indefinitely, and granted him the right to petition for reinstatement after thirty days from suspension.

374. Id. at 197, 502 A.2d at 506.
375. Id. at 200, 502 A.2d at 507.
376. Id. at 201, 502 A.2d at 507.
377. Id.
378. The court did not find a violation of former Maryland Code of Professional Responsibility DR 6-101(A)(1), which prohibited lawyers from handling legal matters they knew or should have known they were not competent to handle; however, the court disagreed with Shaffer's contention that "some form of culpable negligence" is required for a violation of this disciplinary rule. 305 Md. at 201-02, 502 A.2d at 508.
379. 305 Md. at 203-04, 502 A.2d at 509.
380. Id. at 203, 502 A.2d at 509. The court also noted that the crime of which Shaffer was convicted—obtaining property or services by means of a bad check—requires general rather than specific intent. See id. at 202-03, 502 A.2d at 509; Md. ANN. CODE art. 27, § 141(a)(1)-2 (1982).
381. Id. at 198, 502 A.2d at 506.
383. Id.
was conditioned on his participation in rehabilitative activities.\textsuperscript{384}

In \textit{Attorney Grievance Commission v. Newman}\textsuperscript{385} the Court of Appeals agreed with a psychiatrist's testimony that since other aspects of Newman's moral life had not been impaired, alcoholism did not cause Mr. Newman's fraudulent behavior.\textsuperscript{386} In 1984 Newman had entered a guilty plea to federal mail fraud charges.\textsuperscript{387} The court ruled that if there is no causal connection between alcoholism and fraudulent, deceitful, and self-serving conduct, the condition can neither mitigate such conduct nor save the individual from disbarment.\textsuperscript{388}

\textbf{F. Other Developments}

\textbf{1. Freedom of Information.—}In \textit{City of Baltimore v. Burke}\textsuperscript{389} the Court of Special Appeals interpreted the Maryland Public Information Act (MPIA)\textsuperscript{390} in the context of an ongoing political controversy. The case arose when, pursuant to the MPIA, the Mayor and City Council of Baltimore (City), and the Director of Public Works for Baltimore City refused to disclose to a newspaper reporter certain information concerning construction of the Patapsco Waste Water Treatment Plant.\textsuperscript{391} Because the MPIA provides only for the temporary withholding of public records, the City sought judicial permission to continue its refusal to disclose the requested information.

The City argued that since disclosure of the requested documents could weaken its position in a pending arbitration case\textsuperscript{392} and

\begin{itemize}
  \item \textsuperscript{384} Id. at 205, 502 A.2d at 509-10
  \item \textsuperscript{385} 304 Md. 370, 499 A.2d 479 (1985).
  \item \textsuperscript{386} Id. at 376, 499 A.2d at 482-83.
  \item \textsuperscript{387} Id. Newman received a five-year suspended sentence. The court imposed a five-year period of probation, conditioned on his continued treatment for alcoholism. Id. at 373, 499 A.2d at 481.
  \item \textsuperscript{388} Id. at 377-78, 499 A.2d at 483.
  \item \textsuperscript{390} MD. STATE GOV'T CODE ANN. §§ 10-611 to -630 (1984).
  \item \textsuperscript{391} 67 Md. App. at 149-50, 506 A.2d at 684-85. Specifically, the reporter sought information on the effects and costs of the design and construction of improvements to the Patapsco plant. Id. at 149, 506 A.2d at 684. MD. STATE GOV'T CODE ANN. § 10-619 (1984) authorizes the official custodian of a public record temporarily to deny inspection of that public record if he or she believes that “inspection would cause substantial injury to the public interest.”
  \item \textsuperscript{392} 67 Md. App. at 153, 506 A.2d at 686. The City was involved in an arbitration proceeding with the J.W. Bateson Company (Bateson), a construction firm that built the last phases of the Patapsco plant. Bateson demanded over $12 million from the City as additional compensation for work necessitated by alleged design errors. Id. at 149 n.2,
weaken its position in future legal proceedings stemming from the arbitration claims, the City could properly withhold disclosure under section 10-619 of the MPIA\textsuperscript{393} to prevent "substantial injury to the public interest."\textsuperscript{394} The court, however, held that "the tactical disadvantage which the City may suffer in resolving its pending [arbitration] claims because of the disclosure is insufficient to establish a 'substantial injury to the public interest' . . . ."\textsuperscript{395}

In ordering the City to disclose the information, the Court of Special Appeals noted the MPIA's clear preference for public disclosure;\textsuperscript{396} it also cited \textit{Moberly v. Herboldsheimer},\textsuperscript{397} in which the Court of Appeals held that an individual's motive for requesting information has no bearing on the issue of whether disclosure would result in injury to the public interest.\textsuperscript{398} Though the reporter's motive in \textit{Burke} for requesting information was to uncover weaknesses in the City's legal position in a collateral proceeding, such action would not establish an injury to the public interest.\textsuperscript{399}

The court also held that the City's denial of the reporter's request for a fee waiver, and its $50,000 charge for the reproduction of 160,000 pages of documents, was arbitrary and capricious.\textsuperscript{400} Section 10-621(d)(2) of the State Government Article permits the waiver of fees in cases in which the circumstances indicate that a waiver "would be in the public interest."\textsuperscript{401} The Court of Special Appeals adopted the federal courts' liberal construction of the federal Freedom of Information Act fee waiver provision,\textsuperscript{402} which favors fee waivers for the media or "other requesters who will provide broad public dissemination of the information sought."\textsuperscript{403} The

\textsuperscript{393. MD. STATE GOV'T CODE ANN. § 10-619 (1984).}
\textsuperscript{394. 67 Md. App. at 153, 506 A.2d at 686.}
\textsuperscript{395. Id. at 155, 506 A.2d at 687.}
\textsuperscript{396. Id. at 153, 506 A.2d at 686.}
\textsuperscript{397. 276 Md. 211, 345 A.2d 855 (1975).}
\textsuperscript{398. Id. at 227-28, 345 A.2d at 864.}
\textsuperscript{399. 67 Md. App. at 155, 506 A.2d at 687.}
\textsuperscript{400. Id. at 157, 506 A.2d at 688.}
\textsuperscript{401. MD. STATE GOV'T CODE ANN. § 10-621(d)(2) (1984). Section 10-621(d) provides:}
\textsuperscript{402. 5 U.S.C. § 522(a)(4) (1982).}
\textsuperscript{403. 67 Md. App. at 156, 506 A.2d at 688. The court identified two community benefits that would be derived from a disclosure: (1) The public would become informed of
MPIA also provides that "other relevant factors" may be considered in determining whether the public interest justifies a waiver. The court noted that the benefits of publicly disclosing the information requested is a relevant factor that the City should have, but did not consider; thus, the court ordered a fee waiver.

2. Legislation.—Chapter 601 of the 1986 Laws of Maryland defined the powers of the Chesapeake Bay Critical Area Commission. The Act proclaimed that unless a quorum of the Commission or of a panel of the Commission is present, public hearings may not be held, and no official action may be taken.

Chapter 604 of the Act prohibits the Commission from establishing an impervious surfaces limitation greater than certain amounts unless approved by the General Assembly. More specifically, "for stormwater runoff, man-caused impervious areas shall be limited to 15 percent of the parcel to be developed. However, impervious surfaces on any lot not exceeding one acre in size in a subdivision approved after June 1, 1986 may be up to 25 percent of the lot."

Laura B. Black
Carville B. Collins
Kevin C. Golden

the health hazards associated with the dumping of inadequately treated sewage into the Patapsco River; and (2) the public would be made aware of the high cost of improvements to the Patapsco Waste Water Treatment Plant. The court also noted that a denial of a fee waiver in this case "might have a chilling effect on the free exercise of freedom of the press." Id. at 157, 506 A.2d at 688.

405. 67 Md. App. at 157, 506 A.2d at 688.
407. Id. at § 8-1804(e)(3).
408. Id. at § 8-1804(e)(4). In addition to a quorum, § 8-1804(e)(4)(ii) requires a majority vote for any official actions by the Commission or one of its panels.
409. Id. at § 8-1808.3(c).
II. CIVIL PROCEDURE

A. Jurisdiction

1. In Personam.—In *Nueva Engineering, Inc. v. Accurate Electronics, Inc.*, an action by a Maryland corporation against a Connecticut corporation, the United States District Court for the District of Maryland held that it had personal jurisdiction over the nonresident defendant even though the plaintiff had initiated the business relationship between the two.

The plaintiff, a manufacturer, sued one of its principal customers for breach of contract. After reviewing the general case law on jurisdiction over nonresident defendants, the court considered whether the existence of a contract between the two parties was sufficient evidence of purpose and foreseeability on the defendant's part to confer jurisdiction on the court. In deciding that question, federal and state courts, which are "deeply divided" on the issue, have considered various factors, the most important of which is whether the nonresident defendant corporation "initiated the business relationship in some way." In addition, the Supreme Court

---

2. Since the plaintiff had served process on the defendant at the defendant's principal place of business, pursuant to F. R. Civ. P. 4(e) and the Maryland long-arm statute, MD. CTS. & JUD. PROC. CODE ANN. § 6-103 (1984), the court limited itself to consideration of "whether jurisdiction over the defendant . . . would violate the due process clause." 628 F. Supp. at 954.
3. A manufacturer's sales representative for the plaintiff solicited orders from the defendant at the defendant's place of business in Connecticut. Within two years, the defendant became one of the plaintiff's "crucial customers." The defendant's president made a few business trips, but he never placed any orders during these trips. All orders were placed from Connecticut. 628 F. Supp at 955-56.
4. The court reiterated the "minimum contacts" test from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which held that due process requires a nonresident defendant to have certain minimum contacts with the state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Next, the court reviewed the "foreseeability" test from *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *World-Wide Volkswagen* held that a defendant's conduct and connection with the forum state must be such that he should reasonably foresee being "haled into court" there. Finally the court discussed the then most recent Supreme Court case, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which held that the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."
6. Id. at 955. The court found that the First, Fourth, Fifth, and Seventh Circuits, a district court in Washington, D.C., and the Supreme Court favored this approach.
has developed a set of equitable considerations that may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." 7

Although the court found that the defendant had not initiated the business relationship, the court concluded that the defendant had "[taken] steps preparatory to initiating a new phase of that relationship" when its president met with the plaintiff's president in Baltimore to discuss plans for expanding the business. 8 A Fourth Circuit decision, August v. HBA Life Insurance Corp., 9 provided authoritative precedent for granting jurisdiction on that basis. The court also emphasized that the nature of the business relationship, "a special, heavily interdependent one," was an important factor in the decision. 10 Finally, the court implied that in cases like this, the defendant must make at least some showing of unfairness. The defendant here, however, had not "introduce[d] a scintilla of evidence that defending this suit in Maryland [would] impose a special hardship upon it." 11 The court concluded that the proximity of Maryland and Connecticut, the interest of the forum state in providing relief for its citizens against out-of-state debtors, and the interest of the interstate judicial system in obtaining "the most efficient resolution of controversies," outweighed the defendant's interest in defending itself in its home state. 12

In Bailey v. Stouter 13 the Court of Special Appeals held that a circuit court lacked jurisdiction to foreclose the redemption rights

Other factors include "whether the parties contemplated that the work would be performed, where negotiations were conducted, [and] where payment was made." Id. 7

7. Id. (quoting Burger King, 471 U.S. at 477). The Burger King Court noted the following considerations: "the 'burden on the defendant,' the 'forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental social policies.'" 471 U.S. at 477 (quoting World-Wide Volkswagen, 444 U.S. at 292).


9. 734 F.2d 168 (4th Cir. 1984). In that case an Arizona insurance company mailed to an existing policy holder in Virginia a request to sign an agreement that would change the terms of the policy. The Fourth Circuit held that the request constituted a "solicitation" sufficient to confer personal jurisdiction on the Virginia courts. Id. at 173.


11. 628 F. Supp. at 957.

12. Id.

of two Maryland residents. The plaintiff had neither notified the defendants by personal service of process nor satisfied the statutory preconditions for reliance on notice by publication.

Under article 81, section 106(a), Maryland residents who are named as defendants in foreclosure proceedings must be personally served with subpoenas. Publication notice, which is required contemporaneously with personal service by section 107(a), is sufficient only when two successive subpoenas have been returned non est, or when one subpoena has been returned non est and the plaintiff files an affidavit swearing that the defendant has attempted to evade service or that his whereabouts are unknown.

In Bailey the plaintiff ignored the owners' address listed in the tax records and, claiming to have found "newer, more current addresses," had the subpoenas issued to the wrong addresses. One subpoena was returned undelivered and the other was returned non est. Neither subpoena was reissued. When no one answered the complaint, the court entered a final foreclosure decree. The plaintiff's attorney filed an affidavit asserting that he had searched the relevant records and was unable to ascertain the present addresses of the defendants. The Court of Special Appeals, however, held the affidavit insufficient under former Maryland Rule 105 b 1.

14. Id. at 192, 502 A.2d at 1131.
15. Id.
17. Id. at § 107(a).
18. That is, non est inventus, or "He is not found." Black's Law Dictionary 950 (5th ed. 1979).
19. Section 106(a) provides in relevant part:
Upon the filing of the bill of complaint [to foreclose the right of redemption]. the court shall issue its subpoena for all parties defendant named in the said bill who are residents of this State and upon such bill the same process by summons, notice or otherwise shall be had to procure the answer and appearance of all such defendants as is had in other cases in equity.... Provided that in all cases where two successive subpoenas against a named defendant have been returned non est or upon the return of one subpoena non est and proof by affidavit that a defendant has kept out of the way or has secreted himself to avoid service of the subpoena, or whose whereabouts may be unknown, such defendant shall be deemed to be served by the publication issuing under the provisions of the succeeding sections as if he were a non-resident.

20. 66 Md. App. at 189, 502 A.2d at 1129.
22. Id., 502 A.2d at 1130.
23. Id. at 183, 502 A.2d at 1127.
24. Id. at 184, 502 A.2d at 1127.
25. Former rule 105 b 1 has been replaced by rule 2-122(a), which eliminates the former rule's requirement that the plaintiff set forth "a circumstantial account" of the
which required the plaintiff to set forth "a circumstantial account of the efforts made to locate the defendant which satisfies the court that reasonable efforts to locate the defendant have been made in good faith." The court also rejected the plaintiff's argument that a clerk's failure to reissue the subpoenas excused the plaintiff from the requirement of waiting for a second subpoena to be returned non est before relying on publication notice.

The plaintiff's failure to comply with the requirements of section 106(a) deprived the court of jurisdiction. Moreover, the Court of Special Appeals held that the jurisdictional issue was properly raised by a party who was not one of the owners at the time of the foreclosure proceeding, but was a successor to one of the owners. In addition, the court held that the plaintiff's use of three married women's birth names instead of their marital surnames would not render notice by publication fatally defective as a matter of law. In general, "the notice should state the name customarily used by the person to whom the notice is addressed and . . . the failure to state that name may, under some circumstances, cause the notice to be fatally defective." In this case, however, each of the married women who raised the issue actually had retained her birth name as part of her marital name.

---

26. 66 Md. App. at 189-90, 502 A.2d at 1130. The court said:

Merely stating that counsel has searched the land records and other records of the court does not appear to us to be a "circumstantial account of the efforts made to locate the defendant" under the circumstances of this case. At the very least, counsel should have explained why he ignored the . . . address shown in the county tax records.

27. Id. at 190-91, 502 A.2d at 1130-31. The court distinguished Piersma v. Seitz, 10 Md. App. 439, 271 A.2d 199 (1970), aff'd, 262 Md. 61, 276 A.2d 666 (1971) (per curiam). The Piersma court held that "the plaintiff was entitled to rely on the 'proper performance of the Clerk's duty' to reissue the summons 'as a matter of course,' and that the action was not barred simply because the plaintiff failed to direct the clerk to do what the law commanded him to do." 66 Md. App. at 191, 502 A.2d at 1130 (quoting Piersma, 10 Md. App. at 443, 271 A.2d at 202). Piersma, however, dealt with "the purely procedural question of when a summons will be permitted to lie dormant," rather than the dispensing of "a statutorily required form of notice." Id. at 191, 502 A.2d at 1130-31.


29. The three married women held remainder interests in the property, and their whereabouts were unknown. 66 Md. App. at 185, 502 A.2d at 1128.

30. Id. at 186, 502 A.2d at 1128.

31. Two old cases, Morris v. Tracy, 58 Kan. 137, 48 P. 571 (1897), and Freeman v. Hawkins, 77 Tex. 498, 14 S.W. 364 (1890), held notice by publication insufficient when it identified married women by their birth names. The court, however, distinguished Morris and Freeman on the ground that those cases were decided at a time when married
2. Subject Matter.—In Williams v. Williams the Court of Appeals held that a court of equity had subject matter jurisdiction over and could order specific performance of a marital separation and property settlement agreement that had not been incorporated into a divorce decree. Although courts ordinarily do not grant specific performance of agreements to pay money, the court noted that an exception exists for “agreements between husband and wife for payment of alimony or support.” The court further held that the chancellor properly had entered a money judgment against the petitioner’s former husband for overdue payments because once equitable jurisdiction had attached, the court was entitled to grant “full and complete relief,” including relief that is “ordinarily granted at law by way of a monetary judgment.”

B. Final Judgments

1. Lower Court’s Erroneous Determination.—In Houghton v. County Commissioners of Kent County the plaintiffs unwittingly lost their right to appeal an adverse circuit court decision by relying on the Court of Special Appeals’ erroneous determination that the circuit court

women were required by law to take their husbands’ surnames. 66 Md. App. at 185, 502 A.2d at 1128.

33. The agreement provided that it was not to be incorporated or merged into any divorce decree. When Mr. and Mrs. Williams were divorced, the Circuit Court for Montgomery County “ratified, approved and adopted” the agreement, but did not incorporate or merge it into its divorce decree. Id. at 2-3, 501 A.2d at 433.

Mrs. Williams had also requested that Mr. Williams be held in contempt for failure to pay alimony. He argued that the court could not adjudicate a claim of contempt because the separation agreement had not been incorporated into the court’s divorce decree. Id. at 4, 501 A.2d at 433. The circuit court held that the agreement could be enforced through contempt proceedings, but the court only ordered Mr. Williams to pay his overdue nonalimony expenses. The Court of Special Appeals held that the chancellor had erred on the contempt issue, but upheld the money judgment anyway on the ground that the court had acquired jurisdiction by way of the request for specific performance. Id. at 5, 501 A.2d at 434. The Court of Appeals affirmed. Id. at 9, 501 A.2d at 436.

34. Id. at 8, 501 A.2d at 435.

The court also held that service of process on Mr. Williams was sufficient. He had identified himself to a private process server, inquired into the nature of the documents, and began reading them. His attempt to evade service by disavowing his identity and refusing to accept the documents was ineffectual. Id. at 6-7, 501 A.2d at 434-35. Service was complete when the process server left the documents at the defendant’s attorney’s office in the defendant’s presence. Id. at 6, 501 A.2d at 434.

had not issued a final judgment. The Court of Appeals later held that the circuit court's decision was indeed final and appealable, and that the plaintiffs' second appeal was therefore too late. The court later denied the plaintiffs' motion for reconsideration despite a supporting memorandum filed by the Maryland Bar Association.

Mr. and Mrs. Edward Houghton had filed a three-count complaint against the County Commissioners of Kent County. On January 21, 1985, the Circuit Court for Kent County entered an order granting the Commissioners' motion to dismiss counts I and III. On January 23 the Houghtons filed a notice voluntarily dismissing count II. On February 19 the Houghtons filed an order of appeal to the Court of Special Appeals, which the appellate court dismissed on April 19 on the ground that the circuit court had not yet entered a final judgment. Rather than petitioning the Court of Appeals to review that decision, the Houghtons waited until May 1, when the circuit court entered an order of "Final Judgment" on counts I and III. The next day the Houghtons filed a second order of appeal to the Court of Special Appeals. Later they filed a petition for a writ of certiorari, which the Court of Appeals granted.

The Commissioners moved to dismiss the appeal on the ground that it was filed more than thirty days after the circuit court's final judgment and therefore conferred no appellate jurisdiction. Con-

37. Id. at 412-13, 504 A.2d at 1146.
39. 305 Md. at 409, 504 A.2d at 1146. The complaint concerned a voting project to improve a public wharf on the Chester River. The first count alleged that two of the three commissioners had entered into an "improper vote trading agreement." The second count alleged that the public wharf would be a nuisance. The third count alleged that the claimed improper agreement was made at an illegal meeting between the two commissioners. The plaintiffs sought a declaratory judgment and injunctive relief. Id., 504 A.2d at 1146-47.
40. Id. at 410, 504 A.2d at 1147. The court's order stated that "the Motion to Dismiss Counts I and III of the Complaint as Amended is GRANTED this 21st day of January, 1985. The Motion is Denied as to Count II." The word "judgment" was not used in the docket entry. Id.
41. Id. The notice of dismissal was entered on the docket the same day it was filed, and it too did not use the word "judgment." Id.
42. Id. at 410-11, 504 A.2d at 1147. The court dismissed the appeal on its own motion.
43. Id. at 411, 504 A.2d at 1147. The entry on the circuit court docket read: "BY ORDER OF THE Court (Judge J. Owen Wise) Final Judgment entered in favor of Defendant as to Counts I & III." Id.
44. Id.
45. Id.
trary to the Court of Special Appeals, they contended that the Houghtons' voluntary dismissal of count II on January 23, together with the court's order dismissing counts I and III on January 21, amounted to a final appealable judgment. The Houghtons countered that the January "judgment" was "not an appealable final judgment... because the Court of Special Appeals said it was not final... and that is the law of the case." The Court of Appeals rejected the "law of the case" argument, stating that:

[A] decision of the Court of Special Appeals on an earlier appeal is not the law of the case for purposes of this Court's review on a later appeal in the same case... In other words, in this Court, the law of the case doctrine has no applicability when the prior decision relied upon was by a subordinate court.

The court held that "an unqualified order granting a motion to dismiss or strike the plaintiff's initial pleading, thereby having the effect of putting the parties out of court, is a final appealable order." "The orders of January 21 and 23, 1985," the court continued, "together constituted the final judgment of the circuit court." Thus, the court dismissed the Houghton's appeal on the ground that it had been filed too late, in violation of Maryland Rule 1012.

In dissent, Judge McAuliffe, joined by Chief Judge Murphy, urged the court to make an exception to the "law of the case" doctrine to avoid the "harsh and inequitable result" of denying the Houghtons their right of appeal. He maintained that:

47. 305 Md. at 411, 504 A.2d at 1147-48.
48. Id. at 411-12, 504 A.2d at 1148.
49. Id. at 414, 504 A.2d at 1149.
50. Id. at 412, 504 A.2d at 1148.
51. Id. at 413, 504 A.2d at 1148. The court stated: "Nothing in Rule 2-601, adopted on July 1, 1984, and dealing with the entry of judgment, requires that the word 'judgment' always be used as a prerequisite to finality." Id.
52. The court remarked: "The requirement of Rule 1012 and its predecessors, that an order of appeal be filed within thirty days of a final judgment, is jurisdictional; if the requirement is not met, the appellate court acquires no jurisdiction and the appeal must be dismissed." Id. at 413, 504 A.2d at 1148.
53. Id. at 414-18, 504 A.2d at 1149-51 (McAuliffe, J., dissenting). Judge McAuliffe conceded that the Court of Special Appeals had erred in dismissing the first appeal, and he also approved of the law of the case doctrine "as it has developed and been interpreted" in Maryland. But he argued for "a narrow exception here on the ground that the "law of the case" doctrine is basically a "matter of good sense."" Id. at 415, 504 A.2d at 1150 (citing Petition of United States Steel Corp., 479 F.2d 489, 494 (6th Cir.), cert. denied, 414 U.S. 859 (1973)). He stated:

I am aware that hard cases sometimes make bad law, and that we must avoid
Here the ruling that later proves erroneous has addressed the finality and appealability of an order, and the result of not applying the law of the case doctrine is that an innocent party will be deprived of the right of appeal, it seems entirely reasonable to allow the earlier ruling to control the case.\textsuperscript{54}

Judge McAuliffe saw no problem in the Houghtons’ failure to petition the Court of Appeals for a writ of certiorari following the dismissal of their first appeal by the Court of Special Appeals, and he would not penalize them “for pursuing an alternative that was the least expensive and the least demanding of the resources of a busy court system.”\textsuperscript{55}

The Houghtons filed a motion for reconsideration on the ground that, until this case, the Bar and the Judges of the Court of Special Appeals had believed that an appeal could not proceed before the word “judgment” was entered on the docket.\textsuperscript{56} Therefore, they argued, the court’s decision overruled prior precedent\textsuperscript{57} and should be given prospective effect only.\textsuperscript{58} The Maryland State Bar Association, as amicus curiae, filed a memorandum in support of the motion, taking essentially the same position as the Houghtons.\textsuperscript{59} In addition, the Bar Association urged the court to adopt the “unique circumstances” doctrine, which the federal courts have developed to permit certain late appeals. The doctrine is “‘used when distortion of a rule simply to avoid a harsh result in a single case. In this instance, however, I believe the rule may be applied rationally and without distortion to achieve a logical and just result.

\textsuperscript{50}Md. at 418, 504 A.2d at 1151.
\textsuperscript{54} 305 Md. at 417, 504 A.2d at 1150.
\textsuperscript{55} Id., 504 A.2d at 1150-51.
\textsuperscript{56} Houghton v. County Comm’rs of Kent County, 307 Md. 216, 218, 513 A.2d 291, 292 (1986). The Houghtons employed a bit of sarcasm as well: “If this Court or its Standing Committee on Rules of Practice and Procedure had ever resolved that it was not necessary to have the word ‘judgment’ in the docket entry, someone neglected to inform [the Bar and] the Court of Special Appeals.” Id. at 218, 513 A.2d at 292.


\textsuperscript{58} 307 Md. at 218, 513 A.2d at 292. The Houghtons urged the court to follow the approach taken in Shell Oil Co. v. Supervisor, 276 Md. 36, 343 A.2d 521 (1975), instead of dismissing their appeal. In that case the court had held that a statute providing for direct appeals from the Tax Court to the Court of Appeals was unconstitutional and that, as a result, the Court of Appeals was itself without jurisdiction; however, rather than dismissing the action, the Shell court transferred it to the appropriate circuit court. The Houghton court, however, distinguished Shell on its facts. 307 Md. at 227-28, 513 A.2d at 297.

\textsuperscript{59} 307 Md. at 219, 513 A.2d at 292.
an appellant is led astray by judicial action or the like. [It] protects a limited class of appellants who, otherwise, would be left remediless.' 60

The Court of Appeals rejected both arguments and denied the motion. The court stated that its decision in this case was not novel and did not overrule prior cases:61 "We are aware of no case in this Court . . . even suggesting that an unqualified order granting a motion to dismiss the plaintiffs' entire initial pleading is not a final judgment or becomes a final judgment only when the word 'judgment' is used." 62 The court declined to adopt the "unique circumstances" doctrine for several reasons: the doctrine is based on a federal rule that has no equivalent in the Maryland Rules;63 other state courts have criticized the doctrine and refused to adopt it;64 and, the policies that underlie the doctrine have never persuaded the Maryland Court of Appeals.65 Judge McAuliffe and Chief Judge


61. Id. at 220, 513 A.2d at 293.

62. Id. at 223-24, 513 A.2d at 295.

63. The court stated:

[T]he holding in [Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc, 371 U.S. 215 (1962)], the case at the heart of the doctrine, is based squarely on the federal rule allowing an extension of time for an appeal upon a showing of "excusable neglect." The Maryland Rules do not contain a comparable provision authorizing an extension of the time for appeal.

307 Md. at 230, 513 A.2d at 298.


65. 307 Md. at 231, 513 A.2d at 298. The court quoted from an earlier case in which it refused to give an appellant a second chance to make up for a trial court's mistake: [T]he appellant and its counsel were not entitled, as of right, to rely entirely on the judge's indicated purpose. It is settled that a party to litigation, over whom the court has obtained jurisdiction, is charged with the duty of keeping aware of what actually occurs in the case and is affected with notice of all subsequent proceedings and that his actual knowledge is immaterial.


The court also cited a case, exactly on point with the case at bar, to show that the Houghton's circumstances were not so "unique." In Johnson v. Borg-Warner Acceptance Corp., 303 Md. 617, 495 A.2d 836 (1985) (per curiam), the circuit court entered an order granting the defendant's motion to dismiss. The Court of Special Appeals dismissed the plaintiff's appeal, holding that the circuit court order was not a final judgment. In that case, however, the plaintiff petitioned the Court of Appeals to review the Court of Special Appeals' decision. The Court of Appeals vacated the judgment and remanded the case for consideration on the merits. 307 Md. at 223, 513 A.2d at 295.
Murphy dissented again.

2. **Partial Summary Judgment.**—Maryland Rule 2-501(e) permits a trial judge to enter partial summary judgment—a judgment against fewer than all the parties to an action, upon fewer than all the claims in an action, or for less than all the monetary relief requested. Under Maryland Rule 2-602, however, a partial summary judgment becomes final and appealable only if the trial judge expressly certifies that there is no reason for delay. In *Russell v. American Security Bank, N.A.* the Court of Special Appeals held that rule 2-602 does not permit a trial judge to certify a partial summary judgment as final if the amount of that judgment is dependent on the resolution of undecided issues.

The plaintiff brought this action for nonpayment of the principal and interest on a loan. The trial judge granted a partial summary judgment under rule 2-501(e)(3) on the issue of the principal, leaving only the issues of the interest and attorney's fees. Pursuant to rule 2-602, he certified this partial judgment as final, so as to make it immediately appealable.

The defendant contended that the amount of principal he owed was contingent on the resolution of the proper interest rate. The trial court, however, had never resolved that issue. The appellate court thus dismissed the appeal. The issue on which the trial court entered summary judgment was dependent on the resolution of an open issue; therefore, the trial judge erred in certifying the judgment as final.

---

69. *Id.* at 206, 499 A.2d at 1324. This case was decided under the predecessor of current rule 2-602. Both the former rule and the current rule are identical in effect, though not in wording or organization. See 65 Md. App. at 203-04, 499 A.2d at 1323-34.
70. 65 Md. App. at 200, 499 A.2d 1321.
71. *Id.* at 202, 499 A.2d at 1322.
72. *Id.*
73. *Id.* at 205-06, 499 A.2d at 1324. The defendant contended at trial that the bank had charged a higher rate of interest than that specified in the note. If this issue were resolved in the defendant's favor, some of the interest paid would have to be credited to reduce the principal. Therefore, a determination of the principal amount was contingent on the resolution of the interest rate issue. *Id.*
74. *Id.* at 206, 499 A.2d at 1324.
75. *Id.*
3. Effect of Motion to Alter or Amend.—In Unnamed Attorney v. Attorney Grievance Commission the Court of Appeals held that a trial court's judgment is not appealable if one of the parties has filed a timely motion to modify the judgment pursuant to Maryland Rule 2-534. The trial court, pursuant to Maryland Rule 1012 d, must then rule on the motion to modify the judgment before an appeal will lie.

The court, in holding that this judgment was not appealable, stated that when a rule 2-534 "motion to alter or amend an otherwise final judgment is filed within ten days after the judgment's entry, the judgment loses its finality for purposes of appeal." An appeal that has already been filed becomes ineffective, and a party must file a new order of appeal after the court decides the motion to alter or amend. This rule represents a positive change in procedure because it allows the trial court judge to revise a judgment and thus possibly to avoid an appeal.

4. Consent Decrees.—In Ramsey, Inc. v. Davis the Court of Special Appeals held that a trial court order that was entered by consent

---

76. 303 Md. 473, 494 A.2d 940 (1985).
77. Id. at 486, 494 A.2d at 946. Md. R. 2-534 provides in part: "In an action tried by the court, on motion of any party filed within ten days after entry of judgment, the court may . . . amend the judgement, or may enter a new judgment."

The court additionally held that when a party moves to alter or amend a judgment after the ten-day period passes and after an appeal has been noted, appellate jurisdiction attaches and the trial court cannot decide the motion. 303 Md. at 486, 494 A.2d at 946-47.

78. Md. R. 1012 d provides:
In a civil action when a timely motion is filed . . . (3) to alter or amend a judgment pursuant to Rule 2-534, the order for appeal shall be filed within thirty days from the date of entry of an order denying, overruling, or dismissing a motion for new trial or disposing of a motion for judgment notwithstanding the verdict or a motion to alter or amend a judgment. An order for appeal filed before the timely filing or the disposition of any of these motions shall have no effect, and a new order for appeal must be filed within the time above provided.

79. 303 Md. at 486, 494 A.2d at 946.
80. Id., 494 A.2d at 947. This case arose out of the Attorney Grievance Commission's inquiry into the unnamed attorney's possible violations of the Code of Professional Responsibility. Id. at 475, 494 A.2d at 941. On January 22, 1985, the circuit court ordered the unnamed attorney to produce certain records. On February 1, 1985, the Commission filed a motion to alter or amend the January 22 order. Id. at 478-79, 494 A.2d at 943. Because the Commission had thus filed its motion within ten days after the judgment's entry, the judgment lost its finality. Id. at 486, 494 A.2d at 947.
81. Id. at 486, 494 A.2d at 946.
82. Id. Under former rule 625 the court had thirty days to revise a judgment; however, if an appeal was noted, the court lost its power to revise the judgment, and it became final. Id. at 484-85, 494 A.2d at 946.
of the parties constituted a final appealable judgment because no further action by the court was required to adjudicate the claims.\textsuperscript{84} Unlike a settlement order,\textsuperscript{85} a consent judgment is final and can be revised only in cases of fraud, mistake, irregularity, newly discovered evidence, or clerical error.\textsuperscript{86} The \textit{Ramsey} court also held that the trial court had properly refused to admit extrinsic evidence to explain the intent of the parties to the consent agreement: "A consent judgment, since it is the product of negotiations, is subject to construction as a contract."\textsuperscript{87} Maryland courts use an objective test in interpreting contracts.\textsuperscript{88} In this case the court concluded that the language of the agreement was unambiguous, and that "[t]he subjective understanding of the consenting parties \ldots \textit{was} therefore immaterial."\textsuperscript{89}

5. \textit{Consolidated Cases}.—In \textit{Yarema v. Exxon Corp.}\textsuperscript{90} the Court of Appeals held that when a trial court consolidates several separate and distinct cases for the purpose of trial\textsuperscript{91} and directs the entry of separate judgments for each case,\textsuperscript{92} the consolidated cases are to be treated as entirely separate actions for the purpose of finality of judgment.\textsuperscript{93} Thus, a judgment that disposes of all claims in a partic-

\textsuperscript{84} Id. at 725, 505 A.2d at 903. The court observed that the consent order "required the defendants to pay a sum certain to the plaintiffs, dismissed all claims between the parties, assessed court costs against the parties, and was recorded in the court's docket by the clerk as required by Rule 2-601." Id.

\textsuperscript{85} The court distinguished \textit{Mitchell Properties, Inc. v. Real Estate Title Co.}, 62 Md. App. 473, 490 A.2d 271 (1985), in which the Court of Special Appeals held that a settlement order is not a final judgment. The settlement agreement in \textit{Mitchell} made entry of final judgment contingent upon the defendants' failure to pay the agreed damages and costs within a specified time period. The \textit{Mitchell} court had noted, however, that "[i]f the court reduces the settlement order to a money judgment, it becomes a final judgment to the extent the underlying agreement address [sic] the respective claims of the parties." 62 Md. App. at 483, 490 A.2d at 276 (citing Chertkof \textit{v. Harry S. Weiskittel Co.}, 251 Md. 544, 248 A.2d 373 (1968), cert. denied, 394 U.S. 974 (1969)).

\textsuperscript{86} Md. R. 2-555 (b)-(d).

\textsuperscript{87} 66 Md. App. at 727, 505 A.2d at 904; \textit{see also} authorities cited therein.

\textsuperscript{88} Id. at 727, 505 A.2d at 904. On this point the court quoted Roged, Inc. \textit{v. Paglee}, 280 Md. 248, 254, 372 A.2d 1059, 1062 (1977), which states that if the language of a contract is "plain and unambiguous," "the contract will be interpreted to mean what a "reasonable person in the position of the parties would have thought it meant."

\textsuperscript{89} 66 Md. App. at 728, 505 A.2d at 905.


\textsuperscript{91} Pursuant to rule 2-503(a)(1) (formerly rule 503), actions may be consolidated when they involve a "common question of law or fact, or a common subject matter."

\textsuperscript{92} Pursuant to Maryland Rule 2-503(a)(2) (formerly Maryland Rule 606), "[i]n the trial of a consolidated action, the court may direct that joint or separate verdicts or judgments be entered."

\textsuperscript{93} 305 Md. at 240, 503 A.2d at 249-50.
ular case may be appealed immediately despite the existence of unresolved claims in other cases that were consolidated with it for trial.\textsuperscript{94} Rule 2-602, which bars the appeal of a decision that "adjudicates fewer than all of the claims in an action" unless the court expressly finds "no just reason for delay," applies only to multiple claims in a single action.\textsuperscript{95} The rule does not apply to consolidated actions unless the trial court directs the entry of a joint judgment to dispose of all the actions simultaneously.\textsuperscript{96}

The Court of Appeals relied heavily on \textit{Coppage v. Resolute Insurance Co.}\textsuperscript{97} and overruled two cases in which the Court of Special Appeals had attempted to limit or distinguish \textit{Coppage}. Seizing on dicta in \textit{Coppage}, the Court of Special Appeals in \textit{Leach v. Citizens Bank of Maryland}\textsuperscript{98} had suggested that \textit{Coppage} applies only when cases are consolidated "as a matter of convenience."\textsuperscript{99} The \textit{Leach} court therefore distinguished \textit{Coppage} on the ground that the cases in \textit{Leach} were consolidated not for convenience, but rather because of a "common issue of fact and law."\textsuperscript{100} In \textit{O'Connor v. Plotkins, Inc.}\textsuperscript{101} the Court of Special Appeals followed the distinction it announced in \textit{Leach}.\textsuperscript{102}

The Court of Appeals stated that it did not intend \textit{Coppage}'s reference to convenience to serve as a standard for determining whether consolidated actions should be treated as one action for the

\textsuperscript{94} \textit{Id.} at 236, 503 A.2d at 248. That was the court's holding in \textit{Coppage v. Resolute Ins. Co.}, 264 Md. 261, 285 A.2d 626 (1972), a case that was affirmed recently in \textit{Unnamed Attorney v. Attorney Grievance Comm'n}, 303 Md. 473, 494 A.2d 940 (1985).

\textsuperscript{95} 305 Md. at 236, 503 A.2d at 247-48. The court extended its interpretation of former rule 605, discussed in \textit{Coppage}, to present rule 2-602.

\textsuperscript{96} \textit{Id.} at 236, 503 A.2d at 248. In this case the Yaremas and four other parties sued Exxon and nine other defendants. The trial court consolidated the action with three other cases in which Exxon was named as a codefendant. Exxon settled with the Yaremas' co-plaintiffs, but was found liable to the Yaremas and the other plaintiffs. The court denied all post-trial motions in the Yaremas' case on December 16 and entered a "Judgment Absolute." On January 13, 1984, the court revised the Yaremas' damage awards and re-entered judgment. \textit{Id.} at 221-26, 503 A.2d at 242.

Exxon appealed on January 24, but the trial court struck the appeal due to lateness and held that the December 16 judgment was final. Exxon appealed that decision, contending that the January 24 appeal was timely because the court had not entered final judgment until January 13, or in the alternative, that the appeal was premature under former rule 605 a (now rule 2-602) because claims in cases other than the Yaremas' remained unresolved. The Court of Special Appeals seemed to accept Exxon's second argument and dismissed the appeal.

\textsuperscript{97} 264 Md. 261, 285 A.2d 626 (1972).

\textsuperscript{98} 17 Md. App. 391, 302 A.2d 634 (1973).

\textsuperscript{99} \textit{Id.} at 396, 302 A.2d at 636.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} 32 Md. App. 329, 362 A.2d 95 (1976).

\textsuperscript{102} \textit{Id.} at 338-39, 362 A.2d at 100.
purposes of appeal. The court also pointed out that cases can be consolidated only if they involve "common issues of law or fact or a common subject matter"; therefore, the Court of Special Appeals could not have validly distinguished Coppage on the ground that it did not involve "common issues of fact and law." Moreover, in neither Leach nor O'Connor did the Court of Special Appeals address former rule 606. Yet that rule, which allowed a court to authorize separate judgments in consolidated actions, was the basis for the Copyage decision. Accordingly, both cases were overruled.

A secondary issue in Yarema involved the finality of a judgment subsequently revised by the trial court. The Court of Appeals held that if a court revises a judgment within thirty days after it is entered and before an appeal is filed, "the prior judgment loses its finality and the revised judgment becomes the effective final judgment in the case." Although the power to revise a judgment is ordinarily authorized by a motion filed by a party under rule 2-535(a), the court held that the same effect is possible when a court revises a judgment sua sponte.

6. Revision of Judgments.—Under Maryland Rule 2-535(b) a circuit court may at any time revise a judgment tainted by fraud, mistake, or irregularity. In Preissman v. Mayor and City Council of Baltimore the Court of Special Appeals held that the "mistake" within the meaning of rule 2-535(b) is limited to procedural errors that strip the trial court of jurisdiction. Thus, although the City inadvertently sold a taxpayer's property at a tax sale after having collected the taxes due through attachment of the owner's bank ac-

103. 305 Md. at 238, 503 A.2d at 249.
105. 305 Md. at 237, 503 A.2d at 248.
106. Md. R. 606 is now Md. R. 2-503(a)(2).
107. 305 Md. at 238, 503 A.2d at 249.
109. Md. R. 2-535(a) provides in part that: "On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment."
110. 305 Md. at 241, 503 A.2d at 250.
111. Md. R. 2-535(b). Rule 2-535(b) states: "(b) Fraud, Mistake, Irregularity.—On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."
113. Id. at 558-59, 497 A.2d at 829.
count,\(^{114}\) this mistake did not fall within the ambit of the rule.\(^{115}\)

In *Balducci v. Eberly*\(^{116}\) the Court of Appeals held that Maryland appellate courts have the inherent power to revise an ambiguous mandate even after it has been received in the court below.\(^{117}\) Implicitly, the court also held that the ambiguous mandate does not become a final judgment until after the second appeal—after the appellate court has had the opportunity to explain its original mandate.

This dispute arose out of foreclosure proceedings instituted by the trustees of a deed of trust executed by the Eberlys. The circuit court enjoined the foreclosure, but in an unreported per curiam opinion, the Court of Special Appeals vacated the injunction.\(^{118}\) The appellate court observed that the Eberlys had produced no evidence indicating the necessity or propriety of continuing the injunction; however, the court failed to mention whether the circuit court should consider that evidence at a new trial.\(^{119}\)

The trustees resumed the foreclosure proceeding, and the Eberlys once again sought an injunction.\(^{120}\) At a hearing on the merits of granting an injunction, the Eberlys were "well armed with testimonial and documentary evidence to support their posi-

\(^{114}\) *Id.* at 554-55, 497 A.2d at 827. Despite the City's "mistake," Preissman in fact opposed the attempt to revise the original decree, which divested him of title to his properties. Apparently, the properties contained a multitude of housing violations, and Preissman simply did not want them back. *Id.* at 557, 497 A.2d at 828.

\(^{115}\) *Id.* at 559-60, 497 A.2d at 829. The circuit court, which ruled in the City's favor, had erred in failing to distinguish between two distinct meanings of the word "jurisdiction." On the one hand, "jurisdiction" refers to the court's power to render a valid judgment. If, for example, the court does not have personal jurisdiction over a defendant or subject matter jurisdiction over an issue, then the court lacks power to render a valid judgment. On the other hand, "jurisdiction" is sometimes used colloquially to refer to the propriety of granting the particular relief sought. For the purposes of rule 2-535(b), only the former meaning of "jurisdiction" is important. Thus, only a mistake concerning the court's power to render a valid judgment can lead to the invocation of rule 2-535(b).

The Court of Special Appeals did not question the impropriety of the 1983 decree vesting the City with title to the property. Surely, had the circuit court known that Preissman's debt had been satisfied, this order would never have issued. Nevertheless, the court found that even though the debt had been satisfied, the circuit court still had jurisdiction—i.e., power—in the quasi in rem foreclosure proceeding.

\(^{116}\) 304 Md. 664, 500 A.2d 1042 (1985)

\(^{117}\) *Id.* at 674, 500 A.2d at 1048.

\(^{118}\) *Id.* at 667-68, 500 A.2d at 1044.

\(^{119}\) See *id.* at 668 n.5, 500 A.2d at 1044 at n.5. The Eberlys and the circuit court judge had apparently proceeded under the mistaken impression that the parties had stipulated to an agreed set of facts. *Id.*

\(^{120}\) *Id.* at 668, 500 A.2d at 1045.
Nevertheless, the circuit court dismissed the Eberlys’ petition, ruling that the Court of Special Appeals’ mandate was res judicata on the merits of the injunction.  

The Eberlys appealed to the Court of Special Appeals and won a reversal. The court explained that its prior dissolution of the injunction was not a judgment on the merits; therefore, res judicata did not bar a subsequent inquiry into the merits of granting an injunction. The Court of Appeals affirmed, holding it well within the power of an appellate court to correct its own clerical errors after the court below has received an ambiguous mandate.

C. Statutes of Limitations

1. Discovery Rule.—In O’Hara v. Kovens the Court of Appeals held that, for the purposes of the discovery rule, the determination of when a cause of action accrues is a question of fact, not a question of law. Therefore, the trier of fact, rather than the judge acting in a judicial capacity, should make such determinations. The Court of Appeals thus rejected the authority of Moy v. Bell. In that case, the Court of Special Appeals had stated that: “[T]he application of a statute of limitations is strictly a legal question and . . . the facts necessary to determine its application, such as when a cause of action accrues, if a cause of action accrues, etc., must be

121. Id. (quoting circuit court opinion).
122. Id.
123. Eberly v. Balducci, 61 Md. App. 80, 87, 484 A.2d 1043, 1046 (1984), aff’d, 304 Md. 664, 500 A.2d 1042 (1985). The court pointed out that: “Our decision in the prior appeal was not intended to prevent the mortgagors from presenting evidence to sustain their burden regarding the propriety of granting the injunction; we simply held that no interlocutory or permanent injunction could be issued based upon that record.” Id.
124. 304 Md. at 674, 500 A.2d at 1048. The court relied on George v. Farmer’s and Merchant’s Nat’l Bank, 155 Md. 693, 142 A. 590 (1928). In George the Court of Appeals’ mandate contained the words “judgment reversed,” but did not expressly award a new trial. On a subsequent appeal, the court termed this omission a clerical oversight and stated that its prior opinion clearly indicated the “purpose and intention . . . that a new trial should be had . . . .” This purpose would be entirely frustrated if the court were unable to correct the prior mandate. 155 Md. at 697, 142 A. at 591.
125. 305 Md. 280, 503 A.2d 1313 (1986).
126. Under the discovery rule, a cause of action accrues when the claimant in fact knew or should have known of the wrong. Knowledge of facts that would put an ordinary person on inquiry notice is treated as knowledge of any facts that a reasonable inquiry would disclose. Poffenberger v. Risser, 290 Md. 631, 636, 431 A.2d 677, 680 (1981).
127. 305 Md. at 295, 503 A.2d at 1321.
128. Id.
made by the judge in his judicial role.”

According to the Court of Appeals, the Moy court had misinterpreted decisions that predated Maryland’s general adoption of the discovery rule.

2. Soldier’s and Sailor’s Civil Relief Act.—Section 525 of the Soldier’s and Sailor’s Civil Relief Act (SSCRA), a federal statute, tolls the limitation period applicable to plaintiffs who are members of the military services. In McCance v. Lindau the Court of Special Appeals held that section 525 is to be applied unconditionally to those on active military duty. Thus, the court held that the plaintiff, a career military officer, could invoke the protection of the SSCRA without showing that his military service in any way prevented him from filing suit in a timely fashion.

The trial court had emphasized that the plaintiff’s status as a career serviceman could toll that statute for decades; therefore, that court required the plaintiff to demonstrate that his military duties prejudiced him from filing a timely lawsuit. The Court of Special Appeals disagreed. A different standard for career service personnel is invalid not only because the term “career” is ambiguous.

---

130. Id. at 370, 416 A.2d at 293-94.
131. 305 Md. at 297, 503 A.2d at 1321.
133. Id. Section 525 provides:

The period of military service shall not be included in computing any period now or hereafter to be limited by any law ... for the bringing of any action or proceeding in any court ... by or against any person in military service ... whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service ... 

135. Id. at 512, 492 A.2d at 1357.
136. See id.
137. Id. at 509, 492 A.2d at 1355. The trial court found it difficult to believe that Congress had intended to provide blanket protection to career military personnel who might be on active duty for decades. It cited three cases that distinguished career personnel from other persons in the military service: Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977) (party must be “handicapped” by military service for § 525 to apply); King v. Zagorski, 207 So. 2d 61 (Fla. Dist. Ct. App. 1968) (statute’s purpose is to protect those service personnel who have been torn from their normal activity at home to serve their country, not to protect those career service personnel who are no more disadvantaged than the ordinary civilian); and Bailey v. Barranca, 83 N.M. 90, 488 P.2d 725 (1971) (section 525 rests on the premise that military service must be the reason for the failure to meet obligations). On the other hand, the Court of Special Appeals found support in Bickford v. United States, 656 F.2d 636 (Ct. Cl. 1981), which held that the only critical factor is military service; once that is shown, the statute of limitations is automatically tolled for the duration of the service.

138. 63 Md. App. at 509, 492 A.2d at 1355. The Court of Special Appeals wondered when one becomes a career service person: "Does the mere act of enlistment ... consti-
CIVIL PROCEDURE

but also because it appears nowhere in the statute.\textsuperscript{139} Furthermore, the trial court ignored the plain language of section 525, which states that the section applies to all military personnel.\textsuperscript{140} Thus, since the statute itself does not require a showing of prejudice, the court held it error to read this requirement into the statute.\textsuperscript{141} Congress could have granted conditional protection to service personnel, but it clearly chose not to do so.

The court acknowledged that because a career service person could wait for many years to file a suit for any reason, or for no reason at all, this decision may lead to absurd results.\textsuperscript{142} But although Congress has amended other sections of the Act, in over sixty-five years it has neither repealed nor amended section 525.\textsuperscript{143} The court thus deferred to Congress.

3. Defense Raised in Motion to Dismiss.—In G & H Clearing and Landscaping v. Whitworth\textsuperscript{144} the Court of Special Appeals held that a “statute of limitations” defense may sometimes be raised in a motion to dismiss,\textsuperscript{145} and that a motion to dismiss may sometimes be treated as a motion for a more definite statement.\textsuperscript{146} The issues arose when the defendant filed a motion to dismiss the plaintiffs’ complaint, claiming that the action was barred by the statute of limitations and that the complaint was too vague for the defendant to frame an answer.\textsuperscript{147} In disposing of the motion, the trial court determined that the complaint was vague as to the nature and timing of the defendant’s alleged wrongful conduct.\textsuperscript{148} Consequently, the court granted the motion, but gave the plaintiffs fifteen days leave to

\textsuperscript{139} Id. at 510, 492 A.2d at 1355-56. Although the statute itself fails to create an exception for career service personnel, § 510 does state that “the following provisions are made for the temporary suspension of legal proceedings . . . .” 50 U.S.C. § 510 (1982) (emphasis added).

\textsuperscript{140} 63 Md. App. at 510, 492 A.2d at 1356.

\textsuperscript{141} Id. at 510-11, 492 A.2d at 1356.

\textsuperscript{142} Id. at 512, 492 A.2d at 1357.

\textsuperscript{143} Id. at 513, 492 A.2d at 1357. Congress initially enacted the SSCRA during World War I. Id.

\textsuperscript{144} 66 Md. App. 348, 503 A.2d 1379 (1985).

\textsuperscript{145} Id. at 354, 503 A.2d at 1382.

\textsuperscript{146} Id. at 356, 503 A.2d at 1383.

\textsuperscript{147} Id. at 351, 503 A.2d at 1380-81. The complaint, a legal malpractice action, was filed in 1983. It alleged several vague acts of negligence, but did not state when the acts had occurred. The complaint did state, however, that the plaintiffs had employed the defendant in 1978. The defendant contended that the action was barred by the statute of limitations because of the complaint’s reference to the year 1978.

\textsuperscript{148} Id., 503 A.2d at 1381.
amend the complaint.\textsuperscript{149} When the plaintiffs failed to do so, the court dismissed the action with prejudice.\textsuperscript{150}

On appeal, the Court of Special Appeals considered whether it was proper for the defendant to assert the defenses of limitations and vagueness in a motion to dismiss,\textsuperscript{151} and whether the trial court was justified in dismissing the action with prejudice. According to rule 2-323(g), the statute of limitations "is an affirmative defense, to be raised in an answer to the complaint."\textsuperscript{152} The court, however, observed that both rule 2-323(g) and rule 2-322(b), which governs motions to dismiss for failure to state a claim upon which relief can be granted, were derived from the Federal Rules.\textsuperscript{153} In federal practice, however, the defense of limitations may be raised by motion to dismiss when the time bar is apparent on the face of the complaint.\textsuperscript{154} Hence, the court held that:

If the time bar . . . is apparent on the face of the complaint, the complaint would indeed fail to state a claim upon which relief can be granted. . . . [A] motion to dismiss would therefore be an appropriate, although not a mandatory, way in which to assert that defense.\textsuperscript{155}

On the vagueness issue the court noted that

[U]nless the complaint actually omits essential elements of the cause of action or is so utterly vague or deficient in articulation as not to allege a cognizable cause of action, the proper method for complaining about vagueness is a motion for more definite statement, not a motion to dismiss.\textsuperscript{156}

The court held that this defendant was not entitled to the out-

\textsuperscript{149}. \textit{Id.} at 352, 503 A.2d at 1381.

\textsuperscript{150}. \textit{Id.}

\textsuperscript{151}. The court reviewed the Maryland Rules as they stood before 1984. Under former rule 342, in an action at law the statute of limitations had to be specially pled; it could not be raised by demurrer "[u]nless the time within which the action had to be filed was an element of the cause of action itself." \textit{Id.} Under former rule 371 b, in equity actions any defense that was apparent on the face of the bill could be raised by either demurrer or answer. The court stated that "the new Rules, unfortunately, are not quite so clear in this regard." 66 Md. App. at 352, 503 A.2d at 1382.

\textsuperscript{152}. 66 Md. App. at 352, 503 A.2d at 1382.

\textsuperscript{153}. \textit{Id.}


\textsuperscript{155}. \textit{Id.}

\textsuperscript{156}. \textit{Id.}
right dismissal he had requested.\textsuperscript{157} By granting the plaintiffs fifteen days leave to amend, however, the trial court effectively had treated the motion to dismiss as a motion for a more definite statement.\textsuperscript{158} The Court of Special Appeals found that treatment appropriate, stating that the Maryland Rules are subject to "some flexibility in their application, especially as to matters of form."\textsuperscript{159} The court thus held that upon the plaintiffs' failure to file an amended complaint, the trial court properly dismissed the action with prejudice.\textsuperscript{160}

\textbf{D. Attorney's Fees}

\textit{1. Decision to Award.}—Maryland Rule 1-341 permits the court to assess attorney's fees against a party who has maintained or defended a civil action in bad faith or without substantial justification.\textsuperscript{161} In \textit{Kirsner v. Edelman}\textsuperscript{162} the Court of Special Appeals held that it would award attorney's fees incurred on appeal only if it has some reasonable basis upon which to assess the fee.\textsuperscript{163} To establish a reasonable basis for rule 1-341 sanctions, the injured party ordinarily must present an affidavit detailing the offending party's conduct.\textsuperscript{164} In some cases, however, it is enough that the court had the opportunity to observe the offending party's conduct.\textsuperscript{165}

\textit{Kirsner} brought home the force of this ruling with particular clarity. The court conceded that sanctions were warranted on the facts before it.\textsuperscript{166} But because the injured party did not submit an affidavit, and because the court had not had the opportunity to observe counsel, the court declined to impose sanctions.\textsuperscript{167}

In \textit{Century I Condominium Association v. Plaza Condominium Joint

\begin{itemize}
\item \textsuperscript{157} \textit{Id.} at 355, 503 A.2d at 1382-83.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.} at 356, 503 A.2d at 1383.
\item \textsuperscript{160} \textit{Id.} at 357-58, 505 A.2d at 1384.
\item \textsuperscript{161} Md. R. 1-341. Rule 1-341 provides:
\begin{quote}
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 proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.
\end{quote}
\item \textsuperscript{162} 65 Md. App. 185, 499 A.2d 1313 (1985).
\item \textsuperscript{163} \textit{Id.} at 197-98, 499 A.2d at 1320.
\item \textsuperscript{164} \textit{Id.} at 198, 499 A.2d at 1320.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 197, 499 A.2d at 1319.
\item \textsuperscript{167} \textit{Id.}, 499 A.2d at 1320.
\end{itemize}
the Court of Special Appeals held that under rule 1-341 a party that had frustrated its opponent's attempts to stay appellate litigation was not entitled to all attorney's fees incurred on appeal. In so holding, the court illustrated the broad discretionary powers that the new rule affords the courts.

This appeal arose out of an extended legal battle in which Century sought to block Plaza's attempt to construct an eighteen-story condominium in Ocean City. In June 1983 the Worcester County Board of Zoning Appeals granted a height exception and determined that Plaza did not need a conditional use permit to construct off-site parking. In February 1984, after several preliminary skirmishes, the zoning administrator issued a building permit to Plaza. Century then counterattacked on two fronts. First, it sought a declaratory judgment in circuit court to invalidate the administrative decision not to require a conditional use permit. Second, on essentially the same grounds, it went before the Board to appeal the issuance of the building permit. This second claim was before the court in Century.

In June 1984 the circuit court ruled against Century in the declaratory judgment action. The Court of Special Appeals affirmed that ruling in an unreported per curiam opinion issued in March 1985. In the meantime, in April 1984, the Board had dis-

169. Id. at 120-21, 494 A.2d at 720. For the text of rule 1-341, see supra note 161. Rule 1-341 is derived from former Rule 604 b, which applied only to the circuit courts and provided as follows:

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 the 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 opposing such proceeding, including reasonable attorney's fees. Md. R. 604(b)(1983).

The new rule effected two major changes. First, because of its placement in Title 1, it clearly applies to all courts, including the courts of appeals. Rule 604 b, in contrast, applied only to the circuit courts. See Blanton v. Equitable Bank, N.A., 61 Md. App. 158, 161, 485 A.2d 694, 696 (1985) and authorities cited therein. Second, because the new rule replaces the mandatory "shall" with the discretionary "may," the courts now have the flexibility to deal equitably with litigants caught in the heat of battle.

170. 64 Md. App. at 111, 494 A.2d at 715.
171. Id.
172. Id.
173. Id.
174. Id. at 112, 494 A.2d at 716.
175. Id. at 111-12, 494 A.2d at 715-16.
176. Id. at 112, 494 A.2d at 716.
missed Century's parallel appeal. The circuit court affirmed that
decision in October 1984, while the appeal of the declaratory judg-
ment claim was still pending in the Court of Special Appeals.

Century initially sought to appeal the circuit court's October
1984 decision; however, in January 1985, it moved to stay the ap-
peal pending the outcome of the declaratory judgment appeal. In
requesting the stay, Century urged the court to consider the two
appeals' identical subject matter. Although Plaza successfully op-
posed the stay, it sought attorney's fees after prevailing on the sec-
dond appeal. Because the first appeal governed the issues raised
in the second, Plaza contended Century lacked "substantial justifica-
tion," within the meaning of rule 1-341, to press the second
appeal.

Since Plaza had vigorously opposed the stay, and thus the possi-
bility of mitigating its legal fees, the court had to decide whether
Plaza was entitled to fees incurred between the date Century moved
to stay the second appeal and the date of oral argument. Plaza, the
court found, pursued its motion for fees "with ill grace." For,
"[h]ad Plaza agreed to the stay, none of those charges might have
accrued . . . ." Using the discretionary language in the new rule
as a vehicle for the exercise of equitable powers previously unavaila-
ble, the court declined to award fees.

In addition, because Century did not dismiss this action after
losing the declaratory judgment appeal, the court had to decide
whether Plaza was entitled to fees incurred at oral argument. In re-
questing the stay, Century had conceded that the first appeal would

177. Id. at 111, 494 A.2d at 715.
178. Id. at 112, 494 A.2d at 716.
179. Id. at 120, 494 A.2d at 720.
180. Id. at 120-21, 494 A.2d at 720.
181. Id. at 114, 494 A.2d at 717.
182. Id. at 115-16, 494 A.2d at 717.
183. Id. at 120, 494 A.2d at 720.
184. Id. at 121, 494 A.2d at 720.
185. Id. The court also held that despite the duplicative nature of Century's second
claim, Plaza was not entitled to compensation for expenses incurred at trial. Id. at 119,
494 A.2d at 719. While noting that Century "may have been skating on thin ice," the
court refused to hold that the trial judge had abused his discretion in refusing to impose
sanctions. The court continued:

In so holding, we emphasize the role of discretion under Rule 1-341. . . . The
existence of that discretion means that the [trial] court must make a judgment
call with which we may disagree (in the sense that we might have called it other-
wise sitting at the trial bench) but which we will not disturb unless the judg-
ment call is so far off the mark as to amount to an abuse of discretion.

Id. at 119-20, 494 A.2d at 719-20.
dispose of the substantive legal issues involved in the second appeal; therefore, the court held that Century's failure to dismiss the action was "without substantial justification" within the meaning of rule 1-341.186 Thus, Plaza received attorney's fees for some of its expenses incurred at oral argument.187

In denying Plaza's motion for all fees incurred on appeal except those directly related to oral argument, the court brought home the impact of rule 1-341's new discretionary language188 and made clear to litigants the important role that foresight and cooperation play in streamlining litigation. The message is clear: A party cannot recover fees under rule 1-341 that might have been avoided but for some action by the moving party.

2. Local Court Rules.—In Walker v. Haywood189 the Court of Special Appeals held that local "policies" requiring an auditor to place a ceiling on attorney's fees incurred in connection with proceedings on a deed of trust and in bankruptcy were not in fact court policies or rules.190 Thus, the putative "policies" applied only to the auditor; they did not bind a court hearing exceptions to the audit.191 Since the deed of trust in question provided no set allowance for attorney's fees, the court was required to determine whether the fees requested were reasonable.192

This decision will guide local and circuit courts in the adoption of rules. Although these courts have the authority to promulgate rules regulating auditors,193 a policy cannot become a rule unless it

186. Id. at 121, 494 A.2d at 720-21.
188. The new rule uses the discretionary word "may"; its predecessor, rule 604 b, used the imperative "shall." See supra notes 161 & 169.
190. Id. at 13, 498 A.2d at 1204. Walker, the substitute trustee, contended that in foreclosing on the deed of trust he had incurred $900 in attorney's fees. In Prince George's County, however, an unwritten court policy imposed a $750 ceiling on the fees he could collect (10 hours of work at $75 per hour). In addition, Walker claimed $1225 in attorney's fees arising from the related bankruptcy proceeding. Another unwritten policy imposed a $500 ceiling on the fees he could collect for this matter.
191. Id.
192. Id. at 14, 498 A.2d at 1205. The deed of trust provided for the payment of reasonable attorney's fees. Id.
193. Walker contended that the court had no power to establish such a rule. As the court pointed out, however, Maryland Rule 1-102 permits the adoption of local, county, and circuit rules covering five specific subject areas. Regulation of auditors is one of the designated areas. 65 Md. App. at 9, 498 A.2d at 1202.
is adopted by a formal court order in which a majority of the circuit judges concur.\textsuperscript{194} This procedure, the court reasoned, establishes the rule's provisions, sets the rule's effective dates, and evidences the rule's adoption.\textsuperscript{195}

\textbf{E. Choice of Law}

Under Maryland law, a party cannot secure an indemnification agreement against liability for bodily injuries that occur during building construction, alteration, repair, or maintenance if the injuries result solely from that party's negligence. Section 5-305 of the Courts and Judicial Proceedings Article renders these agreements void and unenforceable as against public policy.\textsuperscript{196} Under Pennsylvania common law, however, these agreements are perfectly legal.\textsuperscript{197} Yet in \textit{Bethlehem Steel Corp. v. G.C. Zarnas & Co.}\textsuperscript{198} the Court of Appeals found such an agreement unenforceable under section 5-305 even though the agreement was formed in Pennsylvania and even though Maryland adheres to \textit{lex loci contractus}.\textsuperscript{199}

\begin{itemize}
    \item \textsuperscript{194} 65 Md. App. at 10, 498 A.2d at 1203. The "policies" in question had been adopted by only three judges, not by the entire fourteen-member court; therefore, the Court of Special Appeals concluded that the "policies" were not court policies. \textit{Id.} at 11, 498 A.2d at 1203.
    
    Neither Maryland Rule 1-102 nor its predecessor, Maryland Rule 1.f., expressly stipulates a method for the adoption of local or circuit rules. Similarly, before 1969, the rules stipulated no specific method. The court chose the present method of adopting rules because that method was in use before 1969. 65 Md. App. at 10-11, 498 A.2d at 1202-03.

    Walker asserted a second possible method: "[A] settled practice adhered to for many years and well known constitutes a rule." \textit{Id.} at 12, 498 A.2d at 1203 (citing Detroit Heating & Lighting Co. v. Kemp, 182 F. 847 (C.C.D. Md. 1910)). The court's reaction to this statement is ambiguous. It conceded that "[t]his may well be true," but added that "we certainly do not suggest that courts may evade the strictures on local and circuit rule-making by informally adopting policies which are in fact rules." \textit{Id.}

    \textsuperscript{195} 65 Md. App. at 11, 498 A.2d at 1203. The court also reasoned that this procedure facilitates appropriate publication of the rule, although it added that publication may not always be required. \textit{Id.}

    
    A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building ... purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person ... caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.


    \textsuperscript{198} 304 Md. 183, 498 A.2d 605 (1985).

    \textsuperscript{199} \textit{Id.} at 189, 498 A.2d at 608. \textit{Lex loci contractus} requires courts in the forum state to determine the validity and construction of a contract according to the substantive law of
In 1977 G.C. Zarnas & Co. (Zarnas), a Maryland corporation, entered into a contract in Pennsylvania with Bethlehem Steel, a Delaware corporation. Under the contract Zarnas undertook to paint parts of Bethlehem’s Sparrows Point plant in Maryland. The contract also required Zarnas to indemnify Bethlehem against liability for injuries to Zarnas employees that occurred during the course of the contract. In 1978 a Zarnas employee was injured while working at Sparrows Point. After the employee filed a negligence claim, Bethlehem sought a declaration of its rights under the indemnity agreement.

Bethlehem contended that because Maryland applies the law of the place of the contract, Pennsylvania law should govern the question of the contract’s validity. Therefore, it contended, the court should hold Zarnas to its obligations under the indemnity agreement. The circuit court and the Court of Appeals disagreed. Given its express statement that these agreements are “void and unenforceable,” section 5-305, the court concluded, “reflects a public policy sufficient to override the application of Pennsylvania law under the circumstances of this case.”

The court’s application of public policy is suspect. If the Bethlehem-Zarnas contract did conflict with the public policy of Maryland, the proper approach would have been for the court to dismiss the case; the court should not have used public policy as a means of using Maryland substantive law, rather than Pennsylvania substantive law, to decide the case. Yet the Zarnas court’s approach is subtle and sophisticated. The court would probably not hold that all legislative declarations of public policy would automatically suspend the operation of lex loci contractus. It is unclear, for example, whether the court would have arrived at the same result if a Pennsylvania

the state in which, under the forum’s substantive law, the contract was made. Traylor v. Grafton, 273 Md. 649, 600, 332 A.2d 651, 659 (1975). Courts have traditionally invoked the public policy exception to lex loci contractus in order to bar the enforcement of contracts considered vicious or immoral under the forum’s laws. See 304 Md. at 188-89, 498 A.2d at 607-08 and authorities cited therein; Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S. 2d 527, 529 (1964).

200. 304 Md. at 185, 498 A.2d at 606.
201. Id.
202. Id. at 185-86, 498 A.2d at 606.
203. Id. at 186, 498 A.2d at 606.
204. Id.
205. Id. at 186-87, 498 A.2d at 606-07.
206. Id. at 187, 498 A.2d at 607.
207. Id. at 190, 498 A.2d at 608.
statute expressly created such a contract right. The court suggested that were this so, it would have deferred to Pennsylvania law.209

Moreover, while the basis of its holding is not entirely clear, it appears that the court has employed an interest analysis. The court balanced Maryland's interest in prohibiting indemnification agreements against Pennsylvania's interest in having these agreements enforced.210 The court noted that if the suit had been brought in Pennsylvania, Pennsylvania courts, which employ an interest analysis,211 would probably have applied Maryland law.212 Therefore, the court seems implicitly to have found that Pennsylvania had no interest, or at most a weak interest, in having its law applied.213 Maryland's strong interest in prohibiting these agreements thus prevailed.

F. Other Developments

1. Postjudgment Attachment Procedures.—In Reigh v. Schleigh214 the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of Maryland Rule 3-645(c)(4)-(5), which governs the form of notice contained in a postjudgment writ of garnishment.215 The court held that to comport with the requirements of

209. 304 Md. at 191, 498 A.2d at 609.
210. See id. at 191 n.5, 498 A.2d at 609 n.5. The court seems to have used Maryland's public policy as a surrogate for an interest analysis. Cf. Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (holding that New York's strong public policy against damage limitations in wrongful death claims barred application of Massachusetts damage limitation even though Massachusetts was lex loci delicti). In addition to Maryland's strong interest in applying its own law, evidenced by the clear language of § 5-305, other factors tipped the balance in Maryland's favor. The court observed that: "Zarnas is a Maryland corporation. The contract involved was to be performed entirely in Maryland. The injury occurred in Maryland . . . ." 304 Md. at 191 n.5, 498 A.2d at 609 n.5.
212. 304 Md. at 191 n.5, 498 A.2d at 609 n.5. In attempting to discern how Pennsylvania courts would have decided this case, the court appears to have employed the doctrine of renvoi. Renvoi requires the forum first to use its own choice of law rule to determine which state's substantive law it should apply; then, however, it applies the whole law — the substantive law and the conflicts law — of that other state. The forum thus attempts to decide the case precisely as a court in the other state would decide it. See E. SCOLES & P. HAY, CONFLICT OF LAWS § 3.13 (1982). American courts ordinarily employ renvoi only in property law cases. See id. at 68 n.2. A forum may often employ renvoi in other types of cases as a means of escaping the rigid rule of lex loci. See W. REESE & M. ROSENBERG, CASES ON CONFLICT OF LAWS 460 (1984).
213. 304 Md. at 191 n.5, 498 A.2d at 609 n.5.
215. Id. at 1196. Rule 3-645(c) provides:
   (c) Content.—The writ of garnishment shall . . . (4) notify the judgment debtor and garnishee that federal and state exemptions may be available,
the due process clause of the fourteenth amendment, the writ need only inform a judgment debtor that "there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property"; the writ need not inform a judgment debtor of all defenses he or she may have.\textsuperscript{216} The court also upheld the constitutionality of Maryland Rule 3-643(f), which provides ambiguously for a "prompt" postjudgment hearing at the debtor's request.\textsuperscript{217}

The plaintiff, Esther Reigh, was a seventy-year-old woman whose monthly income consisted of $380.00 in Social Security payments and $43.14 from a pension fund.\textsuperscript{218} Each month both checks were deposited directly into her bank account.\textsuperscript{219} In September 1981 the C & P Telephone Company obtained a judgment against Reigh.\textsuperscript{220} On July 6, 1982, Schleigh, the clerk of the District Court for Washington County, ordered the garnishment of Reigh's bank account.\textsuperscript{221} The bank immediately froze Reigh's account and also informed her by mail that it had been served with a writ of garnishment.\textsuperscript{222} Later that month, the District Court for Washington County exempted Reigh's account from the garnishment on account of her poverty.\textsuperscript{223}

Reigh, joined by three other impoverished judgment debtors, filed this challenge, charging that the then current Maryland District Rules\textsuperscript{224} deprived the plaintiffs of property without due process of law because the rules (1) failed to inform judgment debtors of all available state and federal exemptions; (2) failed to require timely notice served upon the judgment debtor either before or immediately after attachment; and (3) failed to require a hearing within a specified number of days when requested by the judgment debtor.\textsuperscript{225}

\textsuperscript{216} 784 F.2d at 1196.
\textsuperscript{217} Id. at 1199. Rule 3-643(f), which provides for the release of property from levy, states that: "A party desiring a hearing on a motion filed pursuant to this Rule shall so request pursuant to Rule 3-311(d) and, if requested, a hearing shall be held promptly."
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{225} 595 F. Supp. at 1537.
The federal district court found the Maryland District Rules unconstitutional. It thus enjoined issuance of writs of garnishment until the rules were revised to require that (1) the notice contain a complete list of all exemptions available under state and federal law, and (2) a postjudgment hearing requested by the debtor take place no more than two weeks after garnishment.

Considering the revised Maryland Rules on appeal, the Fourth Circuit reversed and adopted the reasoning advanced by the dissenters in the Third Circuit case of *Finberg v. Sullivan*. Requiring the writ to list all possible state and federal exemptions, the court found, would far exceed the simple notice requirements mandated by the United States Supreme Court and would cause more harm than good. Furthermore, it would be inappropriate to require even a partial listing of common exemptions because it would be impossible to determine which exemptions to include in such a list. A partial list, in the court's view, would lead to confusion and to a flood of further litigation.

The Fourth Circuit also found the rule's requirement of a "prompt hearing" to be constitutionally adequate. Absent evidence of delay at the state court level, the court felt it proper to presume "prompt hearings" were in fact taking place. The court thus disapproved of the two-week hearing requirement that the district court had imposed.

---

226. *Id.* at 1556.
227. *Id.* at 1557.
228. 634 F.2d 50, 64-94 (3d Cir. 1980) (en banc) (Aldisert, J., dissenting). *Finberg* is the leading case for the proposition that due process requires judgment debtors to receive notice of all possible state and federal exemptions that might apply. See 784 F.2d at 1194-95 and authorities cited therein. Many commentators have discussed the due process implications of notice requirements for postjudgment garnishment proceedings. See 595 F. Supp. 1535, 1551 n.10 and authorities cited therein; Motz & Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 Md. L. Rev. 61 (1986).
230. 784 F.2d at 1197. The court stated: "'The brute fact is that there are so many exemptions that to set forth this information on a writ would present a mass of incomprehensible boilerplate reeking with legalese.'" *Id.* at 1195 (quoting *Finberg*, 634 F.2d at 84 (Aldisert, J., dissenting)).
231. 784 F.2d at 1197.
232. *Id.*
233. *Id.* at 1199.
234. *Id.*
235. *Id.* Judge Widener dissented on the ground that the plaintiffs lacked standing. *Id.* (Widener, J. dissenting). Before filing this action, all the plaintiffs had their funds exempted from garnishment. *Id.* at 1200. Thus, Judge Widener contended, "no con-
2. Inadequate Record Extract.—Maryland Rule 1028 dictates the contents of the record extract that a party must submit on appeal.236 Maryland Rule 1031 dictates the style and content of an appellate brief.237 In Spivey v. Harris238 the Court of Special Appeals for the first time dismissed an appeal sua sponte because the appellant had failed to comply with either rule.239 By imposing the ultimate sanction of dismissal, the court set an example and sent a clear message to the Bar: the Maryland Rules are mandatory. Failure to comply with them may cause the sins of the attorney to be visited upon the controversy existed when the federal suit was filed. All that was present was fear of future controversy.” Id.

Agreeing with the district court, however, the majority found a live controversy. Id. at 1194. Following Harris v. Bailey, 675 F.2d 614 (4th Cir. 1982), the district court had found that due to their poverty and continued indebtedness, the Reigh plaintiffs were faced with a very real threat of being subjected again to the challenged procedures. 595 F. Supp. at 1542. Therefore, their claim fell within the exception to the doctrine of standing for claims “capable of repetition, yet evading review.” Id.

236. Md. R. 1028. Rule 1028 a provides in part:

The extracts from the record . . . shall be copied verbatim except as otherwise provided . . . . The table of contents, . . . shall also cover the contents of an appendix bound with the brief and shall give reference to [the] initial page of the direct, cross, and redirect examination of each witness . . . . If the transcript of testimony is reproduced, the pages shall be consecutively renumbered.

Rule 1028 b provides in part:

The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

Section i of rule 1028 provides that for violation of sections a or b, the court may “dismiss the appeal, or make any other appropriate order with respect to the case.”

237. Md. R. 1031. Rule 1031 prescribes such minutiae as the size and grade of paper, the type size, the width of margins, and the length of briefs. It also requires, inter alia, a table of contents and citations, a statement of the case, a statement of facts, and a section for argument.


239. Id. at 624, 498 A.2d at 283. Among other things, the appellant violated rule 1028 because his brief referred to pagination from the original transcript, rather than pagination of the record extract. This placed an unnecessary burden on the court:

[I]t would be necessary for the Court to number the pages, a service which we do not provide . . . . [T]here is no way for this Court to tell where a witness' testimony begins and ends other than for the Court to read all of the testimony from the original record. This is also a service we do not provide . . . . Finally, there is no way to tell from the record extract whether objections were made during the course of the trial and thereby preserved for appellate review.

Id.
client.  

3. **Forfeiture.**—Article 27, section 297(a) provides for the forfeiture of motor vehicles used in the transportation, sale, receipt, possession, or concealment of controlled dangerous substances. Former section 297(n) required that a forfeiture hearing be scheduled within thirty days after the defendant's conviction of a controlled dangerous substances violation.

In *State v. One 1980 Harley Davidson* the Court of Appeals held that dismissal of the State's forfeiture petition was not a proper sanction when, because of an administrative error, the State had failed to meet the thirty-day scheduling requirement. The court stressed that the State has no control over scheduling; rather, the court's administrative staff controls such matters. Therefore, the court concluded that the State should not suffer for an error that it did not commit.

4. **Justiciability.**—In *Hale v. Hale* the Court of Special Appeals held that an action to rescind a separation agreement may present a justiciable issue even if no divorce action has been filed, as long as there are interested parties who assert adverse claims on a state of facts, which must have accrued, wherein a legal decision is sought or demanded.

Mrs. Hale sued her husband for rescission of a separation

---

240. The court warned that: "Individual members of the bar have too frequently regarded these rules as optional and this Court has too frequently tolerated this attitude by overlooking the omissions and performing work which would have been done by counsel had counsel complied with the Rules." *Id.* at 623, 498 A.2d at 283.


242. *Id.* at § 297(h)(4).

243. *Id.* at § 297(n) (1982). Md. Ann. Code art. 27, § 297(h)(4) (Supp. 1986) superseded § 297(n) in 1984. Section 297(h)(4) requires that a hearing be scheduled not less than 30 nor more than 60 days after the vehicle's registered owners or the secured parties have either answered or are in default.

244. 303 Md. 154, 492 A.2d 896 (1985).

245. *Id.* at 160, 492 A.2d at 899. In this case the State's Attorney filed a timely request for a forfeiture hearing. *Id.* It is therefore unclear whether the court would have reached the same result had the State's Attorney failed to file a timely request.

246. *Id.*

247. *Id.* The court did not indicate, however, what, if any, sanction would be appropriate.


249. *Id.* at 232, 503 A.2d at 273. The court took its definition of a justiciable issue from *Reyes v. Prince George's County*, 281 Md. 279, 288, 380 A.2d 12 (1977). In that
agreement, alleging that she had been induced to enter the agreement by fraud, duress, and misrepresentation, and that she had suffered financial loss as a result. The circuit court dismissed the case for lack of subject matter jurisdiction, holding that no justiciable issue was present. The court reasoned that because a separation agreement contemplates a divorce, and because no divorce action had yet been filed, the parties could not litigate the separation agreement.

The Court of Special Appeals held that the Hales’ separation agreement was not contingent upon a filing for divorce and was subject to the same general rules that govern other contracts. Furthermore, the court held that the case presented a justiciable issue because Mrs. Hale had alleged that she was “currently being harmed” by an agreement into which she had not freely entered, and her husband had denied the allegations. Since there was a justiciable issue, the circuit court had subject matter jurisdiction under the Maryland Uniform Declaratory Judgments Act. The Court of Special Appeals therefore reversed.

5. Determination of Employment Relationship.—In Whitehead v. Safway Steel Products, Inc. the Court of Appeals held that if the evi-
dence on an employment issue is undisputed, the trial court may ordinarily decide the issue as one of law; however, if a party can point to evidence that conflicting inferences can be drawn from the undisputed facts, the issue will be one of fact.

The court was required to resolve a conflict between two seemingly divergent lines of cases. The first line of cases held that if the facts pertaining to the existence of the employment relationship were undisputed, the issue was one of law to be decided by the court. The second line of cases held that if differing inferences could be drawn from the undisputed facts, the issue was one for the jury. In synthesizing these two lines, the court implied that it had done nothing new; rather, by drawing on the earliest cases on the issue, the court tried to prove that the two tests, although semantically different, were "merely slightly divergent roads to the same Mecca." Any attempt to apply a different standard, the court stated, resulted from a misinterpretation of the test itself.

6. Abuse of Discretion.—In Hart v. Miller the Court of Special Appeals held that a trial judge abused his discretion by dismissing a case on the ground that the plaintiff's counsel failed to comply with

258. Id. at 76, 497 A.2d at 808.
259. Id. The court also determined that if evidence is disputed and if differing inferences can be drawn, the issue is for the jury. Id.

The court appeared reluctant to concede that when evidence is undisputed, the evidence may still yield conflicting inferences. Therefore, the court stated that "something more than conjecture of a party is necessary to establish that 'conflicting inferences' are possible in a given case." Id. Citing a recent decision, Mackall v. Zayre Corp., 293 Md. 221, 230, 443 A.2d 98, 103 (1982), the court stated that "[A]t the very least, a party must point to evidence in the case" from which conflicting inferences can be drawn. 304 Md. at 76, 497 A.2d at 808.


262. 304 Md. at 77, 497 A.2d at 808.

263. Deford v. State, Use of Keyser, 30 Md. 179 (1869); Sacker v. Waddell, 98 Md. 43, 56 A. 399 (1903) (if facts place employee/employer relationship in doubt, question is for jury; however, on any given state of facts, judge should decide legal relationship); Harrison v. Central Constr. Co., 135 Md. 170, 108 A. 874 (1919) (if facts have been ascertained or agreed upon by the parties, or are undisputed, and if there is no dispute as to the inferences to be drawn from the facts, the question becomes one of law to be decided by the judge); Todd v. Easton Furniture Co., 147 Md. 352, 128 A. 42 (1925).

264. 304 Md. at 77, 497 A.2d at 808. The court reasoned that the two tests have frequently been used interchangeably. In addition, the court referred to its long-standing policy of allowing trial courts to decide employment issues in undisputed cases. Id. 265. Id.

265. 65 Md. App. 620, 501 A.2d 872 (1985), cert. denied, 305 Md. 621, 505 A.2d 1342 (1986). This was a tort action resulting from a collision between a motorcycle driven by the plaintiff and an automobile driven by the defendant.
a court order directing him to answer interrogatories within a specified time period. The trial judge had emphasized the need for "consistency" in deciding matters in which the court has wide discretion. Despite the prospective hardship to the plaintiff and the recognition that the plaintiff's counsel had not wilfully attempted to inhibit the defense's trial preparations, the judge dismissed the case, saying "you have to go by the rules."

The Court of Special Appeals reversed, stating that if consistency were the goal of discretionary decisions, discretion would be "meaningless." Instead, "the trial judge is required to consider every aspect of the case and then choose the most appropriate remedy." The court went on to say:

Failure to exercise choice in a situation calling for choice is an abuse of discretion, because it assumes the existence of a rule that admits of but one answer. When, as in the present case, the trial court recognizes its right to exercise discretion, but then declines to exercise it in favor of adhering to some consistent or uniform policy, it errs.

In this case, the court held that it would have been appropriate to

---

267. *Id.* at 628, 501 A.2d at 876. The plaintiff had filed suit on May 13, 1983, and the defendant had filed interrogatories about a month later. The plaintiff's counsel delayed answering the interrogatories despite repeated requests and warnings by the defendant's counsel. On January 13, 1984, the trial judge ordered the plaintiff's counsel to file the answers within 15 days. After further warnings with no response, the defendant's counsel filed a motion for dismissal. On May 17, 1984, shortly before a hearing on the motion, the plaintiff's counsel filed the answers. *Id.* at 621-22, 501 A.2d at 873.

268. *Id.* at 624, 501 A.2d at 874. The judge stated: "You have to have some sort of method of operation for yourself, because matters like this where wide discretion is vested in the court really isn't [sic] appropriate to decide one case one way and another case another."

269. The plaintiff had "sustained seventeen facial fractures requiring extensive corrective and reconstructive surgery. At the time of trial his special damages included medical expenses of $54,000 and lost wages amounting to $36,000." *Id.* at 621, 501 A.2d at 873.

270. *Id.* at 624, 501 A.2d at 874. The judge said, "I find nothing willful, nothing contumacious, nothing intentionally overreaching in this action." *Id.* In fact, the plaintiff's counsel stated at the hearing that the delays were due in part to a disc injury to his lower spine, which kept him out of his office for five consecutive months. *Id.* at 623, 501 A.2d at 874.

271. *Id.* at 625, 501 A.2d at 875.

272. *Id.*

273. *Id.* at 626, 501 A.2d at 875. The court quoted at length from rule 2-433, which sets forth various sanctions that the court may impose upon a party who fails to comply with an order compelling discovery. Dismissal of the action is only one possibility.

impose some sanction against the plaintiff's counsel, but not to dis-
miss the plaintiff's action altogether.\textsuperscript{275}

insurers the right to withhold settlement of a property damage claim
arising out of an automobile accident pending the conclusion of a
personal injury suit arising out of the same accident.\textsuperscript{276} In \textit{Dill v. Avery}\textsuperscript{277} the Court of Appeals held that section 384B does not con-
template that a single accident gives rise to two separate causes of
action for property damage and personal injury.\textsuperscript{278} Therefore, res
judicata prohibited the plaintiffs from splitting their property dam-
age and personal injury claims.\textsuperscript{279}

\begin{flushright}
JENIPHR A.E. BRECKENRIDGE
CATHY A. CHESTER
DEBRA J. HIRSHKOWITZ
JOHN A. MESSINA
\end{flushright}

\textsuperscript{275} \textit{Id.} at 628, 501 A.2d at 876. The court noted that "there [was] not a scintilla of
evidence that the plaintiff was responsible for or aware of the delay in failing to respond
to Interrogatories." \textit{Id.}


\textsuperscript{277} 305 Md. 206, 502 A.2d 1051 (1986).

\textsuperscript{278} \textit{Id.} at 215, 502 A.2d at 1055.

\textsuperscript{279} \textit{Id.} The court rejected the plaintiffs' reliance on dicta from Gelblum v. Bloom, 21
III. COMMERCIAL LAW

A. Debtors and Creditors

1. Role of Mortgage Agents.—In Coner v. Morris S. Berman Unlimited, Inc. the Court of Special Appeals held that a mortgagee's agent, who doubled as the agent for a mortgage broker for which his wife was the sole proprietor, could not extract a finder's fee on behalf of the broker. The court observed that because of the agent's dual role, the broker had not provided arms-length services. In the absence of these services, the agent could not claim a finder's fee. But even if the proprietorship had provided these services, the court would have prohibited the broker-agent from placing a loan with a company that he or she owned.

Mr. and Mrs. Coner appealed from an order ratifying the foreclosure sale of their house to Morris S. Berman Unlimited, Inc. The couple had obtained a loan from Berman Unlimited, securing it with a second mortgage on their home. Six months later they defaulted on the loan, and Berman Unlimited foreclosed. Morris S. Berman and his wife purchased the house individually.

At the time of the loan, Berman deducted a $200.00 "Broker Fee," among other fees, from the proceeds. An entity known as Mortgage Masters received the $200 as a finder's fee. Mortgage Masters was allegedly a sole proprietorship owned by Berman's wife. Mrs. Berman, however, had nothing to do with procuring the loan for the Coners. In fact, Berman signed the actual mortgage loan contract for Mortgage Masters. Berman Unlimited and Mortgage Masters operated from the same location and shared a telephone number. Berman acknowledged that "he act[ed] as

2. Id. at 524-25, 501 A.2d at 463.
3. Id.
4. Id.
5. Id. at 521, 501 A.2d at 461.
6. Id. at 517, 501 A.2d at 459.
7. Id. at 516, 501 A.2d at 459.
8. Id. at 517, 501 A.2d at 459.
9. Id.
10. Id.
11. Id. at 518, 501 A.2d at 460.
12. Id. at 524, 501 A.2d at 463.
13. Id. at 519, 501 A.2d at 460-61.
general manager of Mortgage Masters whenever his wife . . . [was] out of the office."  

The Court of Special Appeals found that Mr. Berman's role in the transaction as agent for both Berman Unlimited and Mortgage Masters violated certain provisions of the Secondary Mortgage Loan Law and the Finder's Fee law.  

Under the Secondary Mortgage Loan Law a lender “may not collect from the borrower any . . . finder's fee for obtaining, procuring or placing a loan”; rather, the lender itself must pay any finder's fee. Under the Finder's Fee law, a mortgage broker cannot serve as a director, officer, or employee of any lender with which he or she places a loan.

The Court of Special Appeals linked these provisions to the state usury law by noting that they are “intended to prohibit a lender from collecting more than the interest or other remuneration that the law allows by collecting as well a finder’s fee for simply introducing himself to the borrower.” The court found that, in the context of this case, the lender had “collected” the finder’s fee, within the meaning of the Secondary Mortgage Loan Law, notwithstanding that he had done so for the benefit of Mortgage Masters. In contravention of the statute, Berman had “extracted a finder’s fee for doing no more than receiving appellants’ application and passing it from one of his hands to the other.”

2. Correction of Default Prior to Institution of Foreclosure Proceedings.—In Balducci v. Eberly the Court of Appeals held that the payment of tax deficiencies prior to the institution of foreclosure proceedings bars the foreclosure proceedings. The court reiter-

15. Id.  
16. Id. at 525, 501 A.2d at 463-64.  
18. Id. at § 12-405(a)(1).  
19. Id. at § 12-406(a).  
20. Id. at § 12-801 to -809.  
21. Id. at § 12-803.  
22. 65 Md. App. at 523, 501 A.2d at 463 (emphasis omitted).  
24. 65 Md. App. at 525, 501 A.2d at 463.  
25. Id. at 524, 501 A.2d at 463.  
27. Id. at 675, 500 A.2d at 1048. The court thus adopted the majority rule. Id. at 675-78, 500 A.2d at 1048-49.  

In Balducci the mortgagors-appellees executed a deed of trust, and promised to pay all taxes. Id. at 666, 500 A.2d at 1043. Subsequently, the mortgagors received a letter from one of the trustees calling for acceleration of the debt under the deed of trust because of failure to pay taxes. Id., 500 A.2d at 1044. Before the filing of the foreclo-
ated the well-established rule that a default under a deed of trust or mortgage resulting from the breach of a covenant to pay taxes when due permits acceleration of the secured debt and the sale of the encumbered property through foreclosure proceedings.\textsuperscript{28} The court explained, however, that the purpose of an acceleration clause is to give the mortgagee some additional protection.\textsuperscript{29} Therefore, if the mortgagor corrects the default before the institution of foreclosure proceedings, the threat to the mortgagee's security evaporates, and acceleration of the debt is no longer necessary to protect the mortgage.\textsuperscript{30}

3. Garageman's Lien as to Purchaser Without Notice.—In Central GMC, Inc. v. Helms\textsuperscript{31} the Court of Appeals held that a garageman's lien\textsuperscript{32} did not attach as against a buyer who purchased a truck without notice of the lien.\textsuperscript{33} The buyer contracted to purchase a used garbage truck.\textsuperscript{34} The parties understood that the seller would have the truck repaired before the buyer took possession.\textsuperscript{35} The garage owner repaired the truck, and, shortly thereafter, the buyer took possession.\textsuperscript{36} The seller never paid the garage owner for the repairs.\textsuperscript{37} Subsequently, the garage owner repossessed and sold the truck.\textsuperscript{38}

The garage owner argued that its surrender of the truck did not discharge the lien as against the buyer because the buyer owned the truck when the lien attached.\textsuperscript{39} The court, however, applied section 2-401 of the Commercial Law Article\textsuperscript{40} and determined that title did
not pass to the buyer until the buyer received both the truck and its title.\footnote{41} Therefore, the buyer did not become the truck’s owner until he took possession.

In reaching its decision, the court recognized that if the buyer had taken the truck with notice of the lien, the lien would not have been extinguished.\footnote{42} The court found no evidence, however, that the buyer had notice of the garage owner’s lien.\footnote{43} The court also noted that a purchaser of a used motor vehicle from an established dealer need not inquire as to unpaid repair bills.\footnote{44}

4. Liability of Cosigner of Installment Sales Contract.—In General Motors Acceptance Corp. v. Daniels\footnote{45} the Court of Appeals held that the cosigner of an installment sales contract was a surety, not a guarantor.\footnote{46} Thus, the creditor could proceed directly against the cosigner.\footnote{47} In addition, the creditor’s failure to notify the cosigner that the principal had defaulted in his payments did not constitute a discharge.\footnote{48}

The court reviewed the distinguishing characteristics between a contract of suretyship and a contract of guaranty.\footnote{49} A contract of suretyship is a tripartite agreement in which the surety is primarily or jointly liable with the principal obligor.\footnote{50} Thus, if the principal obligor fails to perform, the surety is immediately responsible.\footnote{51} Because the surety’s duty to the creditor is to see that the debt is

\footnote{41} Title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

\footnote{42} Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . .

\footnote{43} 303 Md. at 273, 492 A.2d at 1316.

\footnote{44} Id.

\footnote{45} The court found Md. Com. Law Code Ann. § 16-204 (1983) pertinent. 303 Md. at 272, 492 A.2d at 1316. That section provides:

Surrender or delivery of the property subject to the lien discharges that lien against a third person who is without notice of the lien, but does not discharge the lien against the owner or against a third party who has notice of the lien.

\footnote{46} 303 Md. at 275-76, 492 A.2d at 1317-18.

\footnote{47} Id. at 275, 492 A.2d at 1317.

\footnote{48} Id. at 275, 492 A.2d at 1317.

\footnote{49} Id. at 254, 492 A.2d 1306 (1985).

\footnote{50} Id. at 258, 492 A.2d at 1308-09.

\footnote{51} Id. at 264, 492 A.2d at 1311.

\footnote{40} Id. John Daniels purchased a used car from a car dealer, who required a cosigner on the installment contract. Seymoure, John’s brother, signed the contract as buyer, and John signed the contract as co-buyer. After John defaulted on the payments, General Motors Acceptance Corporation declared the contract in default and brought this action. Id. at 258, 492 A.2d at 1308.

\footnote{49} Id. at 259-61, 492 A.2d at 1309-10.

\footnote{50} Id. at 259, 492 A.2d at 1309.

\footnote{51} Id.
paid, and because the surety is charged with knowledge of the principal’s default, the creditor need not notify the surety if the principal obligor defaults on his or her promise.\textsuperscript{52}

A contract of guaranty, on the other hand, is collateral and independent of the principal contract.\textsuperscript{53} The guarantor is secondarily liable to the creditor and is not bound to take notice of nonperformance of the contract.\textsuperscript{54} The guarantor insures the solvency of the principal obligor.\textsuperscript{55}

Hence, in a contract for guaranty, if the principal obligor fails to perform, the guarantor promises to perform.\textsuperscript{56} By contrast, in a contract for suretyship, the surety promises to perform exactly what the principal obligor does perform.\textsuperscript{57}

In concluding that the parties had established a suretyship, the court found it significant that the cosigner had affixed his signature on the line designated “Buyer,” and that the contract had stated unambiguously that all buyers assumed joint and several liability.\textsuperscript{58} The court thus observed, “under the objective law of contracts, a reasonable person knew or should have known that he was subjecting himself to primary liability for the purchase of the automobile.”\textsuperscript{59} Furthermore, the court could find no evidence that the cosigner executed any agreement “collateral to and independent of” the contract between the buyer and the debtor.\textsuperscript{60} But joint execution by the principal and the cosigner makes it unlikely that the parties have created a contract of guaranty; instead, joint execution points towards a suretyship.\textsuperscript{61}

5. \textit{Voidable Preferences}.—Section 15-101 of the Commercial Law Article governs preferences in insolvency.\textsuperscript{62} This statute, which took effect in 1975,\textsuperscript{63} incorporates by reference the sections of the federal Bankruptcy Code that concern fraudulent, void, and voidable preferences.\textsuperscript{64} In 1978, however, Congress substantially revised the
federal Bankruptcy Code.\textsuperscript{65}

In Smith v. Plymouth Locomotive Works, Inc.\textsuperscript{66} the Court of Appeals held that former section 15-101(b)\textsuperscript{67} includes by reference the 1978 amendments to the federal Bankruptcy Code.\textsuperscript{68} Thus, to set aside a preferential transfer, a creditor in a bankruptcy proceeding need not show that a preferential creditor had "reasonable cause to believe" that the debtor either was insolvent or would become insolvent within ninety days from the date of the transfer.\textsuperscript{69} Instead, the creditor need only show that the debtor made the transfer within ninety days preceding the debtor's insolvency.\textsuperscript{70}

In reaching its decision, the court examined the development of preferential transfers in insolvency proceedings.\textsuperscript{71} By enacting sections 15-101(b) and 15-101(c),\textsuperscript{72} the General Assembly intended to

\begin{itemize}
\item[66.] 304 Md. 633, 500 A.2d 1027 (1985). Smith, the assignee for the benefit of the creditors, filed suit to set aside preferential transfers made by the insolvent to Plymouth Locomotive. Id. at 634, 500 A.2d at 1027. The parties stipulated that (1) the insolvent made a transfer to Plymouth that occurred within the 90-day period preceding the suit, and (2) the transfer gave Plymouth more than it would have received under Chapter 7 of the federal Bankruptcy Code. Id., 500 A.2d at 1027-28.
\item[67.] Md. COM. LAW CODE ANN. § 15-101(b) (1983). In a 1985 amendment, the legislature redesignated former section 15-101(b) as present subsection 15-101(d). The statute construed by the court provided:
\begin{itemize}
\item[(b)] Preferences, payments, and transfers.—All preferences, payments, and transfers made or suffered by the insolvent which are fraudulent, void, or voidable under any act of the Congress of the United States relating to bankruptcy are fraudulent, void, or voidable, respectively, under this subtitle.
\end{itemize}
\item[68.] Md. COM. LAW CODE ANN. § 15-101(b) (1983).
\item[69.] The statute currently provides:
\begin{itemize}
\item[(d)] Fraudulent, void or voidable preferences.—All preferences, payments, transfers, and obligations made or suffered by the insolvent which are fraudulent, void, or voidable under any act of the Congress of the United States relating to bankruptcy are fraudulent, void, or voidable, respectively, under this subtitle to the same extent that they would be fraudulent, void, or voidable under applicable federal bankruptcy law.
\end{itemize}
\item[70.] Md. COM. LAW CODE ANN. § 15-101(d) (Supp. 1986).
\item[60.] 304 Md. at 641, 500 A.2d at 1031. The Bankruptcy Reform Act of 1978 eliminated the requirement that the preferential creditor have "reasonable cause to believe" that at the time of the preferential transfer the debtor was insolvent. Id. at 638, 500 A.2d at 1029.
\item[71.] Id. at 641, 500 A.2d at 1031.
\item[72.] Id. at 636-38, 500 A.2d at 1028-29.
\item[73.] Md. COM. LAW CODE ANN. § 15-101(c) (1983). In the 1985 amendment, the legislature redesignated former section 15-101(c) as present subsection 15-101(e). The statute formerly provided:
\begin{itemize}
\item[(c)] Powers of assignee or receiver.—Any assignee for the benefit of creditors or receiver of the assets of an insolvent may set aside any . . .
\item[(2)] Preferential transfer made by the insolvent to or for the benefit of a
allow a creditor both to set aside a preferential transfer that violated the federal bankruptcy laws under section 15-101(b) and to set aside a preference that violated the Maryland insolvency laws under section 15-101(c).

The court found no intention on the part of the General Assembly to limit section 15-101(b) by the "reasonable cause to believe" language of section 15-101(c)(2)(ii). Furthermore, the word "any" in the phrase "any act of the Congress" in section 15-101(b) indicated to the court that the General Assembly anticipated future revisions of the federal Bankruptcy Code.

6. Priority of Antecedent Perfected Security Interest.—In Farmers & Merchants National Bank of Hagerstown v. Schlossberg the Court of Appeals held that the bank's antecedent perfected security interest had priority over the State of Maryland's tax lien. The court also held that a debtor cannot convey to the assignee for the benefit of creditors the rights of a secured party with an antecedent perfected security interest; therefore, the secured party's rights do not become part of the fiduciary estate available for distribution.

In Schlossberg the debtor assigned all its assets to Schlossberg for the benefit of its creditors. At the time of assignment, Farmers & Merchants National Bank held an antecedent perfected security interest, and the State of Maryland held a lien against the debtor for unpaid taxes.

The court initially noted that section 15-102(b) of the Commer-
Commercial Law Article, which governs priorities in insolvency, does not address the rights of the secured party with an antecedent perfected security interest. Provisions of Maryland's Uniform Commercial Code, however, mandate that the claim of a secured party with an antecedent perfected security interest takes priority over the claim of an assignee for the benefit of the creditors. The court also determined it would have reached the same conclusion even before the enactment of section 15-102(b). Section 202(b) of article 81 gives the State priority in the proceeds of a tax sale of corporate property. The court found that section 202(b) conflicted with section 15-102(b). When two statutes conflict, however, the General Assembly is presumed to have intended that the statute whose relevant substantive provisions were enacted most recently implicitly repeals any conflicting provision of the earlier statute. Thus, the court held that the General Assembly implicitly repealed section 202(b) to the extent that it conflicts with section 15-102(b).

In assignments for the benefit of creditors, sections 343 and 394 of article 81 give priority to the State's claims for sales and use taxes. The court, however, rejected the State's argument that sections 343 and 394 were controlling: "[C]ollateral securing an antecedent perfected security interest takes priority over the claim of an assignee for the benefit of the creditors.

82. 306 Md. at 58, 507 A.2d at 177.
84. 306 Md. at 59, 507 A.2d at 177.
85. Md. Ann. Code art. 81, § 202(b) (1980). That section provides in relevant part: [w]henever a sale of either real or personal property of a corporation, from which State taxes are due and payable, shall be made by any sheriff, constable, trustee, receiver, or other ministerial officer, under judicial process or otherwise, all sums due and in arrears for State taxes from the corporation whose property is sold shall be first paid and satisfied, after the necessary expenses incident to the sale . . . . (Emphasis added.)
86. 306 Md. at 61, 507 A.2d at 179. In the distribution of an estate following an assignment for the benefit of creditors, § 202(b) gives absolute priority to all tax claims; however, § 15-102(b) subordinates tax claims to certain other claims.
87. Id., 507 A.2d at 178-79.
88. Id. at 63, 507 A.2d at 179.
89. Md. Ann. Code art. 81, §§ 343, 394 (1980). Sections 343 and 394 both contain the following language:
Whenever the business or property of any person subject to tax under the terms of this subtitle shall be placed in receivership, bankruptcy or assignment is made for the benefit of creditors, or if said property is seized under restraint for property taxes, all taxes, penalties and interest imposed by this subtitle for which said person is in anyway liable shall be a prior and preferred claim. (Emphasis added.)
cedent perfected security interest does not become part of the fiduciary estate until the underlying secured indebtedness has been satisfied.”

The court agreed that the tax lien was a statutory lien within the meaning of section 9-102(b)(2) of Maryland’s Uniform Commercial Code. Nonetheless, the court found that section 9-102(b)(2) only required the application of law predating Title 9. Before the enactment of Title 9, a duly recorded chattel mortgage took priority over a lien subsequently executed or recorded. Thus, on this count as well, the secured party’s claim prevailed over the statutory lien.

7. Acceptance of Late Payments as Waiver.—In Battista v. Savings Bank of Baltimore the Court of Special Appeals held that a creditor’s repeated acceptance of late payments may constitute a waiver of the creditor’s contractual right to prompt payment or the right to repossess even if the contract contains a nonwaiver clause. Whether waiver has occurred is a question of fact for the jury. To retract the waiver, the creditor must give reasonable notice to the debtor that the creditor will in the future insist on performance in strict compliance with the contract.

Battista, the buyer of an automobile, sued the Savings Bank of Baltimore, the secured party, for conversion. After Battista became disabled, she made several late payments. The bank sent two letters to Battista threatening repossession; however, the bank accepted Battista’s late payments each time, and continued to accept

90. 306 Md. at 64, 507 A.2d at 180.
92. 306 Md. at 65-66, 507 A.2d at 181.
93. Id.
95. Id. at 270, 507 A.2d at 209. The contract contained the following provision: Failure of Holder to exercise any of the Holder’s rights hereunder provided shall not be deemed a waiver thereof, and no waiver of any such rights shall be deemed to apply to any other of such rights, nor shall it be effective unless in writing and signed by the Holder.
96. Id. at 263, 507 A.2d at 206.
97. Id. at 270, 507 A.2d at 209.
98. Id. The court found pertinent Md. Com. Law Code Ann. § 2-209(5) (1983). That section states in relevant part: “A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived. . . .” Id.
99. Id. at 263, 507 A.2d at 206. Battista invoked the provisions of her disability credit insurance. After Battista became disabled, her insurer made the monthly payments to the bank. Id.
various late payments for over a year. Finally, when Battista was behind on two payments, the bank repossessed the car.

The court determined that Maryland law clearly recognizes the principle of waiver by conduct. Previous Maryland cases, however, had not considered the effect of express nonwaiver clauses or of notices of intent to repossess in retail sales installment contracts. The court found that a majority of other jurisdictions permit the waiver of contractual rights despite the presence of contractual nonwaiver clauses. Because the decisions from other states were consistent with Maryland decisions, the court adopted the majority view.

A waiver of the right to repossess or the right to prompt payment imposes a duty on the creditor to warn the debtor that strict compliance will be required in the future. Although the bank sent two notices to Battista, the bank thereafter accepted Battista's payments. The court found that such conduct constituted waiver, and that the bank's retraction of waiver did not satisfy the reasonable notice requirement of section 2-209(5) of the Commercial Law Article.

The court rejected Battista's argument that she should recover punitive damages from the bank. To recover punitive damages in a claim arising out of a contractual relationship, the party seeking the damages must prove actual malice on the part of the defendant. For the court to find actual malice, it must find that the defendant performed the unlawful act "intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate; the purpose being to deliberately and

100. *Id.* at 263-64, 507 A.2d at 206.
101. *Id.* at 264, 507 A.2d at 206-07. Battista later brought the account up to date, and the bank returned the car. *Id.*
103. 67 Md. App. at 266, 507 A.2d at 207.
104. See *id.* at 266-70, 507 A.2d at 207-09 and authorities cited therein.
105. *Id.* at 270, 570 A.2d at 210. For the minority view not allowing waiver, see Hale v. Ford Motor Credit Corp., 374 So. 2d 849 (Ala. 1979), and General Grocer Co. of Illinois v. Bachar, 51 Ill. App. 3d 907, 365 N.E.2d 1106 (1977).
107. *Id.*
108. *Id.*
109. *Id.* at 274, 507 A.2d at 211.
110. *Id.*
The court found no evidence of actual malice, although it observed that the bank might have been negligent.\textsuperscript{112} Thus, the Court of Special Appeals concluded that the trial court properly withheld Battista's punitive damage claim from the jury,\textsuperscript{113} but that the question of waiver was a question for the jury.\textsuperscript{114}

8. Conversion on Repossession.—In Hamilton v. Ford Motor Credit Co.\textsuperscript{115} the Court of Special Appeals held that to maintain a suit for conversion, the plaintiff must have had either actual possession or the right to immediate possession of the personal property seized.\textsuperscript{116} In Hamilton a mother and daughter purchased a truck; the mother signed as co-buyer and the daughter signed as buyer, although the truck's title was in the daughter's name.\textsuperscript{117} After the buyers fell behind in their payments, and Ford repossessed the vehicle, the mother filed this suit for conversion.\textsuperscript{118} The court, however, found that the mother, as co-buyer, had only a vested financial interest in the truck and thus was not entitled to immediate possession. Therefore, she as co-buyer could not maintain a suit for conversion.\textsuperscript{119}

The court also found that Ford Motor Credit Company and its representative Alaimo violated section 14-202(6) of the Consumer Debt Collection Act\textsuperscript{120} in attempting to collect payments.\textsuperscript{121} The court, however, declined to adopt the tort of negligent infliction of

\begin{itemize}
\item \textsuperscript{111} Id. (quoting Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 352, 283 A.2d 392, 398 (1971)).
\item \textsuperscript{112} 67 Md. App. at 274-75, 507 A.2d at 212.
\item \textsuperscript{113} Id. at 275, 507 A.2d at 212.
\item \textsuperscript{114} Id. at 271, 507 A.2d at 210.
\item \textsuperscript{116} Id. at 64, 502 A.2d at 1066.
\item \textsuperscript{117} Id. at 51, 502 A.2d at 1060.
\item \textsuperscript{118} Id. at 51-53, 502 A.2d at 1059-60.
\item \textsuperscript{119} Id. at 64-65, 502 A.2d at 1066.
\item \textsuperscript{120} Md. COM. LAw CODE ANN. § 14-202(6) (1983). That section states in pertinent part:
\begin{quote}
[I]n collecting or attempting to collect an alleged debt, a collector may not . . .
\(6\) Communicate with the debtor or a person related to him with the frequency, at the unusual hours, or in any other manner as reasonably can be expected to abuse or harass the debtor . . . .
\end{quote}
\item \textsuperscript{121} 66 Md. App. at 67, 502 A.2d at 1068. Ford Motor Credit and its representative telephoned the mother several times despite her protests that she could not pay the debt, that she was unaware of the location of the truck, that her husband was ill, and that the telephone calls were extremely disturbing. Ford Motor Credit called at least once at night and, despite the mother's request, did not stop calling. Id.
\end{itemize}
9. Fraudulent Conveyances in Administration of Estates.—Section 15-209 of the Commercial Law Article generally permits creditors to ignore fraudulent conveyances. In Barter Systems v. Rosner, however, the Court of Special Appeals held that a creditor cannot use section 15-209 to circumvent the procedures for enforcing claims against an estate. The court conceded that section 15-209 apparently conflicts with the statutes regulating estate proceedings. After applying the rules of statutory construction, the court concluded that the General Assembly intended the statutes regulating estate proceedings, rather than section 15-209, to govern the claims of creditors against estates.

10. Subordination of Vendee's Lien Through Consent Clause.—In Arundel Federal Savings & Loan Association v. Lawrence the Court of Special Appeals held that a "consent" clause in a purchase agreement for real property subordinated the vendee's lien to the lender's lien. The court found that the seller placed this provi-
sion in the contract because a lender would not have otherwise made the loan. Thus, the court concluded that the parties intended the provision to subordinate the vendee's lien to that of the mortgagee.

B. Corporations and Associations

1. Termination Clause in Management Contract.—In Insel v. Solomon the Court of Special Appeals held that a contract between members of a professional association, which provided for termination of any stockholder, physician, or employee for moral turpitude or misconduct, did not apply exclusively to loss of license or criminal conviction.

A dispute arose between the two shareholders of an ophthalmology corporation, Drs. Insel and Solomon, over the contract for the management of their professional association. The contract provided for termination of the mutual venture under several contingencies, including retirement and, in paragraph 10, loss of medical license, conviction of moral turpitude, or involvement in unethical or immoral conduct.

Relations between the two physicians began to deteriorate when Dr. Insel was ready to retire. Dr. Solomon requested that the corporation be involuntarily dissolved pursuant to section 3-413 of...
the Corporations and Associations Article.\textsuperscript{137} In a preliminary ruling, the trial court precluded Dr. Insel from offering evidence as to Dr. Solomon's alleged unethical or immoral conduct.\textsuperscript{138} The court held that paragraph 10 applied only to a member's loss of license.\textsuperscript{139} The court also held that the power to regulate the unethical behavior of physicians is vested in the State Commission on Medical Discipline and is beyond the courts' authority.\textsuperscript{140}

The Court of Special Appeals analyzed the language of paragraph 10 and found the provision ambiguous.\textsuperscript{141} The court turned to well-established Maryland law on contract construction: "If the language is clear, it controls; if it is ambiguous, the court may consider extrinsic factors in ascertaining what the parties intended."\textsuperscript{142} The court concluded that in entering the agreement, each party had wanted simply to guarantee himself an ethical partner. Therefore, it was unreasonable to require a partner's conviction of a crime as a prerequisite to termination of the practice.\textsuperscript{143} Furthermore, the court concluded that the doctors had not intended to predicate the application of paragraph 10 on a proceeding before the Commission on Medical Discipline.\textsuperscript{144} As a result, the court remanded the case for further proceedings.\textsuperscript{145}

2. Beer Franchise Fair Dealing Act.—Section 203E of the Beer Franchise Fair Dealing Act\textsuperscript{146} prohibits the establishment of additional beer distributorships in the territory already served by a licensed franchisee.\textsuperscript{147} In addition, section 203B forbids beer manufacturers from failing or refusing to deliver a distributor's

\textsuperscript{137} Id. at 390, 492 A.2d at 966. MD. CORPS & ASS'NS CODE ANN. § 3-413 (1985) provides grounds for petition by stockholders or creditors for involuntary dissolution.

\textsuperscript{138} 63 Md. App. at 391-92, 492 A.2d at 967.

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 392, 492 A.2d at 967.

\textsuperscript{141} Id. at 395-96, 492 A.2d at 969.

\textsuperscript{142} Id. at 396, 492 A.2d at 969 (citing Della Ratta, Inc. v. American Better Community Developers, Inc., 38 Md. App. 119, 130, 380 A.2d 627, 635 (1977)).

\textsuperscript{143} Id.

\textsuperscript{144} Id. at 398, 492 A.2d at 970.

\textsuperscript{145} Id.

\textsuperscript{146} MD. ANN. CODE art. 2B, § 203E (1981).

\textsuperscript{147} Id. Section 203E provides:

No franchiser, who shall designate a sales territory for which any franchisee shall be primarily responsible or in which any franchisee is required to concentrate its efforts, shall enter into any franchise or agreement with any other beer distributor for the purpose of establishing an additional franchisee for its brand or brands of beer in the territory being primarily served or concentrated upon by a licensed franchisee.
In Erwin & Shafer, Inc. v. Pabst Brewing Co. the Court of Appeals held that the Act does not require a beer franchiser to grant to an existing distributor the right to distribute a brand of beer that the franchiser acquired after the execution of the original distributorship agreement. The court also held that the Act does not grant the beer distributor the right to order and receive a brand not specified in the distribution agreement.

Erwin & Shafer, Inc. (E & S) entered into a distribution agreement with Pabst under which E & S received the exclusive right to distribute in Howard County the Pabst brands specified in the agreement. Pabst merged with Olympia Brewing Company and awarded the distributorship of its newly acquired brands to another distributor, A.E. Davies, Inc. E & S challenged the arrangement between Pabst and A.E. Davies, Inc., claiming that Pabst had violated sections 203B and 203E of the Beer Franchise Fair Dealing Act.

According to the Court of Appeals, the General Assembly enacted the Act in 1974 to “protect beer distributors from unlawful inducements, threats and terminations by beer manufacturers.” The court recognized, however, that changes had taken place in the industry since 1974. Specifically, “[t]here are now far fewer manufacturers of beer products, and distributors typically handle several brands of beer.”

148. Id. at § 203B.
150. Id. at 310, 498 A.2d at 1192.
151. Id. at 315, 498 A.2d at 1194.
152. Id. at 307, 498 A.2d at 1190.
153. Id. at 307-08, 498 A.2d at 1190-91.
154. MD. ANN. CODE art. 2B, §§ 203A-203G (1981). E and S sought injunctive relief in the Circuit Court for Frederick County. Pabst removed the case to the United States District Court for the District of Maryland. The district court certified two questions to the Court of Appeals for determination:

(1) Whether § 203E of the Maryland Beer Franchise Dealing Act, Maryland Code (1974, 1981 Repl. Vol.), Article 2B, § 203A et seq., requires a beer franchisor to grant to a distributor of specified brands of beer in a given territory, the right to distribute a brand of beer which the franchisor acquired after the execution of the original distributorship agreement.

(2) Whether § 203B of the Maryland Beer Franchise Fair Dealing Act, Maryland Code (1974, 1981 Repl. Vol.), Article 2B, § 203A et seq., grants a beer distributor the right to order and receive a brand of beer that is not covered by the distributor’s franchise agreement.

155. 304 Md. at 306, 498 A.2d at 1190.
156. Id. at 307, 498 A.2d at 1190.
The court established that Pabst had not violated section 203E of the Act even though Pabst had selected a second distributor to market its products in Howard County. A contrary construction would "lead to absurd consequences." First, the court stated that "to adopt such an interpretation would be to bestow upon all distributors a right akin to a first refusal in all those brands of beer made or acquired by their manufacturers, without regard to existing franchise agreements." Second, a contrary interpretation would force Pabst either to terminate existing Olympia distributorships in Maryland counties having a Pabst distributor or to violate section 203E by using both distributors. The court thought it clear that the General Assembly had never intended to create such a situation.

E & S contended that even if Pabst's conduct was in accordance with section 203E, it violated section 203B since Pabst did not fulfill E & S's order. The court did not agree. "[T]he Act bestows no such authority upon a distributor such as E & S, simply by virtue of a distributorship agreement." Under the court's interpretation of the statute, unless a beer distributor is authorized to distribute the brands of beer it orders, it is not entitled to delivery.

C. Insurance

1. Method of Computing Period of Incontestability.—In Equitable Life Assurance v. Jalowsky the Court of Appeals held that in computing the two-year period of an incontestability clause in a life insurance policy, one should exclude the date of the policy's issuance and begin counting from the first full day following the issuance of the policy.

Dr. David Jalowsky applied for life insurance with the Equitable Life Assurance Society of the United States and named his parents

---

157. Id. at 311, 498 A.2d at 1192.
158. Id. The court cited Coerper v. Comptroller, 265 Md. 3, 6, 288 A.2d 187, 188 (1972), and Doswell v. State, 53 Md. App. 647, 653, 455 A.2d 995, 999 (1983) for the proposition that "[a] court must shun a construction of a statute which will lead to absurd consequences." 304 Md. at 311, 498 A.2d at 1192.
159. 304 Md. at 311, 498 A.2d at 1192.
160. Id. at 311-12, 498 A.2d at 1193.
161. Id. at 312, 498 A.2d at 1193.
162. Id. at 314, 498 A.2d at 1194.
163. Id.
164. Id. at 315, 498 A.2d at 1194.
165. Id.
166. 306 Md. 257, 508 A.2d 137 (1986).
167. Id. at 267, 508 A.2d at 142.
as beneficiaries. In completing the application, Dr. Jalowsky misrepresented his health by indicating that he had never been treated for cancer and had not consulted a physician for five years. In fact, at the time of the application, Dr. Jalowsky was undergoing treatment for Hodgkin's Disease, a form of cancer, and in the month preceding his application, had undergone two biopsies and other surgical procedures. Equitable issued the policy on April 16, 1981. Dr. Jalowsky died precisely two years later, on April 16, 1983.

Dr. Jalowsky's parents filed a claim with Equitable for the proceeds of their son's policy. Pointing to the insured's misrepresentations and to the policy's two-year incontestability clause, Equitable rejected the claim.

Two Maryland statutes were relevant to the dispute. First, section 390 of the Insurance Code provides that after a life insurance policy has been in effect for a period of two years from its date of issue, it shall become incontestable. Second, section 2 of article 94 provides that "[i]n computing any period of time prescribed or allowed by any applicable statute, the day of the act, event, or default, after which the designated period of time begins to run is not to be included."

The trial court held that the life insurance policy took effect on April 16, 1981, and that the date of Dr. Jalowsky's death was thus beyond the period of contestability. The Court of Special Appeals affirmed, relying upon the decision of the Court of Appeals in Holtze v. Equitable Life Assurance Society of the United States. In Jalowsky, however, the Court of

---

168. Id. at 258, 508 A.2d at 138.
169. Id. at 259, 508 A.2d at 138.
170. Id.
171. Id.
172. Id.
173. Id. In full, the incontestability clause of the policy provided:
   All statements made in the application are representations and not warranties. We have the right to contest the validity of this policy based on material misstatements made in the application. However, this policy will become incontestable after it has been in effect during the life time of the Insured for two years from the Date of Issue shown on page 3.

Id.
176. 306 Md. at 259, 508 A.2d at 138.
178. Id. at 689, 351 A.2d at 143.
Appeals declined to view *Holtze* as an unconditional ruling that the date of a policy's issuance is included in the period of incontestability.\(^{179}\) Instead, the *Jalowsky* court distinguished *Holtze* on the ground that in the prior case the court had not considered the effect of section 2 of article 94.\(^{180}\)

Section 2, which codifies the general common-law rule,\(^{181}\) is in accord with early Maryland decisions.\(^{182}\) On this basis, the court concluded that the General Assembly intended section 2 to provide a uniform schedule for the computation of time.\(^{183}\) To construe section 2 and section 390 "in harmony and full effect,"\(^{184}\) the court limited the scope of section 390. The purpose of that statute is "to put insurers and insureds on notice of the time during which a policy can be contested, rather than delineating a rigid time of commencement for the two year contestability period."\(^{185}\) Thus article 94's general rule for the computation of time prevails even over a conflicting provision in the Insurance Code.

2. *Distribution of Dividend to Former Mutual Policyholders.*—In *Spence v. Medical Mutual Liability Insurance Society*\(^{186}\) the Court of Special Appeals held that former policyholders of a mutual insurance company were not entitled to participate in the distribution of dividends from earned surplus stemming from a year in which they had policies in effect.\(^{187}\) The distribution of the contested dividend was consistent with the issued policy, the company's by-laws, and the relevant Maryland statutes.\(^{188}\)

In December 1983 Medical Mutual's Board of Directors declared that current policyholders who had also been insured by the Society in 1975 were eligible for the company's first dividend.\(^{189}\) In response to this decision, Dr. James Spence and other physicians who had been policyholders in 1975 brought a class action claiming that they were entitled to participate in the distribution of the dividend even though they were not current policyholders.\(^{190}\) The

\(^{179}\) 306 Md. at 261, 508 A.2d at 139.

\(^{180}\) *Id.*

\(^{181}\) *Id.* at 262, 508 A.2d at 139.

\(^{182}\) *Id.*

\(^{183}\) *Id.*

\(^{184}\) *Id.* at 265, 508 A.2d at 141.

\(^{185}\) *Id.* at 264-65, 508 A.2d at 141.


\(^{187}\) *Id.* at 413, 500 A.2d at 1067.

\(^{188}\) *Id.* at 425, 500 A.2d at 1073.

\(^{189}\) *Id.* at 413, 500 A.2d at 1067.

\(^{190}\) *Id.* at 414, 500 A.2d at 1067. The circuit court certified the class, which included
plaintiffs contended that the dividend distribution unfairly discriminated against them, in violation of section 264 of the Insurance Code. 191 By excluding former policyholders, the plaintiffs maintained, the Society had effectively rewritten the insurance policy and caused them to pay a higher premium for their 1975 coverage than current policyholders had paid. 192 The trial court rejected this claim and granted the defendant’s motion for summary judgment. 193

In reviewing the lower court’s decision, the Court of Special Appeals explained that an insurance policy must be construed in accordance with the company’s charter and by-laws. 194 Although the policy was ambiguous, the company’s by-laws stated that only current policyholders were entitled to participate in the distribution of dividends. 195 Addressing the charge of unfair discrimination, the court concluded that the plaintiffs were no longer members of the same classification as the current policyholders; therefore, the dividend distribution did not unfairly discriminate against the plaintiffs. 196 The dividend distribution was consistent with the insurance

"all of those persons, partnerships and professional corporations" who were insured by Medical Mutual under 1975 policies, but who were no longer insured by Medical Mutual on December 6, 1983, and therefore were not declared eligible to receive a share in the $500,000 dividend. Id.

191. MD. ANN. CODE art. 48A, § 264 (1979). Section 264 provides in pertinent part that:

Any domestic stock or domestic mutual insurer may issue any or all of its policies with or without participation in profits, savings or unabsorbed portions of premiums, may classify policies issued on a participating or nonparticipating basis, and may determine the right to participate and the extent of participation of any class or classes of policies. Any such classification or determination shall be reasonable, and shall not unfairly discriminate as between policyholders within the same such classifications.

192. 65 Md. App. at 416-17, 500 A.2d at 1069. The plaintiffs argued that the initial premiums, paid in 1975, represented an inflated estimate of the policy’s cost. They expected that the company would refund the excess premium once the company had determined its actual costs. Thus, they contended, the dividend paid to current policyholders effectively enabled those policyholders to pay less for their 1975 coverage than the plaintiffs paid. Id. at 417, 500 A.2d at 1069.

193. Id. at 414, 500 A.2d at 1067.

194. Id. at 419, 500 A.2d at 1070 (citing Condon v. Mutual Reserve Fund Life Ass’n, 89 Md. 99, 42 A. 944 (1899)).

195. Id. at 420, 500 A.2d at 1070. Medical Mutual’s by-laws stated that “the Board of Directors shall determine the amount, if any, of the premium contributions to be returned to the members as dividends.” Id. The by-laws specified further that “[m]embers whose policies terminate shall automatically be dropped from membership in the Society.” Id.

196. Id. at 422, 500 A.2d at 1072. The court found that the current and former policyholders did not belong to the same class simply because the former policyholders no longer held policies with Medical Mutual. Id.
policy, the company’s by-laws, and the controlling statutes; therefore, the court considered it immaterial that the policy had some of the aspects of a tontine policy\(^{197}\) or that plaintiffs effectively paid more for their 1975 insurance coverage than did current policyholders.\(^{198}\)

3. **Intended Damages Clauses**.—In *Allstate Insurance Co. v. Sparks*,\(^{199}\) the Court of Special Appeals held that an “intended damages” clause in a homeowner’s insurance policy excluded from coverage only those results (“damages”) the insured actually intended.\(^{200}\) Thus, the clause would not exclude from coverage even the foreseeable results of the insured’s intentional acts, unless the insured actually intended those results.\(^{201}\)

On the night of October 4, 1981, James Sparks borrowed his mother’s car and drove to a mill.\(^{202}\) While stealing gas from another car, James ignited gas fumes and caused a fire that destroyed the mill.\(^{203}\) Ms. Sparks’ insurance company, Allstate, challenged a lower court decision holding it liable for the fire’s damages.\(^{204}\) Because the fire resulted from an intentional act, the insurance company contended that the policy’s intended damages clause placed the loss on Ms. Sparks.\(^{205}\)

The policy expressly excluded from coverage “property damage which is either expected or intended from the standpoint of the Insured.”\(^{206}\) In reaching its holding, the court distinguished four Court of Appeals cases that interpreted clauses excluding losses not “caused by accident.”\(^{207}\) “Caused by accident” clauses exclude ob-

---

\(^{197}\) A tontine policy is a type of life insurance policy issued only in states that require an annual distribution of dividends. Under a tontine plan, contributors agree that they may share in the surplus only if they outlive the period of distribution. *Id.* at 424, 500 A.2d at 1073.

\(^{198}\) *Id.* at 426, 500 A.2d at 1073.


\(^{200}\) *Id.* at 742, 493 A.2d at 1112.  

\(^{201}\) *Id.*

\(^{202}\) *Id.* at 740, 493 A.2d at 1111.

\(^{203}\) *Id.*

\(^{204}\) *Id.* at 741, 493 A.2d at 1111. Allstate also appealed the lower court’s decision holding it liable for damages under Ms. Sparks’ automobile insurance policy. *Id.* On this ground, the Court of Special Appeals reversed. The automobile policy did not apply “because the loss did not arise out of the ‘use’ or ‘loading and unloading’ of Ms. Sparks’s car.” *Id.* at 744, 493 A.2d at 1113. Furthermore, “the fire was the result of an ‘independent cause’ unrelated to the use of the Sparks car itself.” *Id.*

\(^{205}\) *Id.* at 741, 493 A.2d at 1111.

\(^{206}\) *Id.,* 493 A.2d at 1112.

\(^{207}\) *Id.* at 742, 493 A.2d at 1112. The court found the following cases inapposite: State Farm Mut. Auto. Ins. Co. v. Treas, 254 Md. 615, 255 A.2d 296 (1969); Glens Falls
jectively foreseeable damages that result from intentional acts.\textsuperscript{208} The \textit{Sparks} court, however, invoked "the very real distinction between intending an act [and] intending a result."\textsuperscript{209} The language of Ms. Sparks' policy, particularly the words "expected or intended from the standpoint of the Insured," clearly mandated a subjective inquiry into the result the insured intended to bring forth.\textsuperscript{210}

While James Sparks may have intended to steal the gas, he never intended or expected to cause the resulting fire.\textsuperscript{211} Thus, the court concluded, the intended damages clause did not enable All-state to escape liability.\textsuperscript{212}

4. \textit{Named Excluded Driver Provisions}.—Section 240C-1 of the Insurance Code\textsuperscript{213} permits insurers to exclude named drivers from automobile liability coverage.\textsuperscript{214} In \textit{Nationwide Mutual Insurance Co. v. Miller}\textsuperscript{215} the Court of Appeals held that a passenger injured while travelling in an automobile driven by a "named excluded driver" cannot circumvent a "named excluded driver provision" by claiming instead under the uninsured motorist portion of the owner's insurance policy.\textsuperscript{216} It was significant, however, that the injured passenger had automobile insurance coverage of his own.\textsuperscript{217}

Miller was injured in an automobile accident while he was a passenger in a car owned by Darlene Rush, but driven by her husband.\textsuperscript{218} Ms. Rush's policy with Nationwide expressly excluded her husband from coverage if he was injured while driving the car.\textsuperscript{219} Miller, the passenger, carried his own automobile insurance with another carrier, but sought recovery for his injuries under the uninsured motorist provision of Ms. Rush's policy.\textsuperscript{220}

\textsuperscript{208} See 63 Md. App. at 742, 493 A.2d at 1112 and authorities cited therein.
\textsuperscript{209} Id. at 742, 493 A.2d at 1112.
\textsuperscript{210} Id. at 743, 493 A.2d at 1112.
\textsuperscript{211} Id. at 744, 493 A.2d at 1113.
\textsuperscript{212} Id.
\textsuperscript{214} Id.
\textsuperscript{215} 305 Md. 614, 505 A.2d 1338 (1986).
\textsuperscript{216} Id. at 618, 505 A.2d at 1340.
\textsuperscript{217} Id. at 615, 505 A.2d at 1338.
\textsuperscript{218} Id.

\textsuperscript{219} Id. The provision stated: "With this endorsement, the \textit{ALL} coverages in your policy are not in effect while the following named person is operating any motor vehicle: Michael A. Rush." Id. at 617, 505 A.2d at 1339.
\textsuperscript{220} Id. at 615, 505 A.2d at 1338.
Miller's insurance company advocated a narrow construction of section 240C-1. That statute, the insurer contended, should apply only to the excluded driver's claims, not to uninsured motorist claims of injured passengers. The court disagreed:

If the uninsured motorist coverage on a vehicle were deemed applicable when the driver is excluded from the vehicle's ordinary liability coverage, then the insurer would in effect still be insuring the liable driver, who had a bad claims or driving record, but the insurer would be denied the appropriate premium.

Uninsured motorist coverage, the court added, "allows ... recovery from the insurer in a position to calculate and charge for the risk assumed." Under the circumstances of Nationwide, Miller's insurance company was best able to take into account the risks of injury caused by uninsured motorists. Thus, in this case, it was consistent with the legislative policy underlying the uninsured motorist statute to impose liability on Miller's insurance company.

5. Uninsured Motorist Coverage.—Section 543(d) of the Insurance Code provides that personal injury protection (PIP) and uninsured motorist coverage (UM) shall be reduced to the extent the recipient has recovered benefits under any workers' compensation statute.

In Hines v. Potomac Electric Power Co. the Court of Appeals held that section 543(d) prevents an employee injured in an insured automobile from receiving PIP and UM benefits if the employee has already received workers' compensation benefits in excess of the PIP and UM coverage available under the employer's certificate of self-insurance or under the employee's own automobile insurance

221. Id. at 618, 505 A.2d at 1340.
222. Id. at 618-19, 505 A.2d at 1340.
223. Id. at 619, 505 A.2d at 1340.
224. Id.
225. Id. at 620, 505 A.2d at 1341.
227. See id. at § 539(a) (defining personal injury protection).
228. See id. at § 541(c) (defining uninsured motorist coverage).
229. Section 543(d) provides:
   Benefits payable under the coverages required in §§ 539 [providing for personal injury protection] and 541 [uninsured motorist coverage] of this article shall be reduced to the extent that the recipient has recovered benefits under workmen's compensation laws of any state or the federal government.
230. 305 Md. 369, 504 A.2d 632 (1986).
policy.\textsuperscript{231}

In \textit{Erie Insurance Exchange v. Reliance Insurance Co.}\textsuperscript{232} the Court of Special Appeals held that a passenger injured while riding in a vehicle that is being used without the owner's permission is not a "person insured" under the owner's uninsured motorist endorsement provision.\textsuperscript{233} Thus, the passenger cannot hold the owner's insurance company liable for damages.\textsuperscript{234}

\section{D. Uniform Commercial Code—Measure of Damages for Breach of Warranty of Title}

By its terms, section 2-714(2) of the Commercial Law Article provides the measure of damages for a breach of warranty in the sale of goods.\textsuperscript{235} In \textit{Metalcraft, Inc. v. Pratt}\textsuperscript{236} the Court of Special Appeals held that section 2-714(2) also provides the measure of damages in an action for breach of warranty of title.\textsuperscript{237}

\section{E. Contracts—Failure of Condition}

In \textit{Laddon v. Rhett Realty, Inc.}\textsuperscript{238} the Court of Special Appeals held that purchasers could recover a deposit from their real estate broker if the contract of sale between the purchasers and the seller were expressly contingent upon the occurrence of an event that failed to occur through the fault of neither party.\textsuperscript{239} According to the court, the purchasers stated a claim against the broker for money had and received, not for breach of contract.\textsuperscript{240} Thus, the

\textsuperscript{231} Id. at 378-79, 504 A.2d at 637. Hines argued that because PEPCO, his employer, was self-insured, its potential liability was not limited to the amount of insurance coverage required under §§ 539 and 541. Id. at 373, 504 A.2d at 634. The court, however, held that under the plain meaning of the insurance statutes, no insurer is liable for the amounts exceeding the statutory limit. Id.


\textsuperscript{233} Id. at 617, 493 A.2d at 407.

\textsuperscript{234} Id. at 617-18, 493 A.2d at 407.

\textsuperscript{235} Md. Com. Law Code Ann. § 2-714(2) (1975). This section provides:
The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.


\textsuperscript{237} Id. at 293, 500 A.2d at 336.


\textsuperscript{239} Id. at 570, 493 A.2d at 383. The contract of sale was expressly contingent upon the purchasers' ability to obtain financing. The purchasers alleged that they were unable to obtain financing. Id. The court stated: "Under the allegations of the declaration, the contractual obligations regarding performance were terminated for failure of a condition precedent." Id.

\textsuperscript{240} Id. at 572, 493 A.2d at 384. A claim for money had and received lies "'whenever
claim could proceed despite the absence of contractual agreement between the purchasers and the broker.²⁴¹

F. Banking


Pursuant to the new law, a capital stock savings and loan association²⁴³ may convert to a commercial bank if it meets certain conditions.²⁴⁴ These conditions include approval of the conversion by the stockholders and the Bank Commissioner, and amendment of the association’s charter to reflect the conversion.²⁴⁵ The association must insure all deposits throughout the conversion.²⁴⁶ The Federal Deposit Insurance Corporation must insure all the new commercial bank’s deposits up to the maximum amount provided by law.²⁴⁷ Persons who were depositors at the time of the conversion are entitled to deposits of like amounts in the newly created commercial bank under the same interest rates and terms as their previous accounts, without interruption of interest.²⁴⁸ Finally, the conversion must be in accordance with Title 3 of the Corporations and Associations Article²⁴⁹ and all the applicable provisions of the Financial Institutions Article.²⁵⁰

Chapter 591 also specifies procedures for the conversions.²⁵¹ The association must file with the Bank Commissioner the appropri-
ate filing fee, an application for conversion, and other supporting documentation. In addition to the authority to approve or disapprove applications for conversion, Chapter 591 vests in the Bank Commissioner the authority to review and to promulgate regulations concerning conversions.

Following the ratification of the application and the completion of the appropriate procedural measures, the new commercial bank "may exercise all the powers of, and shall be subject to all the restrictions imposed on, a commercial bank" under the Financial Institutions Article, with certain exceptions.

Nothing in the new act contravenes the validity of any obligations, transactions, or loans of the savings and loan prior to its conversion to a commercial bank.

2. Acquisition of Maryland Bank by Out-of-State Holding Company.—Chapter 325 of the Laws of 1986 amended section 5-1003 of the Financial Institutions Article to shorten the number of years from four to three that a Maryland bank must have "been in existence and continuously operated" prior to its acquisition by an out-of-state holding company. This three-year requirement is just one of several necessary for the State Bank Commissioner's approval of the acquisition.

G. Consumer Protection—Automotive Repair Facilities Law and Commercial Customers

In Rogers Refrigeration Co., Inc. v. Pulliam's Garage, Inc. the Court of Special Appeals held that the Maryland Automotive Repair

---

252. Id.
253. Id. at § 9-633.
254. Id. at § 9-640(a).
255. Generally, for five years after the conversion, the new commercial bank may hold assets and conduct business activities, but it may not hold insurance assets or conduct insurance activities. Id. at § 9-640(b). If, however, the bank held insurance assets or conducted insurance activities prior to its conversion then, generally, for two years after the conversion the bank may continue to hold those assets or conduct those activities. Id. at § 9-640(c).
259. Id. at § 5-1003(a)(2)(iii).2.
260. Id.
261. See id. for the other conditions, unchanged by the new law.
Facilities Law (ARFL)\textsuperscript{263} protects commercial customers of automotive repair facilities as well as consumer customers.\textsuperscript{264} The court also held that if a repair shop’s failure to give the notice of “customer’s rights” required under the ARFL is inconsequential, the failure does not excuse the customer from paying for the services rendered.\textsuperscript{265}

Rogers owned a fleet of motor vehicles used by its employees in carrying out its commercial refrigeration business.\textsuperscript{266} Pulliam’s Garage was a small automobile repair facility.\textsuperscript{267} In February of 1981, Rogers and Pulliam’s entered into an agreement whereby the garage would repair the Rogers fleet.\textsuperscript{268} Pulliam’s submitted invoices for each repair job to Rogers on completion of the work.\textsuperscript{269}

Eventually, Rogers became delinquent in its payments to Pulliam’s.\textsuperscript{270} The repair shop sought recovery for materials provided and services performed.\textsuperscript{271} Rogers claimed that it had not paid because Pulliam’s had not properly performed the repairs.\textsuperscript{272} The trial court disagreed and awarded recovery to the garage.\textsuperscript{273}

On appeal Rogers challenged the judgment below on the ground that Pulliam’s had failed to comply with the ARFL.\textsuperscript{274} This failure, Rogers maintained, barred Pulliam’s recovery.\textsuperscript{275} Specifically, Rogers relied on the garage’s failure to comply with section 14-1008 of the ARFL. That section stipulates that if a customer is charged more than fifty dollars for a repair, the invoice for that repair must, under the printed heading “Customer’s Rights,” inform the customer of certain rights, including the right to request a written estimate for repairs over fifty dollars, and the right to the return of any replaced parts.\textsuperscript{276} None of the invoices submitted to Rogers Refrigeration by Pulliam’s Garage contained the requisite statement of “Customer’s Rights.”\textsuperscript{277}

\textsuperscript{264} 66 Md. App. at 682, 505 A.2d at 881.
\textsuperscript{265} Id. at 686, 505 A.2d at 883.
\textsuperscript{266} Id. at 678, 505 A.2d at 879.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id. at 679, 505 A.2d at 880.
\textsuperscript{270} Id.
\textsuperscript{271} Id. at 677, 505 A.2d at 879.
\textsuperscript{272} Id. at 680, 505 A.2d at 880.
\textsuperscript{273} Id. at 677, 505 A.2d at 879.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{277} 66 Md. App. at 682, 505 A.2d at 881-82.
Pulliam's urged the court to reject this defense, claiming that the ARFL did not apply to commercial entities.\textsuperscript{278} The garage based its argument on a statutory definition of the word "consumer."\textsuperscript{279} Title 13 of the Commercial Law Article, "The Consumer Protection Act," defines a "consumer" as one who receives goods or services "primarily for personal, household, family, or agricultural purposes."\textsuperscript{280}

The Court of Special Appeals, however, relied on ARFL provisions that, it said, clearly reflected legislative intent to extend coverage of the ARFL to commercial users as well as to persons entitled to benefit from the Consumer Protection Act.\textsuperscript{281} Certain provisions refer to a customer covered by the ARFL as a "person."\textsuperscript{282} Other language in the ARFL defines a "person" to include "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."\textsuperscript{283}

Nonetheless, the court rejected Rogers' argument that the absence of the notice of Customer's Rights required by section 14-1008 on the invoices from the garage barred the garage's recovery.\textsuperscript{284} The object of the contract, the repair of the vehicles, was accomplished at a reasonable cost. Thus, any breach of the contract on the garage's part was inconsequential.\textsuperscript{285}

\textbf{Jeniphr A.E. Breckenridge}  
\textbf{Gillian N. Rudow}  
\textbf{Peter Q. Schluederberg}

\textsuperscript{278} Id. at 680-81, 505 A.2d at 880-81.  
\textsuperscript{279} Id.  
\textsuperscript{281} 66 Md. App. at 681, 505 A.2d at 881.  
\textsuperscript{283} Id. at § 14-1001(d).  
\textsuperscript{284} 66 Md. App. at 686, 505 A.2d at 883-84.  
\textsuperscript{285} Id., 505 A.2d at 884.
IV. CONSTITUTIONAL LAW

A. Maryland Constitutional Law

1. Equal Rights Amendment.—In Burning Tree Club v. Bainum the Maryland Court of Appeals held that a statutory provision granting preferential tax treatment to country clubs operating primarily to benefit members of a particular gender violated the Maryland Equal Rights Amendment (ERA). The court decided, however, that the objectionable provision was not severable from the broader language in the statute that bars preferential tax assessments to clubs practicing gender discrimination. The net effect of the court's decision was to permit country clubs discriminating against women to continue receiving preferential tax benefits.

In 1965 the Maryland General Assembly authorized the State Department of Assessments and Taxation to offer private country clubs reduced assessments on the clubs’ land in exchange for a commitment by the club to preserve its open spaces. A 1974 amendment to the law, Chapter 870, denied the preferential tax assessment to country clubs discriminating on the basis of race, color, creed, gender, or national origin. But the amendment created an exception for clubs whose primary purpose is to benefit members of a particular gender.

3. 305 Md. at 84, 501 A.2d at 832.
4. Id., 501 A.2d at 832-33.
5. On April 4, 1986, the Maryland General Assembly passed a bill that eliminated Burning Tree's preferential tax assessment. On July 1, 1986, Burning Tree filed suit in Anne Arundel County Circuit Court claiming that the new law breached the contract the club signed with the State. The club asked that the new law not be enforced until that contract expired. In addition, the suit claimed that the new law violated Maryland's Equal Rights Amendment because the law permitted clubs to engage in “periodic discrimination,” such as separate tee-off times for men and women. Wash. Post, July 2, 1986, at B7, col. 5.
8. The “primary purpose” provision states: The provisions of this section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times.

Id.
In 1978 Maryland's Attorney General determined that Burning Tree Country Club did not discriminate on the basis of race, creed, color, or national origin and that the gender discrimination prohibition was inapplicable since Burning Tree was operated "with the primary purpose of serving members of one sex." In 1981 Burning Tree entered into a fifty-year agreement with the State to maintain the club's open space in exchange for a tax deferral. In 1983 the Circuit Court for Montgomery County held that the "primary purpose" provision violated the ERA because of the provision's discriminatory effect. Burning Tree appealed, and the Court of Appeals granted certiorari.

The Court of Appeals' decision was rendered in a complicated opinion by a divided court. Judge Eldridge commanded a majority for the view that the State's role in granting the preferential assessments constituted "state action," and that the "primary purpose" provision was unconstitutional. Judge Murphy, however, wrote for a majority that the "primary purpose" provision could not be severed from the broader statutory language barring discrimination on the grounds of race, color, creed, gender, or national origin. Thus, if the "primary purpose" provision fell, the antidiscrimination language must also fall.

The Court of Appeals first considered whether the "primary purpose" provision involved state action sufficient to implicate the

9. 305 Md. at 59, 501 A.2d at 820. Burning Tree, an all-male golf club occupying approximately 225 acres in Montgomery County, is the only single-sex club benefitting from the "primary purpose" provision. Id., 501 A.2d at 819-20.
10. Id., 501 A.2d at 820.
11. Id. at 60, 501 A.2d at 820. The plaintiffs, a taxpayer and a woman seeking membership in the club, sought a declaration that the "primary purpose" provision violated the ERA, an injunction against preferential tax treatment for Burning Tree, and an order requiring Burning Tree to accept membership applications from women. The Circuit Court for Montgomery County held that § 19(e)(4), though facially neutral, had a discriminatory effect, and thus violated the ERA. The court enjoined the State from giving preferential tax assessments to Burning Tree as long as the club continued to discriminate on the basis of gender. The court, however, refused to order Burning Tree to accept membership applications from women. Id. at 59-62, 501 A.2d at 820-21.
12. Id. at 62, 501 A.2d at 821.
13. Id. at 91, 501 A.2d at 836 (Eldridge, J., concurring in part and dissenting in part).
14. Id. at 83-84, 501 A.2d at 832-33 (opinion of Murphy, C.J.).
15. Id. at 84, 501 A.2d at 832. Judge Rodowsky's concurring opinion argued that the "primary purpose" provision is "facially unconstitutional under the ERA but that the unconstitutional portion is clearly nonseverable." Id. at 85, 501 A.2d at 833 (Rodowsky, J., concurring). "In effect, the court's entire mandate in this case reflects the conclusions of only one member, Judge Rodowsky." Id. at 91 n.5, 501 A.2d at 836 n.5 (Eldridge, J., concurring in part and dissenting in part).
ERA. The court noted that the original statute permitting tax breaks to country clubs for "open spaces" made no mention of gender, race, or any other suspect classifications; however, it was the 1974 amendment, Chapter 870, that was under attack in this case. The court said that Chapter 870 specifically deals with discrimination and yet explicitly distinguishes between gender-based discrimination and other kinds of discrimination. In addition, Chapter 870 employs the administrative machinery of the State to enforce the law's provisions. Therefore, the court decided that the State's involvement in the discrimination amounted to state action. The court readily distinguished a number of cases in which the Supreme Court had found no state action. The statutory language in those cases was neutral and did not specifically sanction the challenged discrimination.

The court then addressed whether the "primary purpose" provision violated the ERA. A majority of the court rejected the view that the ERA is implicated only when the government "imposes a burden on one sex but not the other, or confers a benefit upon one sex but not the other." The majority applied Maryland State Board
of Barber Examiners v. Kuhn, in which the Court of Appeals stated that gender-based classifications are "suspect" and are subject to "stricter scrutiny." The court examined similar decisions from a number of other states before concluding that under the ERA classifications based on gender should be "subject to at least strict scrutiny." In applying this strict test, the court placed the burden of persuasion "upon those attempting to justify the classifications." Since no arguments were offered to the court to justify the gender-based classification in Chapter 870, the court concluded that the "primary purpose" provision violated the ERA.

The court split over whether the unconstitutional provision was severable from the rest of the statute. In resolving severability

27. Id. at 506-07, 312 A.2d at 222 (citing Frontiero v. Richardson, 411 U.S. 677 (1973)).
29. Id. at 98, 501 A.2d at 840. The court indicated that gender-based classifications might call for an even stricter standard than "strict scrutiny." Quoting Rand v. Rand, 280 Md. 508, 512, 374 A.2d 900, 903 (1977), the majority noted that the "'broad sweeping, mandatory language of the amendment' " indicated an "'overriding compelling state interest' " in equality of rights for both sexes. 305 Md. at 95-96, 501 A.2d at 838-39 (the language quoted from Rand was itself a quote from Darrin v. Gould, 85 Wash. 2d 859, 871, 877, 540 P.2d 882, 889, 893 (1975)).
30. 305 Md. at 98, 501 A.2d at 840. Judge Eldridge then stated:

Of course, because of the inherent differences between the sexes, some sex-based classifications may be justified after such scrutiny, whereas comparable race-based classifications could not be sustained. As the United States Supreme Court stated in Goss v. Board of Education, 373 U.S. 683, 687 (1963), "'racial classifications are 'obviously irrelevant and invidious.' " Thus, separate restroom or locker room facilities for blacks and whites cannot be tolerated, but such separate facilities for men and women can be justified by the State.
31. 305 Md. at 100, 501 A.2d at 841.
32. Id. The court said that even if the statute were not discriminatory on its face, an examination of its discriminatory purpose and impact would render it unconstitutional. "'It is undisputed that the sole purpose of the provision was to allow Burning Tree to continue discriminating against women and still receive the state subsidy. This has also been the sole effect of the provision since 1974.'" Id.
33. Even though the three judges who announced the opinion of the court would have found the "primary purpose provision" constitutional and thus would not have reached the severability issue, since a majority of the court found the provision unconstitutional these judges did express their opinions on severability. Id. at 80, 501 A.2d at 830-31. Because Judge Rodowsky agreed with these judges on this issue, id. at 85, 501 A.2d at 833, they commanded a majority.
questions, courts look to “what would have been the intent of the legislative body, if it had known that the statute could be only partially effective.” Furthermore, “when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion.” A majority of the Burning Tree court wrote that Chapter 870’s dominant purpose was to “avoid, as much as possible, disturbing existing, sexually discriminatory practices of country clubs without completely deleting sex as one of the bases of prohibited discrimination.” In the court’s view, Chapter 870 contained a nearly “complete, intrinsic contradiction” concerning gender discrimination; therefore, the court was unable to conclude that the dominant purpose of the statute was “to enact a bar against sex discrimination which was to operate absent the primary purpose provision.” Thus, the language in Chapter 870 that prohibited gender discrimination fell along with the “primary purpose” provision.

The reasoning of the majority on the issue of severability seems strained. Chapter 870’s dominant purpose would appear to be the prohibition of a variety of discriminatory practices. The “primary purpose” provision is thus a minor exception to a broad policy. Thus, the dissent wrote that “the dominant purpose was not the preservation of a subsidy for a single discriminatory country club.”

2. Power of Counties to Enact Ordinances.—In Holiday Universal Club of Rockville, Inc. v. Montgomery County the Court of Special Appeals held that the Montgomery County Council had the power to enact an ordinance prohibiting discrimination in places of public accommodation. The court also held that even though it did not define the word “discrimination,” the ordinance was not unconstitu-

35. Id. (quoting Davis, 294 Md. at 384, 451 A.2d at 114).
36. 305 Md. at 83, 501 A.2d at 832.
37. Id.
38. Id.
39. Id. at 84, 501 A.2d at 832-33.
40. Id. at 104, 501 A.2d at 843 (Eldridge, J., concurring in part and dissenting in part).
42. Id. at 575, 508 A.2d at 995.
tionally vague. The case arose when three men were denied admission to an aerobics class at the Rockville Holiday Spa (Spa). The men filed complaints with the Montgomery County Human Relations Commission (HRC), alleging discrimination on the basis of gender in violation of the Montgomery County Public Accommodation Ordinance. Before the HRC could hold hearings, the Spa sought a declaratory judgment that the Public Accommodation Ordinance was unconstitutional and an interlocutory injunction staying the HRC proceedings. The Circuit Court for Montgomery County denied the injunction, and the Spa appealed.

The Spa argued (1) that Montgomery County lacked the power to enact ordinances of this type; and, (2) that the ordinance was unconstitutionally vague. The Court of Special Appeals noted that a charter county derives its power from article XI-A of the Maryland Constitution and the Express Powers Act. Article XI-A shifts local lawmaking powers from the state legislature to county governments for all matters covered by the Express Powers Act. The Express Powers Act grants charter counties "a general police power to enact ordinances for the public good," provided the ordinances do not conflict with other state laws.

The Maryland Court of Appeals in *Montgomery Citizens League v. Greenhalgh* had previously held that Montgomery County had the

---

43. Id.
44. Id. at 570, 508 A.2d at 992.
45. Id. The relevant portion of MONTGOMERY COUNTY, MD., CODE § 27-9 (1977) stated:

It shall be unlawful for any owner, lessee, operator, management, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, sex, marital status, religious creed, ancestry, national origin, handicap, or sexual orientation in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

67 Md. App. at 571-72, 508 A.2d at 993.
46. 67 Md. App. at 570, 508 A.2d at 992-93.
47. Id. at 570-71, 508 A.2d at 993. A refusal to grant an interlocutory injunction is appealable under MD. CTS. & JUD. PROC. CODE ANN. § 12-303(3)(iii) (Supp. 1985).
48. 67 Md. App. at 571, 508 A.2d at 993.
50. 67 Md. App. at 574, 508 A.2d at 994 (citing Montgomery Citizens League v. Greenhalgh, 253 Md. 151, 159-60, 252 A.2d 242, 246 (1969)).
51. Id. at 573, 508 A.2d at 994.
power to pass an ordinance prohibiting housing discrimination. The *Greenhalgh* court reasoned that since the state legislature could unquestionably pass such a law, and since the Express Powers Act granted charter counties a "co-extensive police power," the county could enact a similar provision. Although the *Greenhalgh* decision dealt with a fair housing ordinance, the Court of Special Appeals extended *Greenhalgh*'s rationale to the Public Accommodations Ordinance.

The Spa also argued that the ordinance, by failing to define "discrimination," was unconstitutionally vague because it did not provide adequate notice of the type of conduct prohibited. The Court of Special Appeals held that in a case such as this, which involved civil rather than criminal penalties, the strict standard for vagueness urged by the Spa did not apply. The court further noted that even under the strict standard, the ordinance was acceptable, because it gave "'fair notice' to the public and 'fixed standards' to those enforcing the law."

3. Conflict between County Charter and Public General Law.—In *Rowe v. Chesapeake & Potomac Telephone Co.* the Court of Special Appeals held inoperative a Montgomery County charter amendment that prohibited the county from obtaining goods and

53. *Id.* at 164-65, 252 A.2d at 248-49.
55. 67 Md. App. at 574, 508 A.2d at 994.
56. 253 Md. at 165, 252 A.2d at 249.
57. 67 Md. App. at 575, 508 A.2d at 995.
58. *Id.*
59. *Id.* The Spa urged application of the standard announced in *Miller v. Maloney Concrete Co.*, 63 Md. App. 38, 491 A.2d 1218 (1985), a case involving a criminal statute. The court in that case said that when imposing criminal penalties it is required:

(1) that the statute give fair notice of what is required or prohibited so that persons of ordinary intelligence and experience may be able to govern their conduct accordingly, and (2) that it "provide legally fixed standards and adequate guidelines" for those charged with administering and enforcing the law.
60. 67 Md. App. at 575, 508 A.2d at 995.
62. If there is a conflict between a charter provision and a public general law, the charter provision is generally held to be inoperative. *Wilson v. Board of Supervisors of Elections of Baltimore City*, 273 Md. 296, 302, 328 A.2d 305, 309 (1974).
63. The amendment, § 313A of the Montgomery County Charter (1982), stated:

The county government may not purchase and contract for goods and services with the C & P Telephone Company (C&P) unless C&P includes telephone sub-
services from the C&P Telephone Company unless the phone rates charged county residents in Montgomery Village and Gaithersburg were no higher than the rates charged residents in other parts of the county.64 The court held the provision inoperative because it conflicted with a public general law65 that grants the Public Service Commission the sole power to regulate public utility telephone rates in Maryland.66

Previously, the Circuit Court for Montgomery County had held the amendment unconstitutional, terming it "an effort to intrude into the administration of the affairs of Montgomery County Government specifically delegated to the County Council or the County Executive."67 The Court of Special Appeals declined to decide the constitutional issue, opting instead to dispose of the case on narrower grounds.68

Under the Maryland Constitution, a conflict between a county charter provision and a public general law is resolved in favor of the public general law.69 Section 27 of article 7870 requires the Public Service Commission to authorize the rates charged and services rendered by a public service telephone company.71 The court acknowledged that the county charter amendment did not attempt directly to regulate C&P's rates.72 In that respect, the court noted, this case

64. 65 Md. App. at 528-29, 501 A.2d at 465.
66. 65 Md. App. at 533, 501 A.2d at 467-68. The charter amendment resulted from a May 1981 petition drive that succeeded in placing the proposed amendment on the ballot in November 1982. The charter amendment was approved by the voters despite the opposition of the County Executive. C&P sought a declaratory judgment that § 313A was unconstitutional and an injunction to prevent the county from enforcing it. Montgomery County declined to offer any arguments in its defense. Two county residents, Richard Rowe and Chester Julian, intervened. Id. at 529-30, 501 A.2d at 465-66.

As a preliminary matter, the Court of Special Appeals determined that there was a justiciable controversy. Id. at 532, 501 A.2d at 467. Because the county did not contest C&P's motions, the intervenors argued that there was no controversy and hence no justiciable issue for the court below to have ruled on. The Court of Special Appeals upheld the lower court on this point, stating that the existence and opposition of the intervenors created a justiciable controversy. Id. at 530-32, 501 A.2d at 466-67.

67. Id. at 529, 501 A.2d at 465.
68. Id. at 532, 501 A.2d at 467.
69. Id. (quoting Wilson v. Board of Supervisors of Elections, 273 Md. 296, 301, 328 A.2d 305, 308 (1974)); MD. CONST., art. XI-A § 3.
71. 65 Md. App. at 532, 501 A.2d at 467.
72. Id. at 532-33, 501 A.2d at 467.
differed from *East v. Gilchrist,*\(^7\)\(^3\) in which a charter provision forbidding the expenditure of funds for a landfill directly conflicted with a public general law "mandating the expenditure of those funds."\(^7\)\(^4\)

Nevertheless, the court recognized that the amendment's "plain intent" was to force C&P to change its rates.\(^7\)\(^5\) Such a rate change could occur, however, only if C&P violated the Public Service Commission's order establishing the phone rates, or if the Commission changed C&P's rates "irrespective of the usual factors involved in public utility ratemaking."\(^7\)\(^6\)

The court carefully pointed out that, as in *East,* its decision did not render the charter amendment unconstitutional. Rather, the decision means only that the amendment cannot be given effect as long as the public general law with which it conflicts remains operative.\(^7\)\(^7\)

**B. Commerce Clause**

In *Turner v. Smalis, Inc.*\(^7\)\(^8\) the United States District Court for the District of Maryland adopted a magistrate's finding that Maryland law\(^7\)\(^9\) does not require a foreign corporation doing only interstate business in Maryland to register\(^8\)\(^0\) with the state in order to assert a defense of limitations.\(^8\)\(^1\) The Supreme Court has held that the commerce clause precludes a state from requiring a foreign corporation "to qualify to do interstate business in that state before according to that corporation the same rights, remedies, and judicial fora as are available to domestic corporations."\(^8\)\(^2\) It is unclear whether a state could constitutionally require a foreign corporation doing only interstate business merely to register rather than to qualify.\(^8\)\(^3\) By de-

---

\(^{73}\) 296 Md. 368, 463 A.2d 285 (1983).

\(^{74}\) 65 Md. App. at 533, 501 A.2d at 467.

\(^{75}\) Id.

\(^{76}\) Id., 501 A.2d at 468.

\(^{77}\) Id.


\(^{79}\) MD. CORPS. & ASS'NS CODE ANN. §§ 7-202, 7-203 (1985).

\(^{80}\) Registration under § 7-202 requires only that the corporation notify the state of its address and the name and address of its registered agent within the state. Qualification under § 7-203 requires the above as well as filing a certificate executed by an official of the place where the corporation is organized attesting that the corporation is in good standing in that place. Id.

\(^{81}\) 622 F. Supp. at 249.

\(^{82}\) Id. at 252 (citing Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974)) (emphasis in original).

\(^{83}\) 622 F. Supp. at 254.
termining that there is no such registration requirement in Maryland, the *Turner* court side-stepped this constitutional issue.

The plaintiff, Turner, was injured while using a conveyor device manufactured and sold by Smalis, a Pennsylvania corporation.84 The accident occurred in 1980, but Turner did not file suit against Smalis until 1983.85 Smalis argued that Turner’s claim was barred by Maryland’s statute of limitations.86 Turner claimed that Smalis could not raise the statute of limitations defense because under section 5-204 of the Courts and Judicial Proceedings Article, “a foreign corporation, required by law to qualify or register to do business in Maryland, cannot raise” the defense of limitations if it fails to qualify or register under the applicable statutes.87

Section 7-202 of the Corporations and Associations Article provides that a corporation doing only interstate business in Maryland need not qualify, but must register.88 Smalis never qualified or registered; this apparently barred its statute of limitations defense.89 As the magistrate noted, however, in *G.E.M., Inc. v. Plough, Inc.*90 the Maryland Court of Appeals construed an earlier registration requirement91 as applying only to foreign corporations “doing business” in Maryland.92 Similarly, in *Finch v. Hughes Aircraft Co.*93 the Maryland Court of Special Appeals held that section 7-301, which denies access to state courts to unqualified and unregistered foreign corporations, applied only to those foreign corporations “doing business” in Maryland.94 “The ‘doing business’ test,” the *Turner* court wrote, “requires far more than occasional interstate sales activity conducted in Maryland . . . .” Rather, ‘doing business’ requires

---

84. *Id.* at 250.
85. *Id.* The accident occurred in February 1980 and Turner received his first workers’ compensation award in April 1980. Turner did not file suit until June 1983. *Id.*
92. 622 F. Supp. at 252; see *Plough*, 228 Md. at 486-89, 180 A.2d at 480-81. In *Plough* the defendant corporation solicited orders for goods to be shipped into Maryland, but maintained no Maryland office, paid no Maryland taxes, and owned no property in Maryland. 228 Md. at 486-89, 180 A.2d at 480-81.
94. *Id.* at 245-46, 469 A.2d at 894-95.
a permanent corporate presence."

The magistrate determined that Smalis' business activity in Maryland was limited to interstate sales and occasional in-state deliveries. Therefore, Smalis was not "doing business" in Maryland.

The magistrate further concluded that Maryland courts would construe "doing business" for purposes of section 5-204 as they had in analyzing the statutes at issue in Plough and Finch. Since Smalis was not "doing business" in Maryland, it was not required to register; therefore, its failure to do so did not prevent Smalis from raising the limitations defense. By employing this analysis, the court avoided the question of whether a state would violate the commerce clause by requiring registration before allowing a limitations defense.

The Turner court acknowledged that the magistrate's reading of "doing business" effectively erases the distinction made in section 7-203 between "doing any interstate or foreign business" and "doing any intrastate business." Still, the court noted that the Court of Appeals' decision in Plough construed the forerunners of sections 7-202 and 7-203 to require a "doing business" test, but had "made no distinction in that regard between qualification and registration."

C. Freedom of Speech—Public Employees

In Leese v. Baltimore County the Court of Special Appeals held that Leese, a county employee, had no property interest in receiving a new, upgraded position, and that his liberty interest in future employment was not abridged by the county's actions. The court held, however, that Leese had stated a cause of action by alleging that the county dismissed him for exercising his first amendment rights. The county and its supervisory employees are not immune from first amendment claims. This decision illustrates that while

96. Id.
97. Id.
98. Id. at 254.
99. Id.
100. Id. at 249.
101. Id.
103. Id. at 458-63, 497 A.2d at 167-70.
104. Id. at 463-66, 497 A.2d at 170-71.
105. Id. at 476-85, 497 A.2d at 177-81.
"the employment at will doctrine is alive and well in Maryland, there are certain constitutional limitations on the government's authority to fire its employees."\(^\text{106}\)

Leese had worked for six years in an untenured, part-time position as director of Baltimore County's Senioride program. At Leese's suggestion, the county upgraded the position to full-time merit status. Leese applied for the newly upgraded position, but was not hired.\(^\text{107}\) When he appealed the hiring decision, Leese was fired. He filed suit, alleging that the hiring process had denied him due process, and that his firing was an unconstitutional retaliation for exercising his first amendment rights to criticize the hiring decision. The circuit court dismissed his suit for failure to state a cause of action.\(^\text{108}\) The Court of Special Appeals affirmed in part and reversed in part.\(^\text{109}\)

The court first considered Leese's due process claims. In *Board of Regents v. Roth*\(^\text{110}\) the Supreme Court held that an employee alleging deprivation of a property interest in a job must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."\(^\text{111}\) Under the Baltimore County Code, filling a merit position is discretionary. Because Leese alleged no facts showing that the county had to exercise discretion in his favor, the court affirmed the dismissal of this claim.\(^\text{112}\) The court further held that Leese had no property interest in his part-time job since the county codes and regulations make clear that part-time employees are terminable at will.\(^\text{113}\) Although Leese might reasonably have expected to be hired, or at least not to be fired, the court followed the clear weight of authority in holding that these reasonable expectations did not rise to the level of constitutional entitlements.\(^\text{114}\)

The court also rejected Leese's claim that the county abridged

---

106. *Id.* at 463, 497 A.2d at 170.

107. Instead, Leese was "retained in a new, non-merit, part-time position, at a reduced salary," in which his duties were the same as before. *Id.* at 452, 497 A.2d at 164.


109. *Id.* at 450, 497 A.2d at 163. On the aspects of Leese's appeal not reaching constitutional issues, the court held that Leese stated a cause of action for abusive discharge; failed to state a cause of action for intentional infliction of emotional distress; stated a cause of action for libel per quod; but that governmental immunity barred claims of defamation, intentional infliction of emotional distress, and abusive discharge against the county. *Id.* at 467-79, 497 A.2d at 172-78.

110. 408 U.S. 564 (1972).

111. *Id.* at 577.

112. 64 Md. App. at 458, 497 A.2d at 167.

113. *Id.* at 459, 497 A.2d at 168.

his liberty interest in future employment by firing him and placing unfavorable remarks in his personnel record. To support such a claim, a plaintiff must allege that the former employer has published false statements so stigmatizing as to foreclose “his freedom to take advantage of other employment opportunities.” To be stigmatizing, the reasons given for a dismissal “must impute some sort of ‘dishonesty, immorality, pressure to drop criminal charges, intoxication and the like.’” False statements about an employee’s work performance do not necessarily violate a liberty interest. The court concluded that the statements in question amounted to nothing more than negative comments about Leese’s job performance, insufficient in themselves to make out a cause of action.

The court next considered Leese’s claim that he was fired in retaliation for exercising his first amendment rights. There are two elements to such a claim. First, the plaintiff must show that he or she was engaged in constitutionally protected speech or conduct at the time of the discharge. Second, he or she must show that the protected speech or conduct motivated the employer to fire the employee.

Leese claimed he was fired because he appealed the county’s decision not to hire him for the new merit position. The court first noted that Leese had a constitutional right to petition the government for redress of a grievance. In addition, the object of his petition was a public concern, the integrity of the county merit system. The court therefore concluded that Leese was engaged in constitutionally protected conduct when he was fired. Leese’s allegation that he was fired because of the protected conduct satisfied the second element of the claim as well. Thus, the Court of Special Appeals reversed the circuit court on the first amendment issue.

Finally, the court concluded that with respect to the first amendment claim, the officials named as defendants merited neither

115. 64 Md. App. at 463, 497 A.2d at 170.
117. 64 Md. App. at 462, 497 A.2d at 169 (quoting Smith v. Board of Educ., 708 F.2d 258, 266 n.6 (7th Cir. 1983)).
118. Id.
119. Id. at 463, 497 A.2d at 170.
120. Id. at 464-65, 497 A.2d at 170-71.
121. Id. at 466, 497 A.2d at 171.
122. Id. at 466-67, 497 A.2d at 171-72.
123. Id. at 467, 497 A.2d at 172.
absolute nor qualified immunity.\footnote{124} Absolute immunity shields only those "officials whose special functions or constitutional status requires complete protection from suit."\footnote{125} The court found that the defendants in this case lacked the status entitling them to absolute immunity.\footnote{126} Qualified immunity shields "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."\footnote{127} The court reasoned that because the officials should have realized the unconstitutionality of a retaliatory dismissal of Leese, they lacked even qualified immunity.\footnote{128}

\section*{D. Due Process}

In \textit{Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Association} the Court of Special Appeals held unconstitutional a portion of Maryland's Real Property Article\footnote{129} that requires a defendant requesting a jury trial in a summary eviction proceeding to pay into escrow all rent that is allegedly past due. Specifically, the court found part of section 8-118 repugnant to article 23 of the Maryland Declaration of Rights,\footnote{131} because the statute presupposes that the defendant in fact owes the rent\footnote{132} and effectively places "a premium on the exercise of one's inviolate right to a civil jury."\footnote{133}

\begin{itemize}
\item 64 Md. App. at 482-83, 497 A.2d at 180 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982)).
\item Absolute immunity extends only to legislators, in their legislative functions, see \textit{Eastland v. United States Servicemen's Fund}, 421 U.S. 491 (1975); judges, in their judicial functions, see \textit{Stump v. Sparkman}, 435 U.S. 349 (1978); prosecutors and similar officers and administrative officials in adjudicative functions, see \textit{Butz v. Economou}, 438 U.S. 478 (1978); and the President of the United States, \textit{Nixon v. Fitzgerald}, 457 U.S. 731 (1982).
\item \textit{Harlow}, 457 U.S. at 818.
\item 64 Md. App. at 484, 497 A.2d at 181.
\item 64 Md. App. 222, 494 A.2d 947 (1985).
\item Section 8-118 provides:
\begin{quote}
Rent escrow account in certain landlord-tenant actions.
\begin{itemize}
\item \textit{Tenant to pay rents into account.}—In an action under § 8-401, § 8-402, or § 8-402.1 of this article in which a party prays a jury trial, the District Court shall enter an order directing the tenant or anyone holding under the tenant to pay all accrued and unpaid rents, and all rents due and as they come due during the pendency of the action . . .
\end{itemize}
\end{quote}
\item Article 23 of the Maryland Declaration of Rights guarantees a right to a jury trial in all civil proceedings when the amount in controversy is over five hundred dollars.\footnote{131} \textit{Md. Const. Decl. of Rts.} art. 23.
\item 64 Md. App. at 230, 494 A.2d at 951.
\item \textit{Id.} at 233, 494 A.2d at 953.
\end{itemize}
Lucky Ned's, the defendant in a summary eviction proceeding, requested a jury trial. Pursuant to section 8-118, the court ordered Lucky Ned's to pay allegedly past due rent into escrow. When Lucky Ned's refused to pay, the court granted the landlord's motion for summary judgment.

The issues presented on Lucky Ned's appeal were: (1) whether section 8-118 unconstitutionally interferes with the right to a jury trial; and (2) whether the statute violates due process by permitting payment of money and entry of a judgment without a hearing. The court examined cases upholding the constitutionality of statutes that require payment as a prerequisite to a jury trial. The court found that in those cases "the amounts involved were minor and the purpose of the requirements were related to court administration." The court conceded that summary eviction proceedings are designed to protect legitimate property interests and noted that the prompt relief available in such proceedings can easily be frustrated by a tenant's request for a jury trial.

Nevertheless, the court found that requiring the tenant to pay accrued rent into escrow is unreasonable for three reasons. First, the escrow account gives the landlord unwarranted security that he or she may collect a judgment. Second, section 8-118 could place a jury trial beyond the tenant's financial reach. And third, because section 8-118 requires a judicial determination of the amount owed before a tenant can present its case to a jury, the statute effectively preempts the jury's function.

134. The action was brought under Md. REAL PROP. CODE ANN. § 8-401 (Supp. 1986), which provides for a summary eviction proceeding upon a tenant's failure to pay rent. 135. 64 Md. App. at 226, 494 A.2d at 949. As of the scheduled district court trial date, Lucky Ned's allegedly owed approximately $7000 in unpaid rent. The defendant requested a hearing in order to show that the landlord's claim was fraudulent. Id. 136. Under § 8-118(c), if the tenant refuses to pay accrued rent or rent as it comes due pursuant to the court order, the court may grant judgment in favor of the landlord and issue a warrant for possession. MD. REAL PROP. CODE ANN. § 8-118(c) (Supp. 1986). 137. 64 Md. App. at 228, 494 A.2d at 950. 138. See, e.g., Knee v. Baltimore City Passenger Ry., 87 Md. 623, 624-27, 40 A. 890, 891-93 (1898) (upholding constitutionality of requirement that court costs be paid as a condition precedent to a jury trial). See generally Application of Smith, 381 Pa. 223, 112 A.2d 625 (1955) (collecting cases upholding the constitutionality of requiring a party seeking a civil jury trial to pay additional fees incurred as a result of the request for a jury). 139. 64 Md. App. at 232, 494 A.2d at 952. 140. Id. 141. See id. 142. Id. at 230, 494 A.2d at 951. By contrast, the court found no such encroachment on the jury function in the statute's requirement that future rents be paid into escrow as they become due during the pendency of the action. Relying on Lindsey v. Normet, 405
MARYLAND LAW REVIEW

Lucky Ned's also argued that article 24 of the Maryland Declaration of Rights and the fourteenth amendment to the United States Constitution require a due process hearing before the court may force a tenant to pay future rent as it becomes due during the pendency of the trial. The court agreed. Because section 8-118 makes no provision for a hearing, the court looked elsewhere to determine whether the tenant's due process rights were adequately safeguarded. The court cited Maryland Rule 2-311(f), which provides that "the court . . . may not render a decision dispositive of a claim or defense without a hearing if one was requested."

After eliminating the unconstitutional portion of section 8-118(a), the only sanction remaining in the statute for a tenant's failure to make escrow payments is contained in subsection (c). The court may invoke this sanction only if a landlord moves for judgment, but once a landlord moves for judgment, the tenant may re-

143. Article 24 states that "no man ought to be . . . deprived of his . . . property but by the judgment of his peers, or by the Law of the Land." Supreme Court interpretations of the fourteenth amendment are authority for interpretation of article 24. See Department of Transp. v. Armacost, 299 Md. 392, 415-16, 474 A.2d 191 (1984) ("[A] legislative body generally intends its enactments to be severed if possible.").


145. 64 Md. App. at 238, 494 A.2d at 955-56.

146. Subsection (c) provides:

(c) Failure to pay rent.—In an action under § 8-401 . . . if the tenant fails to pay rent accrued or as it comes due pursuant to the terms of the order, the circuit court, on motion of the landlord . . . shall give judgment in favor of the landlord and issue a warrant for possession.

MD. REAL PROP. CODE ANN. § 8-118(c) (1981).
quest a hearing under Maryland Rule 2-311(f). Thus, when section
8-118(c) is read in conjunction with Maryland Rule 2-311(f), it be-
comes clear that the due process hearing requirement has been ade-
quately met. After severing the unconstitutional portion of section
8-118(a), the court held, the remainder of the statute affords ade-
quate assurance of a hearing when placed in the context of the
Maryland Rules.147

E. Equal Protection

In Whiting-Turner Contracting Co. v. Coupard148 the Court of Ap-
peals upheld the constitutionality of section 5-108 of the Courts and
Judicial Proceedings Article.149 Section 5-108 is a statute of repose
that exempts architects and professional engineers (design profes-
sionals) from liability for certain claims resulting from the defective
condition of an improvement to real property if the claim arises
more than ten years after the property improvement first became
available for its intended use.150 Although the statute, as it stood at
the time this claim arose, favored design professionals over contrac-
tors,151 suppliers, owners, tenants, and all other parties,152 the court

147. 64 Md. App. at 239, 494 A.2d at 955-56.
149. Md. CTS. & JUD. PROC. CODE ANN. § 5-108(b) (1980). Although this case is con-
cerned with the statute as it stood prior to the 1980 amendments, it implicates the cur-
rent statute as well.
150. At the time this action arose, § 5-108 provided:
   Injury to person or property occurring after completion of improvement to
   realty.

   (b) Action against architect or professional engineer.—A cause of action for dam-
   ages does not accrue and a person may not seek contribution or indemnity
   from any architect or professional engineer for damages incurred when wrong-
   ful death, personal injury, or injury to real or personal property, resulting from
   the defective and unsafe condition of an improvement to real property, occurs
   more than 10 years after the date the entire improvement first became available
   for its intended use.

   For convenience the court adopted three definitions: (1) “Design Professionals”
   means “any architect or professional engineer”; (2) “Injury” means “wrongful death,
   personal injury, or injury to real or personal property”; and (3) “Completion” means
   “the date the entire improvement first became available for its intended use.” 304 Md.
   at 346, 499 A.2d at 181-82.
151. Subsection (b) was amended July 1, 1980, after the cause of action arose in this
   case. It now exempts “any architect, professional engineer, or contractor . . . .” (emphasis
   added).
152. Under Md. CTS. & JUD. PROC. CODE ANN. § 5-108(a) (1984), all other parties may
   be sued for injuries occurring up to twenty years after the property improvement first
   became available for its intended use.
held it did not violate the equal protection guarantees found in the United States and Maryland Constitutions.\textsuperscript{153}

In April 1980 a man was seriously injured after falling through a second story window in a parking garage.\textsuperscript{154} He sued the owner, the tenant, the contractor, and the architect of the garage.\textsuperscript{155} The first three defendants settled with the plaintiff, then sued the architect, Coupard, for contribution or indemnity.\textsuperscript{156} The trial court granted the architect's motion for summary judgment, holding that section 5-108(b) barred all claims against the architect; the ten-year period of repose had elapsed since the building became available for use in 1969.\textsuperscript{157} The settling defendants appealed. The Court of Appeals granted certiorari on its own motion, prior to consideration by the Court of Special Appeals.\textsuperscript{158}

A key to the court's holding was its decision to apply a "rational basis" test instead of the "heightened scrutiny" test advocated by the appellants.\textsuperscript{159} The court reasoned that the right to sue for indemnity, though concededly a "personal" right, is not as important as other rights that require a "heightened scrutiny" test.\textsuperscript{160} Moreover, the overwhelming majority of decisions evaluating statutes of repose on equal protection grounds use a "rational basis" test.\textsuperscript{161} Thus, the court concluded, "the challenged portion of the Act, which enjoys a strong presumption of constitutionality, can be invalidated only if the classification is without any reasonable basis and is

\textsuperscript{153} 304 Md. at 352-60, 499 A.2d at 185-89.
\textsuperscript{154} Id. at 346, 499 A.2d at 182.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 346-47, 499 A.2d at 182.
\textsuperscript{157} Id. at 347, 499 A.2d at 182.
\textsuperscript{158} Id. at 346-47, 499 A.2d at 182.
\textsuperscript{159} Id. at 350, 499 A.2d at 183-84. The appellants invoked the "heightened scrutiny" test set forth in Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981). The court described this test as follows:

[\textit{W\textsubscript{here}} a statute creates a "sensitive," though not "suspect" criteri[on] of classification, affects "important," though not fundamental personal rights or works a "significant interference" with a liberty or benefit vital to the individual, the courts will apply a standard more exacting than the rational basis test but less rigorous than the strict scrutiny analysis. 304 Md. at 350, 499 A.2d at 183-84 (quoting Department of Transp. v. Armacost, 299 Md. 392, 474 A.2d 191, 200 (1984)).

\textsuperscript{160} 304 Md. at 350, 499 A.2d at 184. The court noted that the right to a certain period of time in which to sue for indemnity is not as important as "the right not to be discriminated against based on sex alone" or "the rights arising under statutes or constitutional provisions dealing with free public education." It is "more like a hospital's right to select members of its staff, a right which has been regulated by the podiatrists' statute." Id.

\textsuperscript{161} Id. at 351, 499 A.2d at 184.
"purely arbitrary." 162

Applying the rational basis test, the court adopted the position of the Supreme Court of Michigan. 163 Thus, the court emphasized the differences between contractors and design professionals 164 and viewed the reduction of potential liability for design professionals as a legislative means of encouraging design creativity and experimentation. 165 Moreover, the court noted that Maryland law allows contractors to limit their personal liability by doing business as a corporation, whereas design professionals who incorporate remain exposed to personal liability for individual negligence. 166 The statute of repose therefore permits design professionals to enjoy a benefit—limited liability—that other professionals already enjoy.

Whiting-Turner argued there was no rational basis for the distinction between contractor and architect in the case because of the unusually close relationship between the parties: the architect had been hired by and was working for the contractor, who was responsible to the owner for both designing and building the garage. 167

The court, however, dismissed this argument with a quotation from Justice Powell: the statutory classification "need not be drawn so as to fit with precision the legitimate purposes animating it . . . . That Maryland might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." 168

The appellants also argued that the statute of repose improperly favored design professionals over owners and occupiers. 169 But the court justified that distinction on the ground that the design professional usually surrenders control of the premises upon com-

162. Id. at 352, 499 A.2d at 185 (emphasis added).
164. The court, quoting O'Brien, stated:
Architects and engineers are required by law to be licensed, while non-residential contractors are not. The Legislature might have concluded that the different education, training, experience, licensing and professional stature of architects and engineers made it more likely that a limitation on their tort liability would not reduce the care with which they performed their tasks than would be the case with contractors.

304 Md. at 354, 499 A.2d at 186 (quoting 410 Mich. at 17-18, 299 N.W.2d at 342 (footnote omitted)).

165. 304 Md. at 354, 499 A.2d at 186.
167. Id. at 357, 499 A.2d at 187.
168. Id. at 357-58, 499 A.2d at 187-88 (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976)).
169. Id. at 355, 499 A.2d at 186.
pletion, whereas owners and occupiers usually retain control, along with the responsibility for maintenance. The court also approved a distinction between design professionals and suppliers of material or equipment, noting that the latter are in a better position to detect defects and thus reasonably may be held liable to a greater extent than the former.

The court acknowledged that courts of other jurisdictions have struck down statutes of repose favoring design professionals and contractors over owners, occupiers, and suppliers. The court distinguished those cases on the ground that almost all of them followed an Illinois precedent, Skinner v. Anderson, which was “not an equal protection holding.” Skinner was decided on the basis of a section of the Illinois Constitution that prohibited the “granting to any corporation, association or individual of any special or exclusive privilege, immunity or franchise.” The Court of Appeals concluded that those cases did not “give to the legislative judgment the degree of deference required under the rational basis test.”

In State v. Wyand the Court of Appeals upheld the constitu-

170. Id.
171. Id. at 356, 499 A.2d at 187.
172. Id. at 356-57, 499 A.2d at 187.
173. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
174. 304 Md. at 357, 499 A.2d at 187.
175. 38 Ill. 2d at 459, 231 N.E.2d at 590.
176. 304 Md. at 357, 499 A.2d at 187. The court also rejected three minor arguments that the appellants had raised in addition to their equal protection claims. First, the appellants contention the statute violated the restriction against passage of a “special” law for a case that was already covered by an existing “general” law. Id. at 358, 499 A.2d at 188 (citing Md. Const. art. III, § 33). The court said the prohibition against “special” laws applies only to laws passed to benefit particular parties known to the lawmakers, which was not the case here. Id. at 358-59, 499 A.2d at 188.

Second, the appellants contended that the statute violated the policy of providing a remedy for every injury. Id. at 359, 499 A.2d at 188 (citing Md. Const. Decl. of Rts. art. 19). The court said that “the test for determining whether access to the courts ha[s] been denied in violation of art. 19 look[s] to the reasonableness of the restriction,” which the court had already demonstrated. Id. at 360, 499 A.2d at 189 (emphasis added).

Third, the appellants contended the statute violated the requirement that “every Law enacted by the General Assembly shall embrace but one subject,” because it contained both a grant of immunity and a statute of limitations. Id. at 360-61, 499 A.2d at 189 (quoting Md. Const. art III, § 29). The court said that “[t]he purpose of the . . . provision is ‘to prevent the combination in one act of several and distinct incongruous subjects . . . .’ ” Id. at 361, 499 A.2d at 189 (quoting Allied Am. Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles, 219 Md. 607, 614, 150 A.2d 421, 426 (1959)). The court noted that the statute in question concerned only “the single subject of time bars against claims arising out of Injury.” Id. at 361, 499 A.2d at 190.

tionality of a Maryland statute\textsuperscript{178} that provides exemptions from gaming laws for certain civic and charitable organizations in specified counties. The statute was challenged for the first time by three men who had been convicted of operating an illegal gambling establishment in Washington County.\textsuperscript{179} They contended the statute denied them equal protection\textsuperscript{180} on the ground that their activities would have been exempted from the gaming laws had they been conducted by one of the types of organizations enumerated in the statute.\textsuperscript{181} The Circuit Court for Washington County agreed and dismissed all charges against the defendants, declaring the statute unconstitutional.\textsuperscript{182} The Court of Appeals reversed, finding a rational basis for the enactment of the statute.\textsuperscript{183}

\textsuperscript{178} Md. Ann. Code art. 27, § 255(a), (b) (1982 & Supp. 1986). Section 255(a) lists the counties to which the section applies. Section 255(b) provides in relevant part:

(1) This subtitle may not be construed to make it unlawful for any volunteer fire company or bona fide fraternal, civic, war veterans', religious or charitable organization or corporation to conduct or hold a carnival, bazaar, or raffle for the exclusive benefit of any such volunteer fire company or fraternal, civic, war veterans', religious or charitable organization or corporation, if no individual or group of individuals benefits financially from the holding of any bazaar, carnival, or raffle or receives or is paid any of the proceeds from any carnival, bazaar, or raffle, for personal use or benefit.

(2) The organization or corporation may award prizes in cash or in merchandise by such devices as are commonly designated as paddle wheels, wheels of fortune, chance books, bingo, or any other gaming device.


\textsuperscript{180} 304 Md. at 724, 501 A.2d at 45. The defendants based their equal protection challenge on the fourteenth amendment to the United States Constitution and article 24 of the Maryland Declaration of Rights.

\textsuperscript{181} Id. at 723, 501 A.2d at 44. The defendants also averred that the “clubs in Washington county that operate [exempt] gambling operations, including the same type as is involved in this case, utilize the net profits therefrom for the general benefit of the members themselves in that the net proceeds are normally deposited among the general revenues of the club.” Id. at 724, 501 A.2d at 45 (quoting defendants’ motion to dismiss in circuit court).

\textsuperscript{182} Id. at 725, 501 A.2d at 45. The circuit court judge said:

There is no justifiable, legitimate reason to grant such privileges as those bestowed by Section 255(a) to such fraternal and veteran's organizations. Such legislation does, in fact, constitute class legislation in its purest sense. It is discriminatory, arbitrary and has no reasonable relationship to the subject matter of the gaming or lottery subtitles.

\textit{Id.}

\textsuperscript{183} Id. at 730, 501 A.2d at 48. The Court of Appeals granted the State's petition for certiorari before the case was argued in the Court of Special Appeals. \textit{Id.} at 725, 501 A.2d at 45.
The court quoted the general rule that legislation challenged on equal protection grounds "'is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to legitimate state interest . . . . When social or economic legislation is at issue the Equal Protection Clause allows the states wide latitude.'" 184 The court rejected both the "strict scrutiny" and "heightened scrutiny" standards of review, because the statute does not make distinctions based on suspect classifications, nor does it pertain to a fundamental right.185 The court found that the presumption of constitutionality of a statute enacted under the state's police power is so strong that "'if any state of facts reasonably can be conceived that would sustain the constitutionality of the statute, the existence of that state of facts as a basis for the passage of the law must be assumed.'"186

In applying the rational basis test to the statute, the court observed that, in general, "'the promotion of general charitable, civic, educational and public safety purposes is a proper object of legislation.'"187 The General Assembly, the court stated, could have concluded that the exempt organizations contribute to the general welfare and well-being of the community;188 that, as to veterans' organizations, serving one's country is a reason for special consideration;189 that there is a difference "'between gambling for profit and professional fund raising by a bona fide charitable organization'";190 and that "'bingo games and raffles are not inherently immoral, and . . . do not have a totally pernicious influence on the character of the player.'"191 Thus, a rational basis existed for the enactment of the statute.192

184. 304 Md. at 726-27, 501 A.2d at 46 (quoting City of Cleburne, Tex. v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)).
185. Id. at 727, 501 A.2d at 46 (citing Cleburne, 473 U.S. at 442).
186. Id. at 727-28, 501 A.2d at 46 (quoting Supermarkets Gen. Corp. v. State, 286 Md. 611, 616-17, 409 A.2d 250, 253 (1979), which quoted Edgewood Nursing Home v. Maxwell, 282 Md. 422, 427, 384 A.2d 748 (1978)).
187. Id. at 728, 501 A.2d at 47.
188. Id.
189. Id. at 729, 501 A.2d at 47.
190. Id. (quoting State v. Gedarro, 19 Wash. App. 826, 830, 579 P.2d 949, 951 (1978)).
192. Id. at 730, 501 A.2d at 48. The defendants raised an additional argument proposing an alternate wording of the statute to make it fairer. They said that "'it would be proper . . . to exempt gambling in the enumerated organizations if (i) all the net proceeds were returned to the players, or (ii) all net proceeds were devoted to religious, charitable, civic, or benevolent purposes without any of the net profits going to the ben-
F. Right to Jury Trial

In Bailey v. State\(^1\) the petitioner sought reversal of his rape conviction on the ground that, because blacks and young people are underrepresented in Prince George's County jury pools,\(^2\) he was denied the "right to a jury selection from a fair cross section of the community guaranteed by the Sixth Amendment."\(^3\) The Court of Special Appeals held that the underrepresentation of age groups in a jury pool cannot form the basis for a sixth amendment challenge.\(^4\) The court further held that the evidence failed to show an unfair and unreasonably low percentage of blacks in Prince George's County jury pools.\(^5\)

The Supreme Court, in Duren v. Missouri,\(^6\) announced a three-part test for analyzing fair cross-section claims.\(^7\) A court should find a sixth amendment violation if:

1) the groups alleged to be excluded are "distinctive groups" in the community; and

2) the representation of these groups is not fair and reasonable in relation to the number of such persons in the community; and

3) this underrepresentation is due to the "systematic exclusion" of these distinctive groups.\(^8\)

\(^{193}\) Id. at 724, 501 A.2d at 45 (quoting defendants' motion to dismiss in circuit court). The court dismissed this argument as reaching only the wisdom of the statute and not its constitutionality. Id. at 730, 501 A.2d at 48.

\(^{194}\) Id. at 602, 493 A.2d at 399.

\(^{195}\) Id. at 601, 493 A.2d at 399. Such underrepresentation can also be challenged under the equal protection clause of the fourteenth amendment. See Alexander v. Louisiana, 405 U.S. 625 (1972). One reason for not doing so in cases involving age groups is the Supreme Court's unwillingness to "extend heightened review to differential treatment based on age." City of Cleburne, Tex. v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985). Furthermore, some courts hold that a defendant must be a member of the underrepresented group in order to raise an equal protection claim. See Castaneda v. Partida, 430 U.S. 482, 494 (1977) (dicta); Morgan v. United States, 696 F.2d 1239, 1240 (9th Cir. 1983). But see United States v. Sneed, 729 F.2d 1333, 1334 (11th Cir. 1984) (stating that defendant not belonging to the underrepresented group may raise an equal protection claim). The defendant need not be a member of the underrepresented group to have standing to raise a sixth amendment claim. See Taylor v. Louisiana, 419 U.S. 522, 526 (1975).

\(^{196}\) 63 Md. App. at 603, 493 A.2d at 399.

\(^{197}\) Id. at 604, 493 A.2d at 400.

\(^{198}\) 439 U.S. 357 (1979).

\(^{199}\) Id. at 364.

\(^{200}\) Among the groups recognized as distinctive for sixth amendment fair cross-section purposes are: American Indians (United States v. Herbert, 698 F.2d 981, 984 (9th Cir.), cert. denied, 464 U.S. 821 (1983)); Mexican Americans (Hernandez v. Texas, 347 U.S. 475 (1954)); daily wage earners (Thiel v. Southern Pac. Co., 328 U.S. 217 (1946));
Bailey argued that both blacks and persons aged eighteen to twenty-nine are distinctive groups. The Court of Special Appeals, relying on "the overwhelming weight of the authority," particularly Hopkins v. State, ruled that age groups are not distinctive for purposes of analyzing fair cross-section claims. Under Hopkins, for a group to be distinctive:

[I]t must be shown that the particular group has a definite composition and that membership does not shift from day to day. The group must have cohesion. "There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process."

The Hopkins court concluded that there was no evidence to indi-
cate that the attitudes, ideas, or experiences of those aged eighteen to twenty-one differed materially from those of people over the age of twenty-one.\footnote{206} Furthermore, the Hopkins court said that there was no evidence that the rights of those aged eighteen to twenty-one were inadequately represented by those eligible for jury duty.\footnote{207} The Court of Special Appeals adopted this reasoning in deciding that persons aged eighteen to twenty-nine are not a distinctive group.\footnote{208}

Relying on Peters v. Kiff,\footnote{209} the court found that blacks are a distinctive group, thereby satisfying the first prong of the Duren test.\footnote{210} As to the second prong, the Court of Special Appeals upheld the lower court’s finding that the representation of blacks in the jury pool was not "unfair and unreasonable in relation to the number of such persons in the community."\footnote{211} The court noted that while "no precise mathematical standards"\footnote{212} exist for determining unreasonable underrepresentation, all Supreme Court cases finding a sixth amendment violation had absolute disparity values approaching forty percent.\footnote{213} Since the absolute disparity in the present case was less than fourteen percent, the court concluded that Bailey failed to satisfy the second prong of Duren.\footnote{214}

\footnote{206. Id.}
\footnote{207. Id.}

The difficulty with the Hopkins standard is that it is hard to imagine any group's qualifying as distinctive under it. All groups—blacks, women, persons aged 18 to 21—have daily shifts in membership as people are born, grow older, die, or move. Furthermore, it is utterly implausible to suggest that all women or all blacks share the same attitudes, ideas, or experiences.

Two other rationales, however, militate against age groups as distinctive. First, since most people will be members of the full spectrum of age groups during their lives, a jury adequately represents all age groups regardless of the present age of the jurors. In this sense age is unlike immutable characteristics such as race and gender. Second, the boundaries of any age group are arbitrary. See Blair, 493 F. Supp. at 406. Because no reasonable cut-off point can be established, no particular age group can be considered distinctive.

\footnote{209. 407 U.S. 493 (1972).}
\footnote{210. 63 Md. App. at 603, 493 A.2d at 400.}
\footnote{211. Id.}
\footnote{212. Id. at 604, 493 A.2d at 400.}
\footnote{213. Id. Absolute disparity figures are calculated by subtracting the group's percentage in the jury pool from the group's percentage in the community. Id., 493 A.2d at 401. In this case, blacks constituted 34.7% of the county population, but only 21.2% of the jury pool. The absolute disparity, therefore, was 13.5%.

\footnote{214. Id., 493 A.2d at 400-01.}
The court rejected Bailey's argument that the second prong could be satisfied if the court considered comparative disparity figures, which in this case approached thirty-nine percent. The court noted that most federal courts reject the use of comparative figures, albeit for contradictory reasons. Some courts have said that the use of comparative disparity figures is inappropriate if the excluded group composes more than ten percent of the total community. Others have held that comparative disparity is inappropriate if the excluded group is a very small proportion of the population. Given this confusion over the usefulness of comparative disparity figures, the Court of Special Appeals' failure to examine more closely the merits of this approach is unfortunate.

215. Id., 493 A.2d at 401. "'[C]omparative disparity' figures are calculated by dividing the absolute disparity number by the percentage of the cognizable class in the eligible population." Id. at 605, 493 A.2d at 401. In this case 13.5 divided by 34.7 (the percentage of blacks in the county population) equals .389.

216. Id. at 604, 493 A.2d at 401.

217. Id. at 605. Decisions rejecting comparative disparity analysis include: United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) ("[W]here small absolute disparities are proven . . . and the minority group exceeds ten percent of the population . . . it is not necessary to consider other statistical methods."); United States v. Hafen, 726 F.2d 21, 24 (1st Cir.), cert. denied, 466 U.S. 962 (1984) (rejecting comparative disparity if underrepresented groups form a very small portion of total population); United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975) (accepting absolute, rather than comparative, disparity as the measure of fairness intended by Congress); United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir. 1974) (rejecting comparative disparity as distorting reality when a very small proportion of the total population was black); State v. Castonquay, 194 Conn. 416, 481 A.2d 56 (1984) (rejecting comparative disparity where small proportion of the population was Hispanic). But see Alston v. Mann, 791 F.2d 255, 259 (2d Cir. 1986), cert. denied, 107 S. Ct. 1285 (1987) (suggesting, in dicta, that the "absolute disparity approach employed in Jenkins may be outmoded and should be discarded").


220. Because Bailey failed to satisfy the second prong of the Duren test, the court declined to consider whether his claim would satisfy the third prong: that the underrepresentation of the distinctive groups must be due to systematic exclusion. 63 Md. App. at 605, 493 A.2d at 401. In dicta, however, the court indicated that satisfying the second prong of Duren would not automatically bootstrap a petitioner past the third prong. Id.
G. Preemption

In two recent decisions, Maryland courts considered whether the National Labor Relations Act\(^2\) (NLRA) preempted state court jurisdiction over claims involving union activities.

The Court of Appeals determined in *Vane v. Nocella*\(^2\) that because the NLRA "arguably prohibited" the allegedly illegal union activities, the National Labor Relations Board (NLRB) rather than the state court had jurisdiction.\(^3\) Vane sued in state court for tortious interference with contractual relations, alleging that the union coerced his employer into firing him.\(^4\) Applying the test enunciated by the Supreme Court in *Sears, Roebuck v. San Diego County District Council of Carpenters*,\(^5\) the Court of Appeals affirmed the trial court's dismissal of the suit.\(^6\) The court found that Vane's state claim for tortious interference was identical to his possible NLRA claim for unfair labor practices, since both claims would require Vane to prove that the union caused his discharge.\(^7\) Thus, the NLRA preempted the state's common-law jurisdiction.

In *Pemberton v. Bethlehem Steel Corporation*,\(^8\) however, the Court of Special Appeals held that the NLRA did not preempt state court jurisdiction over claims of invasion of privacy and intentional infliction of emotional distress.\(^9\) Applying the *Sears* test,\(^10\) the court

---


\(^3\) 303 Md. 362, 494 A.2d 181 (1985).

\(^4\) Id. at 385, 494 A.2d at 192.

\(^5\) 303 Md. at 365, 494 A.2d at 182. Vane worked for H.L. Hartz and Sons as an industrial engineer. As one of his duties, Vane negotiated piece rates with the employees' union, the Amalgamated Clothing and Textiles Workers of America. After the union objected to the piece rates he had set, Vane was fired. *Id.*

\(^6\) 436 U.S. 180 (1978). To determine whether conduct is "arguably prohibited" by the NLRA, the *Sears* Court said that "[t]he critical inquiry [is] . . . whether the controversy presented to the state court is identical to . . . or different from that which could have been, but was not, presented to the Labor Board." *Id.* at 197. *Sears* refined the rule first enunciated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959): "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245 (emphasis supplied).

\(^7\) 303 Md. at 385, 494 A.2d at 192.

\(^8\) Id. at 383, 494 A.2d at 192.


\(^10\) *Id.* at 144, 502 A.2d at 1106. The plaintiff alleged that the company's conduct included "placing [him] under surveillance, circulating documents pertaining to his criminal record to members of Local 24, and sending reports of his marital infidelity to his wife." *Id.*

\(^225\) See *supra* note 225.
found that the state claims extended "beyond an arguable [sic] unfair labor practice" and thus "would be of merely 'peripheral concern' to the NLRB but of significant interest to the state." The evidence necessary to find an unfair labor practice under the NLRA might not establish that the defendants committed the common-law torts. Thus, because the claims were not identical, no preemption occurred. The state court, therefore, retained jurisdiction over the tort claims.

JENIPHR A.E. BRECKENRIDGE
CATHY A. CHESTER
MICHAEL J. GENTILE
JOHN A. MESSINA

231. 66 Md. App. at 155, 502 A.2d at 1112.
232. Id. at 156, 502 A.2d at 1113.
233. Id.
V. CRIMINAL LAW

A. Constitutional Issues

1. Probable Cause.—Section 26-202 of the Transportation Article allows police officers to effect warrantless arrests if they have reasonable grounds to believe that a person will disregard a traffic citation.\(^1\) Construing this provision for the first time in Parker v. State,\(^2\) the Court of Special Appeals held that when the defendant was stopped for a defective brake light, could produce no identification other than a prison I.D. card, and acted in an extremely nervous manner, the police officer had reasonable grounds to arrest under section 26-202(a)(2)(ii).\(^3\) Equating “reasonable grounds” with probable cause, the court found that the trial judge correctly determined that the officer had probable cause to believe Parker would not honor a citation.\(^4\)

2. Double Jeopardy.—In State v. Boozer\(^5\) the Court of Appeals considered the application of the doctrine of double jeopardy\(^6\) as it

\(^{1}\) MD. TRANSP. CODE ANN. § 26-202 (1984 & Supp. 1986) provides in relevant part: (a) In general.—A police officer may arrest without a warrant a person for a violation of the Maryland Vehicle Law, including any rule or regulation adopted under it, or for a violation of any traffic law or ordinance of any local authority of this State, if:

(2) The person has committed or is committing the violation within the view or presence of the officer, and either:

(i) The person does not furnish satisfactory evidence of identity; or

(ii) The officer has reasonable grounds to believe that the person will disregard a traffic citation.

\(^{2}\) 66 Md. App. 1, 502 A.2d 510, cert. denied, 306 Md. 70, 507 A.2d 184 (1986). Parker challenged the arrest in order to suppress evidence seized during the search of his car incident to the arrest. Id. at 4, 502 A.2d at 511.

\(^{3}\) Id. at 7, 502 A.2d at 513. In his dissent, Judge Bell contended that the arrest based on the traffic citation was a subterfuge to enable the police officer to search Parker’s car without a warrant and to confirm the officer’s suspicions of criminal activity. Judge Bell reasoned that Parker’s failure to provide adequate identification—the only factor present that justified an arrest under the statute—could not be used to legitimize the arrest, for the officer never asked Parker to provide further details as to his identity or address. Id. at 19-23, 502 A.2d at 519-21 (Bell, J., dissenting).

\(^{4}\) 504 Md. 98, 497 A.2d 1129 (1985).

\(^{5}\) The doctrine of double jeopardy is embodied in the fifth amendment to the United States Constitution, which provides that no person shall “be subject for the same offense to be twice put in jeopardy of life and limb.” U.S. CONST. amend. V. The double jeopardy clause is applicable to the states through the fourteenth amendment’s due process clause. Benton v. Maryland, 395 U.S. 784, 794-96 (1969).
relates to crimes committed as separate acts that occur in close proximity to each other and are part of a single criminal episode. Specifically, the court held that a defendant once placed in jeopardy on a charge of committing a fourth-degree sexual offense may be subjected to a second prosecution for an attempted fourth-degree sexual offense if both charges arise out of the same criminal transaction, but involve different acts prohibited by the statute.7

The court reasoned that because the two crimes are not the same offense under article 27, section 464C,8 it is constitutionally permissible to charge them as separate offenses.9 Thus, the court held that the double jeopardy clause does not preclude the State from bringing more than one charge of sexual offense in the fourth-degree resulting from a single criminal transaction.10 The court found that the vast majority of other jurisdictions had reached this same conclusion even when the separate acts were part of a single transaction.11 After examining the language, structure, and legislative history of article 27, section 464C, the court concluded that the General Assembly could have intended Maryland to follow this majority rule.12

7. 304 Md. at 113, 497 A.2d at 1137. The defendant had initially been charged with committing a sexual act in the fourth degree. At trial, however, the State’s Attorney sought leave to amend the charges to allege that the defendant engaged in sexual contact without consent. The trial judge denied the motion to amend and the State’s Attorney subsequently entered a nolle prosequi. The State then filed a new statement of charges, alleging that defendant had attempted to commit vaginal intercourse, another sexual offense in the fourth degree. Id. at 100-01, 497 A.2d at 1129-30.

   (a) What constitutes.—A person is guilty of a sexual offense in the fourth degree if the person engaged:
      (1) In sexual contact with another person against the will and without the consent of the other person; or
      (2) In a sexual act with another person who is 14 or 15 years of age and the person performing the sexual act is four or more years older than the other person; or
      (3) In vaginal intercourse with another person who is 14 or 15 years of age and the person performing the act is four or more years older than the other person.

9. 304 Md. at 102, 497 A.2d at 1131. The court found that “many of the various acts of criminal conduct grouped together in § 464C historically and customarily have been considered sufficiently separate and distinct from each other to justify separate punishment, even though occurring in close temporal proximity and within the same criminal episode.” Id. at 104, 497 A.2d at 1132.

10. Id. at 113, 497 A.2d at 1136. The court expressly avoided the question of “whether an attempt is the same offense for double jeopardy purposes as the substantive crime attempted.” Id. at 102, 497 A.2d at 1131.

11. See id. at 105-08, 497 A.2d at 1132-34 and authorities cited therein.

12. Id. at 108-09, 497 A.2d at 1134-35. As part of its examination of legislative intent, the court noted that the General Assembly specifically permitted the use of the
In *Copsey v. State*¹³ the Court of Special Appeals held that the doctrine of double jeopardy precluded successive prosecutions of a defendant for a continuing sexual offense committed in neighboring counties.¹⁴ The defendant was initially charged and convicted in St. Mary's County of a continuing sexual offense against a minor.¹⁵ The criminal conduct took place both in St. Mary's County and Charles County and involved regular transportation across the border. The State subsequently charged the defendant in Charles County for what was in effect a continuing sexual offense against the same minor over a shorter, but included, period of time.¹⁶ A Charles County trial court rejected the defendant's plea of double jeopardy.¹⁷

The Court of Special Appeals reversed, pointing out that the State could have charged, tried, and convicted the defendant in either St. Mary's or Charles County since the sexual offenses took place in both counties during overlapping periods of time.¹⁸ Since St. Mary's County moved first against the defendant, however, by filing a criminal information and calling his case for trial, jeopardy first attached, and was exhausted, in that jurisdiction for all offenses.

short form of a charging document in sexual offense cases. The defendant had argued that the use of the short form was inconsistent with the concept of separate offenses. The court stated that if the State uses the short-form charging document, then it is limited to a single conviction and punishment for conduct within the Code section specified even though the defendant may have committed more than one offense embraced by that section. In this case, however, the State did not elect to use the short form, but brought separate charges instead. *Id.* at 111-13, 497 A.2d at 1136-37.


14. *Id.* at 234, 507 A.2d at 192.

15. *Id.* at 226, 507 A.2d at 187. During a five-year period the defendant, who was 59 years old at the time charges were filed, engaged in anal intercourse and fellatio on an almost daily basis with a young boy. The State had strong proof of general criminal behavior, but could not pinpoint precise dates, so it charged the defendant with a single continuing offense over the course of the five-year period. The defendant pleaded guilty to a sexual offense in the second degree and received a suspended sentence. *Id.* at 226-27, 507 A.2d at 187-88.

16. *Id.* at 226, 507 A.2d at 187. Public dissatisfaction with the defendant's suspended sentence led to the subsequent prosecution in Charles County. *Id.*

17. *Id.*

18. *Id.* at 228-29, 507 A.2d at 188-89. The court cited two statutes that make it easier for the State to charge and to prove a crime in cases in which there is uncertainty as to the county in which the crime occurred. Under Md. Ann. Code art. 27, § 590 (1982), if a crime is committed on or near boundary lines of counties so as to render it doubtful in which county the offense was committed, then the county that by issuing process for arrest and prosecution first assumes jurisdiction may charge, try, convict, and sentence the defendant. Also, Md. Ann. Code art. 27, § 465 (1982), states that if a defendant transports a person, intending to violate the sexual offenses subtitle, then the defendant may be tried in any county where the transportation was offered, solicited, begun, continued, or ended. 67 Md. App. at 229, 507 A.2d at 189.
committed during the period charged. The court thus held that because the defendant stood in obvious jeopardy in St. Mary’s County for the criminal offenses committed in both St. Mary’s and Charles Counties, his fifth amendment protection against double jeopardy barred prosecution in Charles County.

3. Right to Counsel.—In Harris v. State (Harris III) the Court of Appeals affirmed the circuit court judge’s denial of Harris’ motion to withdraw his guilty pleas, holding that Harris’ counsel had not been constitutionally ineffective. The court applied the two-prong test set forth in Strickland v. Washington to find that the attorney’s conduct had been neither deficient nor prejudicial to Harris’ defense. Thus, the court refused to reverse the murder conviction for which Harris had received the death sentence.

Under the Strickland test to establish ineffective assistance of counsel, a defendant must show both that the attorney’s perform-

19. 67 Md. App. at 229-30, 507 A.2d at 189. The court pointed out that if St. Mary’s County and Charles County had carefully orchestrated their charging documents, the defendant could have stood trial in both counties. This could have been accomplished if each respective county had confined its charging document to the specified criminal conduct that occurred within its boundaries. Id. at 231-32, 507 A.2d at 190.

20. Id. at 234, 507 A.2d at 192.


22. Id. at 723, 496 A.2d at 1093.


24. Harris pleaded guilty to all charges. 303 Md. at 690, 496 A.2d at 1076. He and an accomplice had robbed a sporting goods store and killed the owner’s son. This appeal marked the third time that Harris’ case had come before the Court of Appeals. In the first appeal, Harris I, 295 Md. 329, 455 A.2d 979 (1983), Harris argued that his guilty pleas and waiver of jury sentencing had been involuntary. The court found that while the pleas had been made knowingly and voluntarily, the waiver of a jury for sentencing had not been; therefore, the court remanded for a new sentencing hearing. Id. at 338-40, 455 A.2d at 984.

On remand, before resentencing, Harris moved to withdraw his guilty pleas, claiming that he had entered them involuntarily and without the effective assistance of counsel. The judge denied the motion, and the jury imposed a sentence of death. Harris appealed a second time, arguing that the denial of his motion was erroneous. 303 Md. at 691, 496 A.2d at 1076-77. In Harris II, 299 Md. 511, 474 A.2d 890 (1984), the court agreed with Harris because the circuit court judge had improperly ruled that a claim of ineffective counsel could only be resolved in a postconviction hearing. The court therefore remanded the case for an evidentiary hearing concerning the effectiveness of counsel. Id. at 518-19, 474 A.2d at 893-94. On remand, after a full hearing, the judge again denied the motion to withdraw the pleas. In the instant appeal Harris asserted that the circuit court judge erred in determining that counsel had been effective; therefore, he contended, the circuit court judge erred in denying the motion. 303 Md. at 690-92, 496 A.2d at 1076-77.

25. 303 Md. at 723, 496 A.2d at 1093.
ance was deficient and that the performance prejudiced the defense.\textsuperscript{26} For prejudice to result, the defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different."\textsuperscript{27} Both prongs of the test involve mixed questions of law and fact.\textsuperscript{28}

The \textit{Harris} court analyzed the requirements of \textit{Strickland}, noting that the defendant has a "heavy burden" to establish ineffective counsel.\textsuperscript{29} The defendant may discharge this burden by identifying specific deficient acts, by showing that counsel's conduct was objectively unreasonable, and by overcoming the presumption that the attorney's actions are part of "trial strategy."\textsuperscript{30} In proving prejudice, the defendant may not merely show that "the errors had \textit{some conceivable effect} on the outcome of the proceeding,"\textsuperscript{31} but must in fact establish that prejudice actually resulted.\textsuperscript{32}

The court also evaluated the requirements of \textit{Strickland} concerning judicial review of a claim of ineffective counsel. A court must evaluate the reasonableness of an attorney's actions based on the facts of the case at the time the attorney acted and must decide whether, in light of the circumstances, the attorney's actions were professionally incompetent.\textsuperscript{33} The court must allow for attorney discretion in planning trial strategy, however, when it evaluates the counsel's professional judgment.\textsuperscript{34} In considering whether prejudice resulted, the court "must consider the totality of the evidence before the judge or jury."\textsuperscript{35}

Applying the \textit{Strickland} test to Harris' numerous allegations of error,\textsuperscript{36} the court summarily rejected the contention that the attorney's heavy workload and inexperience had made his performance ineffective.\textsuperscript{37} In addition, the court found that no prejudice resulted

\textsuperscript{26} 466 U.S. at 693.
\textsuperscript{27} Id. at 695.
\textsuperscript{28} Id. at 698.
\textsuperscript{29} 303 Md. at 697, 496 A.2d at 1080.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 700, 496 A.2d at 1081 (emphasis in original).
\textsuperscript{32} Id. at 699, 496 A.2d at 1081.
\textsuperscript{33} Id. at 700-01, 496 A.2d at 1081-82.
\textsuperscript{34} Id. at 698-99, 496 A.2d at 1080-81.
\textsuperscript{35} Id. at 701, 496 A.2d at 1082.
\textsuperscript{36} Id. at 704-05, 496 A.2d at 1083-84.
\textsuperscript{37} Id. at 720, 496 A.2d at 1091-92. The attorney had worked as an Assistant Public Defender for four years. During that time, he had tried about 1000 circuit court cases, but only about 12 were jury trials. Half of those were murder cases, though only four were for first-degree murder. \textit{Id.} at 693, 496 A.2d at 1078. The attorney handled 20 cases a week. \textit{Id.} at 720 n.15, 496 A.2d at 1092 n.15. The court cited United States v. Cronic, 466 U.S. 648 (1984), in which the Supreme Court stressed that "[t]he character
from the attorney's decision to enter a guilty plea for first-degree rather than felony murder, since Harris could have received the death penalty for either offense.\textsuperscript{38}

The court analyzed Harris' remaining allegations under the deficiency component of \textit{Strickland}, but found that the attorney's actions reflected a reasonable trial strategy. Thus, the attorney acted reasonably in attempting to throw Harris on the mercy of the court by having him plead guilty to first-degree murder.\textsuperscript{39} Likewise, the court deferred to the attorney's decision to accept a State-proffered statement of facts establishing that Harris was a principal in the first degree. Harris had agreed to the statement; furthermore, the attorney's action fell within the realm of reasonable trial strategy.\textsuperscript{40} Moreover, the court found that the attorney's investigation of the case was not deficient, even though he failed to locate an alleged third accomplice.\textsuperscript{41}

Finally, the court evaluated Harris' allegation that his counsel
was deficient in failing to comprehend the difference between a principal in the first degree and a principal in the second degree in a case of first-degree murder. The court acknowledged that the attorney may not have appreciated the difference between the two degrees. Harris, however, had informed his attorney that he had fired the shot that killed the victim. Because Harris was therefore a principal in the first degree, the court concluded that the attorney's failure to distinguish the degrees was not unreasonable.

In a strongly worded dissent, Judge Cole argued that "trial counsel's performance here is a textbook example of ineffective assistance of counsel." While the State could place Harris at the scene of the crime, the State's only evidence that Harris pulled the trigger came from an accomplice who had changed his story three times. Furthermore, if the State could not establish that Harris had fired the gun and was therefore a principal in the first degree, it could not sentence him to death. Therefore, the difference between a principal in the first degree and a principal in the second degree took on life and death proportions. By unnecessarily entering a plea of guilty to first-degree murder, the attorney deprived Harris of his right to put the State to its proof. Therefore, Judge Cole found that the attorney had "failed to advocate his client's cause with the zeal and vigor demanded," and thus had acted both deficiently and prejudicially.

In White v. State the Court of Special Appeals ruled that a criminal defendant has no right to have counsel present at a tape replay of a voice line-up. In White the defendant's counsel was present at the original "live" voice line-up, but was not present at a taped replay two months later at which the victim identified the de-

42. Id. at 712, 496 A.2d at 1087. The difference is significant. A principal in the first degree, the person who actually commits a crime, may be sentenced to death; however, a principal in the second degree, a person who aids in the commission of a crime, may not be sentenced to death. Id. at 712-13, 496 A.2d at 1088.
43. Id. at 714, 496 A.2d at 1088.
44. Id. at 715, 496 A.2d at 1089.
45. Id. at 713-14, 496 A.2d at 1088.
46. Id. at 724, 496 A.2d at 1093-94 (Cole, J., dissenting).
47. Id. at 725, 727, 496 A.2d at 1094, 1095. Harris confessed to his attorney, not to the police, that he pulled the trigger; therefore, the confession was not part of the State's evidence. Id. at 732, 496 A.2d at 1097-98.
48. Id. at 734, 496 A.2d at 1098-99.
49. Id.
50. Id. at 733, 496 A.2d at 1098.
51. Id. at 734, 496 A.2d at 1099.
53. Id. at 109, 502 A.2d at 1089.
fendant’s voice as that of her assailant.\textsuperscript{54} The court noted that the sixth amendment requires that the State permit counsel to attend visual line-ups,\textsuperscript{55} but likened the tape replay to the photo array context for which no constitutional right to the presence of counsel exists.\textsuperscript{56} Because the taped replay could be duplicated in court, the Court of Special Appeals adopted the reasoning of United States v. Otero-Hernández\textsuperscript{57} and concluded that the Constitution does not mandate the presence of counsel at a replay of a voice line-up.\textsuperscript{58}

In Johnson v. State\textsuperscript{59} the Court of Special Appeals held that a trial court does not violate a defendant’s right to a fair trial if the court concurrently accepts a defendant’s waiver of the right to counsel, a defendant’s assertion of the right to self-representation, and a defendant’s waiver of the right to be present at trial.\textsuperscript{60} In so ruling, the court rejected the defendant’s argument that he had no right to waive his right to counsel, proceed \textit{pro se}, and then waive his right to be present at trial, simply because his decisions were foolish.\textsuperscript{61}

The court noted that the law does not require defendants to be wise in order to stand trial; instead, it requires only that they be competent.\textsuperscript{62} Thus, if the trial court has properly concluded that

\begin{itemize}
\item \textsuperscript{54} Id. at 105, 502 A.2d at 1087. During the first voice line-up, the victim, who had been raped and robbed, selected the defendant and one other individual. \textit{Id.} The court did not have to decide whether a defendant had a right to the presence of counsel at the original voice line-up, but cited cases in a number of jurisdictions that have held that a criminal defendant has no right to counsel at the time of voice line-up procedures. \textit{Id.} at 108 n.3, 502 A.2d at 1088 n.3.
\item \textsuperscript{55} Id. at 107, 502 A.2d at 1088; see Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).
\item \textsuperscript{56} 66 Md. App. at 107, 502 A.2d at 1088; see United States v. Ash, 413 U.S. 300, 321 (1973).
\item \textsuperscript{57} 418 F. Supp 572, 574-75 (M.D. Fla. 1976). The defendant did not attend the replay session; therefore, he could not raise a confrontation clause challenge. 66 Md. App. at 109, 502 A.2d at 1089.
\item \textsuperscript{58} 66 Md. App. at 109, 502 A.2d at 1089.
\item \textsuperscript{60} Id. at 373, 507 A.2d at 1147-48.
\item \textsuperscript{61} Id., 507 A.2d at 1148. In the present case the defendant dismissed his attorney, finding the attorney’s efforts insufficient. \textit{Id.} at 355-56, 507 A.2d at 1138-39. The defendant then proceeded to represent himself; however, on the day the trial was scheduled to begin, the defendant declared that he was disqualifying himself as his own attorney and would hire another attorney. The court would not permit the defendant to withdraw his waiver of counsel. The defendant then refused to participate in the trial and asked that he be allowed to leave the courtroom. \textit{Id.} at 357, 507 A.2d at 1139. The trial judge conducted a thorough examination of the defendant and determined that he was competent to stand trial. Ruling that the court could not force the defendant to employ a lawyer or to remain in the courtroom, the judge accordingly granted the defendant’s request to leave the courtroom. \textit{Id.} at 357-58, 507 A.2d at 1139-40.
\item \textsuperscript{62} Id. at 373, 507 A.2d at 1148.
\end{itemize}
the defendant is competent to stand trial and that the defendant has knowingly and intelligently waived his or her rights, the trial court need not appoint alternate counsel for the defendant and may continue the trial without representation for the defendant.63

The court likened Johnson's situation to that of the pro se defendant who actively brings about his or her own conviction by systematically putting forth unfavorable evidence, and to the pro se defendant who simply chooses to remain silent, thus refusing to participate at all.64 In these situations, the courts have refused to impose a duty upon the defendant to conduct an effective defense, despite the seeming imprudence of the defendant's proceeding on this course.65 Thus, the court concluded that a trial court need not ensure representation for a defendant who chooses to proceed pro se and then declines the right to be present at trial.

4. Miranda.—In State v. Quinn66 the Court of Special Appeals held that after a suspect in police custody has requested counsel, the presentation to the suspect of an “Application for Statement of Charges”67 that contains incriminating statements by codefendants and that induces the suspect to make an incriminating statement violates the suspect's fifth amendment rights.68 In Bryant v. State69 the Court of Special Appeals had held that if the accused had invoked the right to counsel and was then placed in a room with a codefendant who implicated the accused in the crime, causing the accused to make an incriminating statement, the police had violated the accused's right against self-incrimination.70 In Quinn the court followed Bryant. While the police had not actually interrogated the defendant, the effect of giving him the Application containing his

63. Id. at 373-74, 507 A.2d at 1148.
64. Id.
67. The statement of charges is a charging document that consists of a "written accusation alleging that a defendant has committed an offense." It is filed in a district court by a peace officer or a judicial officer. Md. R. 4-102(i). The Application for Statement of Charges is a written presentation of those facts known to the charging officer that give him or her cause to believe that the accused should be charged with a particular crime.
68. 64 Md. App. at 672, 498 A.2d at 678.
70. Id. at 283, 431 A.2d at 720.
coddefendant's incriminating statement was "precisely the same" as if the police had orally interrogated the defendant. Thus, the court held that under the tenets of *Miranda v. Arizona* and *Edwards v. Arizona*, the lower court had properly suppressed Quinn's incriminating statements.

5. Self-Incrimination.—In *Smith v. State* the Court of Special Appeals overturned a trial court's denial of a new trial motion that was based upon the trial judge's failure to compel a witness' testimony. The witness had previously entered into a plea bargain agreement to charges arising out of the same incident. During a hearing on the new trial motion, the witness had successfully invoked the fifth amendment privilege against self-incrimination. The court held that the trial judge should have compelled the witness' testimony, because the State could not have charged the witness with any further crimes related to the incident. The court reasoned that the witness was immune from further prosecution because none of the charges contained in the indictment against the

71. 64 Md. App. at 673, 498 A.2d at 678.
73. 451 U.S. 477, reh'g denied, 452 U.S. 973 (1981). In *Miranda* the Supreme Court held that under the fifth amendment's prohibition against self-incrimination, if an accused exercises the constitutional right to the assistance of counsel, "interrogation must cease until an attorney is present." 384 U.S. at 526. The Court has recognized that the accused may subsequently waive this right; however, in *Edwards* the Court found that a waiver is invalid if the defendant makes incriminating statements in response to police-initiated interrogation. 451 U.S. at 485. This occurs after the defendant has requested counsel.
74. 64 Md. App. at 674, 498 A.2d at 679.
76. *Id.* at 313-14, 492 A.2d at 927.
77. *Id.* at 316, 492 A.2d at 928. Facing an 18-count indictment, the witness pled guilty to a single count in exchange for a suspended sentence and probation. The State nol prosessed the remaining counts. *Id.*
78. The defendant's new trial motion was based upon the existence of newly discovered evidence not available to him at trial. *Id.* at 314, 492 A.2d at 927.
79. *Id.* at 316-18, 492 A.2d at 928-29. The witness' testimony was necessary to evaluate the new evidence. *Id.*
80. *Id.* at 320-22, 492 A.2d at 930-31. The court stated that the fifth amendment protection against self-incrimination

"must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer . . . . The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, . . . and to require him to answer if 'it clearly appears that he is mistaken.'"

witness could have been reinstated following his plea agreement, and because no uncharged offenses arising out of the same incident could subsequently have been brought against him.

6. **Right to Jury Trial.**—Section 4-302(e)(2)(ii) of the Courts and Judicial Proceedings Article and its predecessor, section 4-302(d)(2)(ii), limit the right to a jury trial in the first instance. In *Fisher v. State* the Court of Appeals held that section 4-302(d)(2)(ii) was unconstitutional under Maryland law when applied to one charged with driving while intoxicated.

The court based its opinion largely upon the principles established in its earlier decision, *Kawamura v. State*. In *Kawamura* the

---

81. 63 Md. App. at 319, 492 A.2d at 930. The State could not have reinstated any of the remaining charges against the witness since jeopardy attached when the witness accepted the plea agreement and pleaded guilty. *Id.*

82. *Id.* The court determined that the one-year statute of limitations barred a possible conspiracy charge against the witness. It also found that the witness’ guilty plea to felony theft made him a principal to all crimes charged, thereby precluding a possible future conviction as an accessory. *Id.* at 319-20, 492 A.2d at 930.


   Notwithstanding the provisions of subparagraph (i) of this paragraph, the presiding judge of the District Court may deny a defendant a jury trial if:

   1. The prosecutor recommends in open court that the judge not impose a penalty of imprisonment for a period in excess of 90 days, regardless of the permissible statutory or common law maximum;
   2. The judge agrees not to impose a penalty of imprisonment for a period in excess of 90 days; and
   3. The judge agrees not to increase the defendant’s bond if an appeal is noted.

84. 305 Md. 357, 504 A.2d 626 (1986). The court’s opinion followed an earlier per curiam order.

85. Article 5 of the Maryland Declaration of Rights provides in relevant part: “That the Inhabitants of Maryland are entitled to . . . trial by jury . . . .” Article 21 of the Declaration of Rights states: “That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.” Article 23 of the Declaration of Rights provides in relevant part: “In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.” Article 24 of the Declaration of Rights provides: “That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges . . . 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.”

86. The court based its decision in this case completely upon Maryland constitutional law, rather than upon federal law. 305 Md. at 368, 504 A.2d at 631-32. The court had no choice but to follow this course since the United States Supreme Court in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), had upheld a similar Massachusetts statute as valid under the federal constitution.


The court found that section 4-302(d)(2)(ii) unconstitutionally denied a jury trial in the first instance to a defendant charged with theft. The court conceded that some minor offenses do not give rise to the right to a jury trial; however, offenses subject to infamous punishment, such as imprisonment in the penitentiary, are not within the realm of the petty offenses to which the right to a jury trial does not attach. Because a court could impose a sentence of imprisonment in the state penitentiary for the offense of theft, the court found that Kawamura had a right to a jury trial; therefore, section 4-302(d)(2)(ii) could not be applied under the Maryland Constitution.

In Fisher the court cited three factors as important in determining whether the right to a jury trial under the State Constitution attaches to a particular offense. These factors are: (1) whether the offense historically had been subject to the summary jurisdiction of justices of the peace, or had instead been tried before juries at and before the adoption of the Maryland Declaration of Rights; (2) whether the offense is an infamous crime or a crime subject to infamous punishment, as indicated by the place or length of incarceration; and (3) whether the offense is commonly viewed as "serious."

As to the first factor, the court noted that the consideration of whether the offense had historically been subject to trial by jury or to the summary jurisdiction of the justices of the peace was inapplicable: the offense of driving while intoxicated was unknown at the time of the adoption of the Declaration of Rights. As to the second factor, the court noted that the offense of driving while intoxicated is punishable by imprisonment for a maximum of one year for the first offense and two years for the second offense. Because no statutory provisions limit the place of confinement to local jails, a

---

89. Id. at 286, 473 A.2d at 443-44. The Maryland consolidated theft statute appears in Md. Ann. Code art. 27, § 342 (1982).
90. Specifically, the Kawamura court cited State v. Glen, 54 Md. 572 (1880), which held that a right to a jury trial does not attach in various minor offenses that were historically subject to the summary jurisdiction of justices of the peace. 299 Md. at 290, 473 A.2d at 446.
91. 299 Md. at 291, 473 A.2d at 446.
92. The court noted that while § 342(d)(2) does not specifically state the punishment for theft, under Md. Ann. Code art. 27, § 690(b) (1982) one convicted of theft under § 342(f)(2) and sentenced to three months or more imprisonment could be confined in the penitentiary. 299 Md. at 295, 473 A.2d at 448.
93. 299 Md. at 297, 473 A.2d at 449.
94. 305 Md. at 365-66, 504 A.2d at 630.
95. Id. at 366, 504 A.2d at 630.
court may order a person convicted of driving while intoxicated to serve his or her sentence in the penitentiary. The court thus found that the possibility of two years’ imprisonment in the state penitentiary for driving while intoxicated satisfied the second factor of infamous punishment. Finally, because driving while intoxicated frequently results in the loss of human life and is thus regarded with great concern by the public, the court concluded that this offense also meets the test of seriousness. The Fisher factors therefore indicated that the General Assembly could not constitutionally deprive persons charged with driving while intoxicated of the right to trial by jury.

In State v. Huebner the Court of Appeals held former section 4-302(d)(2)(ii) unconstitutional as applied to the offenses of resisting arrest and assault and battery. More important, the court held that the State cannot enter a nolle prosequi only to those charges for which the defendant could demand a jury trial—thereby defeating the right to a jury trial—and, at the same time, continue to prosecute lesser offenses in district court, without a jury.

In this widely reported case Prince George’s County police arrested the defendants, Hans Heubner and his daughter Gisela, on numerous charges, including disorderly conduct, resisting arrest, and assault and battery on a police officer. The defendants made clear to the district court judge their desire for a jury trial; therefore, in light of Kawamura, it was unclear whether the district court could constitutionally retain jurisdiction under section 4-302(d)(2)(ii). The prosecutor, however, attempted a new ploy: he

97. 305 Md. at 366-67, 504 A.2d at 631.
98. Id. at 367, 504 A.2d at 631.
99. Id. While holding § 4-302(d)(2)(ii) unconstitutional as applied to one charged with drunk driving, the court in dicta stated that it would not reach a similar conclusion in the case of one charged with the offense of driving while under the influence of alcohol; for the latter offense carries a maximum sentence of only two months imprisonment. Id. at 368-69, 504 A.2d at 631-32.
100. 305 Md. 601, 505 A.2d 1331 (1986).
101. Id. at 609-10, 505 A.2d at 1335.
102. Id. at 613, 505 A.2d at 1337.
103. As the court observed, the publicity this case engendered "prompted the Chief Judge of the District Court of Maryland to assign a judge from Baltimore City, 'outside the sphere of influence of the Washington Post,' to preside at the trial of the cases." Id. at 603 n.1, 505 A.2d at 1332 n.1 (quoting the Chief Judge of the District Court of Maryland).
104. Id. at 603, 505 A.2d at 1332. The defendants also faced charges of tampering with a motor vehicle and hindering a police officer. Id.
105. Id.
entered a nolle prosequi to each of the charges except disorderly conduct, a petty offense for which a defendant may not demand a jury trial.107

Applying the test of Kawamura and Fisher,108 the Court of Appeals held that, under the Maryland Constitution, the right to a jury trial attaches in the first instance to the offenses of resisting arrest and assault and battery.109 Both offenses, the court reasoned, are "serious" crimes subject to "infamous punishment."110 Thus, if the State had attempted to use section 4-302(d)(2)(ii) to prosecute these charges in the district court, the statute would have been "unconstitutional as applied."111

Because the State entered nolle prosequis to these charges, however, it was necessary for the court to decide whether the district court properly retained jurisdiction over the charges of disorderly conduct.112 The court observed first that under former section 4-302(e),113 "once the circuit court obtains jurisdiction of a charge, it has exclusive original jurisdiction over all the offenses 'arising from the same circumstances,' even though those other offenses were 'otherwise within the District Court's exclusive jurisdiction.'"114 But when the Huebners asserted their right to a jury trial, the Maryland Constitution divested the district court of jurisdiction under former section 4-302(d)(2)(ii)115 to entertain the prosecutions for resisting arrest and assault and battery; therefore, under former section 4-302(d)(1),116 the Huebners immediately became entitled to a jury trial in circuit court.117 Consequently, when the Huebners asserted their right to a jury trial, section 4-302(e) vested the circuit court with jurisdiction over all of the charges against them, including disorderly conduct. Citing Thompson v. State,118 the court concluded that once the circuit court obtained jurisdiction, the entrance

107. 305 Md. at 606, 505 A.2d at 1333-34.
108. 305 Md. 357, 504 A.2d 626 (1986); see supra notes 84-99 and accompanying text.
109. 305 Md. at 609, 505 A.2d at 1335.
110. Id. at 608-09, 505 A.2d at 1335.
111. Id. at 609-10, 505 A.2d at 1335.
112. Id. at 610, 505 A.2d at 1335-36.
118. 278 Md. 41, 359 A.2d 203 (1976).
of the nolle prosequi could not thereafter deprive the circuit court of jurisdiction. Thus, the Court of Appeals concluded that "the entry of the nolle prosequi was a nullity."

7. Right to Confrontation.—In Thomas v. State the Court of Special Appeals held that a witness' invocation of the fifth amendment in response to questions that go merely to the witness' credibility does not impair a defendant's right to confrontation. The defendant claimed that the trial judge erred by denying his motion to strike the testimony of a Mr. Dexter Marshall, who had invoked his fifth amendment privilege against self-incrimination. The court concluded that Marshall only invoked his fifth amendment rights in response to questions concerning collateral matters, namely, his involvement in the drug operation run by the victim. The questions were designed to explore Marshall's general credibility, not to establish his untruthfulness in testifying to specific events of the crime. Therefore, Marshall's invocation of the privilege did not deprive the defendant of the right to confront Marshall through cross-examination.

8. Identification Evidence.—In Evans v. State the Court of Appeals held that exhibiting a single photograph of the defendant to a grand jury witness did not taint that witness' in-court identification of the defendant. In so holding, the court affirmed the conviction and death sentence of the defendant, Vernon Lee Evans, for first-degree murder and related offenses.

At trial a Mr. Harper testified concerning Evans' acquisition of the weapon allegedly used in the murder. After his testimony,
the defense discovered that during his grand jury testimony, Harper had identified Evans from a single photograph. The trial judge denied the defendant's motions for a mistrial and to suppress Harper's in-court identification.\textsuperscript{131}

The Court of Appeals rejected the defendant's contention that because of the suggestive and unreliable pretrial identification procedure, due process required suppression of Harper's in-court identification.\textsuperscript{192} The court considered the pertinent factors\textsuperscript{135} and concluded that the pretrial identification was reliable and "unlikely to produce an irreparable misidentification."\textsuperscript{134} The court also rejected the defendant's contention that he was entitled to a mistrial.\textsuperscript{135} The court held that any sanction for violation of the discovery rules is left to the discretion of the trial judge, and, in this case, the violation did not result in prejudice to the defendant.\textsuperscript{136}

In \textit{Branch v. State}\textsuperscript{137} the Court of Appeals held that a robbery victim's identification of the defendant sufficed to establish that the defendant was the robber, despite substantial variation between the victim's initial description and the defendant's actual appearance.\textsuperscript{138}

\textit{Branch} involved a robbery at gunpoint. Shortly after the incident, the victim described one of her assailants as being approximately five feet seven inches tall, fifteen to sixteen years old, and 110 to 125 pounds in weight.\textsuperscript{139} She could not identify her assailant from two books of photographs, but did identify Branch from one of three pictures shown to her by police.\textsuperscript{140} At the time in question,
Branch was nineteen years old, six feet three inches tall and weighed 185 pounds. He was also missing two front teeth, a feature the victim failed to note. Despite the discrepancy between the victim's initial description and Branch's actual physical appearance, the victim's confused testimony, and Branch's alibi, the jury convicted Branch of robbery with a deadly weapon and use of a handgun in a crime of violence.

In affirming Branch's conviction, the Court of Appeals stated that under Maryland law the testimony of a single eyewitness, if believed, is sufficient to sustain a conviction. Asserting that the discrepancy in the description went to the weight rather than the sufficiency of the evidence, the court held that the victim's photographic identification of Branch shortly after the incident could enable a rational trier of fact to conclude beyond a reasonable doubt that Branch committed the crime.

9. Search and Seizure.—In Bates v. State the Court of Special Appeals held that a paying passenger has standing to object to the unconstitutional search of a taxicab. The court refused to endorse a "bright line formula" that would limit standing solely to vehicle owners or drivers. It thus distinguished the decision of the United States Supreme Court in Rakas v. Illinois, choosing to rely instead on that Court's decision in Katz v. United States.

The Rakas defendants, guests in a private automobile, had failed to offer any proof concerning their expectation of privacy.

141. Id. at 179, 502 A.2d at 496.
142. Id., 502 A.2d at 496-97.
143. Id. at 179-81, 502 A.2d at 497-98.
144. Id. at 177, 502 A.2d at 496.
145. See id. at 183-84, 502 A.2d at 499 and authorities cited therein.
146. 305 Md. at 184, 502 A.2d at 499. Judge Eldridge, in dissent, termed the majority opinion a shortsighted extension of the single eyewitness rule. He stated that in holding that such a substantial discrepancy affects only the weight and not the sufficiency of the evidence, the majority failed to recognize that certain forms of eyewitness testimony are inherently unreliable. In a case such as Branch, in which several factors weigh against the single eyewitness' identification testimony, the dissent would have held that testimony insufficient to convict. Id. at 190, 502 A.2d at 502 (Eldridge, J., dissenting).
148. Id. at 281, 494 A.2d at 977.
149. Id. at 283, 494 A.2d at 978.
152. 439 U.S. at 148. Note also that in Rakas the search involved the glove compartment and the area under the car seat. As the Court observed, "Like the trunk of an automobile, these are areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy." Id. at 148-49.
Bates, however, was not merely a passenger. Rather, by hiring the cab, he and his fellow passenger had acquired a significant measure of control over the vehicle.\textsuperscript{153} Thus, the Bates court found this situation more closely analogous to that of Katz.\textsuperscript{154}

In Katz the government had attached a listening device to the outside of a public phone booth in order to intercept private conversations.\textsuperscript{155} By depositing his money into the phone, the defendant had acquired a "reasonable expectation of privacy" in the phone booth.\textsuperscript{156} Therefore, it was irrelevant that the phone company remained the booth's true owner and that the defendant was arguably only a guest: without a warrant, the government could not eavesdrop on the defendant's conversation. In Bates the cab's ownership and the defendant's status were similarly irrelevant.\textsuperscript{157} By hiring the cab, the defendant had acquired a reasonable expectation of privacy therein.\textsuperscript{158} Thus, without a warrant, the police could not constitutionally search the cab.

In Cable v. State\textsuperscript{159} the Court of Special Appeals expanded the implied scope of a search warrant to include items in the constructive as well as the actual possession of the person named in the warrant.\textsuperscript{160} The police had obtained a search warrant against the defendant, based on information that he would arrive at Baltimore-Washington International Airport transporting illegal drugs.\textsuperscript{161} The warrant authorized the search of the defendant "and any luggage, suitcase, briefcase or any items carried or possessed by him."\textsuperscript{162} After his arrival at the airport, the police observed the defendant carrying a briefcase, followed him to a hotel, and arrested

\textsuperscript{153} 64 Md. App. at 285, 494 A.2d at 979. The court looked to the rights that a taxi passenger would acquire upon payment of the fare. These included the rights to name a destination, to choose a route, to exclude other passengers, and to object to the solicitation of other fares during the journey. The court dismissed as irrelevant the State's contention that the taxi driver still retained a "significant measure of residual control." \textit{Id.} at 286, 494 A.2d at 979. At issue were the rights of the passenger \textit{vis à vis} the police, not the driver. \textit{Id.} at 286, 494 A.2d at 979.

\textsuperscript{154} \textit{Id.} at 287, 494 A.2d at 980.

\textsuperscript{155} 389 U.S. at 348.

\textsuperscript{156} \textit{Id.} at 352.

\textsuperscript{157} 64 Md. App. at 284, 494 A.2d at 979.

\textsuperscript{158} \textit{Id.} at 287, 494 A.2d at 980.


\textsuperscript{160} \textit{Id.} at 498, 505 A.2d at 111.

\textsuperscript{161} \textit{Id.} at 494, 505 A.2d at 109.

\textsuperscript{162} \textit{Id.}
him. At the time of his arrest, the defendant was not carrying his briefcase. While searching the defendant at the police station, however, the police found a claim ticket. Using the ticket, police officers claimed the briefcase from the hotel security room, searched it, and discovered that it contained a large quantity of illegal drugs.

The defendant contended that because he had not "carried or possessed" the briefcase at the time of his arrest, the police had exceeded the scope of the warrant. The court disagreed. Drawing an analogy to the possession of contraband, the court observed that under Maryland law either actual or constructive possession would sustain a conviction. Thus, the court reasoned, search warrants should extend to items in the defendant's constructive possession. By virtue of the claim ticket, the defendant had a possessory interest in the briefcase at the time of his arrest; therefore, the search warrant extended to the briefcase even though it was not in the defendant's actual possession.

In *Payne v. State* the Court of Special Appeals clarified the justification necessary for a *Terry* "stop" and "frisk." A police officer can effect neither a stop nor a frisk without a reasonable suspi-

---

163. *Id.* at 494-95, 505 A.2d at 109.
164. See *id.* at 495, 505 A.2d at 109.
165. *Id.*
166. *Id.*
167. *Id.*
169. 65 Md. App. at 495, 501 A.2d at 110.
170. *Id.* The court was careful to note that the warrant mentioned the briefcase. The police do not have free rein to manufacture theories of constructive possession; they cannot, for example, search the room of a defendant who was arrested carrying a hotel key. *Id.* at 495-96, 501 A.2d at 110.

Since the police officers had acted in good faith upon a warrant signed by a judge, the court would also have admitted the product of the search under the rationale of *United States v. Leon*, 468 U.S. 897 (1984). 65 Md. App. at 497, 501 A.2d at 110-11. On this point, the court's reasoning is tenuous. The *Leon* case held that a court should not exclude evidence obtained "by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. *Cable*, however, did not involve an underlying determination of probable cause; rather, it involved the interpretation of a warrant's language and scope.

172. *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry* the Supreme Court attempted to reconcile a concern for police flexibility and safety with the constitutional imperative of protecting citizens from unreasonable searches and seizures. The Court thus permitted police briefly to detain suspects and to conduct a limited search for weapons on grounds less than the traditional fourth amendment requirement of probable cause. *Id.* at 21.
cion flowing from "specific and articulable facts." 173 The court emphasized, however, that a stop and a frisk are independent procedures; therefore, independent considerations govern their validity. 174 A stop is a brief detention for investigatory purposes; a frisk, on the other hand, is a carefully limited search "designed exclusively to detect the presence of offensive weapons." 175 A lawful detention, therefore, does not necessarily authorize a lawful search.

In Payne, for example, the police officer was authorized to make a stop, since the defendant's car was double-parked. 176 The defendant's attempt to conceal a bag, however, even when combined with his passenger's nervous behavior, did not authorize the officer's subsequent search of the bag. 177 The officer had no basis for concluding that the bag contained a weapon, as opposed to narcotics or other contraband. 178 Absent a suggestion of danger, therefore, the frisk was not justified. 179

10. Death Penalty.—a. Allocution.—In Harris v. State (Harris IV) 180 the Court of Appeals held that the Maryland death penalty statute 181 does not permit a sentencing court to condition a defendant's right to allocution 182 on the forfeiture of the right to have counsel present a closing argument. 183 The sentencing court had focused on Maryland's death penalty statute, which provides that "the defendant or his counsel may present argument . . . against the sentence of death." 184 Reasoning that allocution is a form of argument, the sentencing court had obliged Harris to choose between

173. Id. at 21.
174. 65 Md. App. at 569-70, 501 A.2d at 486.
175. Id. at 570, 501 A.2d at 487.
176. Id., 501 A.2d at 486.
177. Id. at 574, 501 A.2d at 488.
178. Id. The bag did in fact contain a handgun. Id. at 569, 501 A.2d at 486.
179. Note that in Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court had extended the scope of a frisk in an automobile stop to include the entire passenger compartment. Id. at 1035. The Court of Special Appeals, however, insisted that the threshold criteria for such a frisk remained a reasonable belief in the suspect's dangerousness. 65 Md. App. at 572-74, 501 A.2d at 488.
181. MD. ANN. CODE art. 27, § 413 (1982).
182. Section 413(c)(2) of article 27 enables a defendant to make an "unsworn statement in mitigation of the death penalty"; the statement is not subject to cross-examination and, unlike closing argument, is "not limited to the record in the case, inferences from material in the record, and matters of common human experience." 306 Md. at 351-52, 509 A.2d at 123.
184. MD. ANN. CODE art. 27, § 413(c)(2) (1982)
addressing the jury personally or through his attorney. The Court of Appeals disapproved of this procedure. "[A]llocution," the court asserted, "is neither synonymous with nor encompassed by the term 'argument.'"186

The new Maryland Rules clearly guarantee capital defendants the right prior to sentencing to "present evidence in mitigation of punishment."187 The new rules, however, were not yet in effect at the time of Harris' sentencing.188 Thus, in Harris' case, the common law, rather than a statute or rule, would govern the right of allocution.189 The court concluded that, under the common law, a "defendant who timely asserts his right to allocute, and provides an acceptable proffer, must be provided a fair opportunity to exercise that right."190

b. "Death Qualified" Juries.—Anticipating the Supreme Court's decision in Lockhart v. McCree,191 the Court of Appeals in Foster v. State192 held that exclusion of jurors so opposed to the death penalty as to affect their impartiality does not deny a criminal defendant a fair trial.193 A jury convicted Foster of felony murder; the same jury sentenced her to death.194 Foster had filed a pretrial motion requesting separate juries for each phase of the trial; statistics, she asserted, prove that "death qualified" juries, which exclude persons so opposed to the death penalty as to affect their impartiality, are conviction prone.195 Exclusion of such persons from the jury dur-

185. 306 Md. at 350-51, 509 A.2d at 123.
186. Id. at 352, 509 A.2d at 123-24.
187. Id., 509 A.2d at 124. Md. R. 4-343(d) provides that in capital cases, "Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement."
188. The rule became effective on July 1, 1984. Between January 1, 1962 and January 1, 1979, former rules 761 and 762 governed the right to allocution in capital cases. 306 Md. at 352, 509 A.2d at 124.
189. 306 Md. at 353, 509 A.2d at 124.
190. Id. at 359, 509 A.2d at 127; see Dutton v. State, 123 Md. 373, 91 A. 417 (1914) (allocution is strongly endorsed in capital cases).
193. Id. at 466, 499 A.2d at 1249-50.
194. Id. at 442, 499 A.2d at 1237.
195. Id. at 447-48, 499 A.2d at 1240. A jury is "death qualified" by a process of determining during voir dire whether any of the prospective jurors are unalterably opposed to capital punishment or would never vote to impose it regardless of the evidence. To obtain the death qualified jury, such jurors are excused for cause. If jurors are generally opposed to the death penalty, but could subordinate personal views and apply the law of the jurisdiction, they are qualified; similarly, jurors not opposed to the death penalty are qualified. Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981).
ing the guilt or innocence phase of the trial, according to Foster, would deny her a fair trial. 196

The trial judge denied the motion. 197 Later, the State successfully challenged for cause a prospective juror because he was opposed to the death penalty, and because he stated that his opposition would affect his impartiality. 198 Foster objected to the excusal of the potential juror. 199 On appeal Foster asserted that the denial of her motion for bifurcated jury and the excusal of the one juror were error.

The court first dealt with the defendant’s argument for a bifurcated jury, stating that, in this case, the relevant section of the Maryland death penalty statute 200 required that a single jury both convict and sentence the defendant. 201 The court then addressed Foster’s challenge to the exclusion of the prospective juror, finding that in light of the juror’s statements during voir dire, the trial judge correctly applied Maryland law governing challenges to prospective jurors. 202

The court rejected Foster’s argument that juries from which persons opposed to the death penalty have been excluded are more prosecution-prone and, therefore, are not properly representative of the community. 203 The court reviewed the United States Supreme Court’s decision in Witherspoon v. Illinois 204 and subsequent cases in which the Supreme Court and federal circuit courts addressed the issue of the impartiality of death qualified juries. 205 The Supreme Court and most of the lower courts had found that the use of death qualified juries did not violate the defendant’s right to a fair trial. 206 The court also termed it unrealistic to assume that prospec-

---

196. 304 Md. at 447-48, 499 A.2d at 1240.
197. Id. at 449, 499 A.2d at 1241.
198. Id. at 449-50, 499 A.2d at 1241.
199. Id. at 450, 499 A.2d at 1241.
201. 304 Md. at 453, 499 A.2d at 1243.
202. Id. at 454, 499 A.2d at 1243. The court explained that a challenge for cause was warranted if the prospective juror either was "'unable to apply the law' " or "'[held] a particular belief ... that would affect his ability or disposition to consider the evidence fairly or impartially.'" Id. (quoting King v. State, 287 Md. 530, 535, 414 A.2d 909, 912 (1980)).
203. 304 Md. at 456-57, 499 A.2d at 1244-45.
204. 391 U.S. 510 (1968). In Witherspoon the Court held that the exclusion of jurors opposed to capital punishment does not automatically result in an unrepresentative jury on the issue of guilt. Id. at 516-18.
205. See 304 Md. at 457-66, 499 A.2d at 1245-50 and authorities cited therein.
206. Id. at 458-64, 499 A.2d at 1246-48. Foster challenged the use of the death qualified jury, stating that over two dozen studies showed that death qualified juries are more
tive jurors in capital cases, whose opposition to the death penalty would prevent their imposing it or would prevent them from ever rendering a guilty verdict, would suddenly become unbiased on the question of guilt or innocence if they knew that a different jury, or a jury from which they were excluded, would determine the sentence instead.\textsuperscript{207} For these reasons, the court rejected Foster’s arguments.

c. Aggravating and Mitigating Factors.—Maryland’s death penalty statute\textsuperscript{208} permits the imposition of capital punishment only for murder in the first degree; in such cases, life imprisonment is the alternative sentence.\textsuperscript{209} Before a defendant may be sentenced to death, the statute requires that the sentencing authority—the judge or jury—find at least one aggravating circumstance.\textsuperscript{210} Against this aggravating circumstance it must weigh any mitigating circumstances.\textsuperscript{211} If the sentencing authority finds that the mitigating circumstances do not outweigh the aggravating circumstances, the defendant may receive the sentence of death.\textsuperscript{212}

The judge or jury may consider it a mitigating factor that “[t]he act of the defendant was not the sole proximate cause of the victim’s death.”\textsuperscript{213} In Evans v. State\textsuperscript{214} the Court of Appeals rejected the contention that the acts of a hired killer were not the “sole proximate cause” of the victim’s death.\textsuperscript{215} Correctly, therefore, the defendant’s participation in a contract to kill cannot serve to mitigate the sentence he or she would otherwise receive.

favorable to the prosecution than juries that do not exclude persons opposed to the death penalty. The court, however, minimized the importance of the studies; instead, it cited to post-\textit{Witherspoon} decisions that also held that exclusion of such persons from juries in capital cases did not result in an unrepresentative or biased jury. The court flatly disagreed with the Eighth Circuit’s decision in Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985), which the Supreme Court has since reversed. \textit{See} 304 Md. at 458-64, 499 A.2d at 1246-48; Lockhart v. McCree, 106 S. Ct. 1758 (1986).\textsuperscript{207} 304 Md. at 466, 499 A.2d at 1249-50. The court also held that by accepting the jury, the defense abandoned earlier objections to the composition of the jury made in the pretrial motion and during voir dire. \textit{Id.} at 452-53, 499 A.2d at 1242-43.\textsuperscript{208} Md. Ann. Code art. 27, §§ 412-414 (1982).\textsuperscript{209} Id. at § 412(b).\textsuperscript{210} Id. at § 413(d), (f).\textsuperscript{211} Id. at § 413(g)-(h).\textsuperscript{212} Id. at § 413(h)(2).\textsuperscript{213} Id. at § 413(g)(6).\textsuperscript{214} 304 Md. 487, 499 A.2d 1261 (1985), reconsid. denied sub nom. Foster, Evans and Huffington v. State, 305 Md. 306, 503 A.2d 1326, \textit{cert. denied}, 106 S. Ct. 3310 (1986).\textsuperscript{215} 304 Md. at 531-34, 499 A.2d at 1284-86. Evans had contracted with Anthony Grandison to kill two witnesses scheduled to testify against Grandison in a federal narcotics trial. \textit{Id.} at 494, 499 A.2d at 1265.
The Court of Appeals analyzed the history of the term "proximate cause," noting that at common law and by statute, "the act of hiring another to commit murder is a proximate cause of that murder."216 The court determined, however, that in the death penalty statute the General Assembly had not used the term "proximate cause" in this "ordinary" sense.217 But, as the court pointed out, "under the ordinary meaning of the word 'mitigating,' there is nothing mitigating about a murder because it was done pursuant to a contract."218 Thus, the court reasoned, in the death penalty statute the term "proximate cause" referred "only to direct physical causes of the victim's death"; it does not refer "to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act directly causing death."219

In Foster, Evans, and Huffington v. State220 the Court of Appeals held that the prosecution bears the burden of proof as to whether aggravating circumstances outweigh mitigating circumstances.221 The court thus rejected the contentions of three capital defendants who, on motions for reconsideration,222 argued that article 27, section 413(h)223 violated due process by placing the burden of persua-

216. Id. at 533, 499 A.2d at 1285.
217. Id.
218. Id. at 534, 499 A.2d at 1285.
219. Id. Similarly, in Huffington v. State, 304 Md. 559, 500 A.2d 272 (1985), reconsideration denied sub nom. Foster, Evans and Huffington v. State, 305 Md. 306, 503 A.2d 1326, cert. denied, 106 S. Ct. 3315 (1986), the Court of Appeals held that a defendant's acts can be the proximate cause of the victim's death even if a codefendant has been convicted of felony murder in connection with the death of the same victim. 304 Md. at 574, 500 A.2d at 279. The court reiterated that the term "proximate cause" refers only to the direct physical cause of the victim's death, not to the acts of principals in the second degree. Id.

As an additional mitigating factor, Huffington had urged that, by accompanying known drug dealers to a rural rendezvous, "the victim . . . consented to the act which caused his death." Id. at 581, 500 A.2d at 283; see Md. Ann. Code art. 27 § 413(g)(2) (Supp. 1986) (making it a mitigating circumstance that the victim consented to the act that caused his or her death). The court dismissed this conduct as unrelated to the true cause of the victim's death—gunshot wounds inflicted by Huffington. 304 Md. at 588, 500 A.2d at 284.

221. Id. at 311-14, 503 A.2d at 1329-30.
222. In three prior cases, the Court of Appeals had upheld the imposition of death sentences upon each defendant: Huffington v. State, 304 Md. 559, 500 A.2d 272 (1985); Evans v. State, 304 Md. 499, 499 A.2d 1236 (1985); and Foster v. State, 304 Md. 487, 499 A.2d 1261 (1985). Because each motion for reconsideration presented the same principal argument, the court chose to rule upon all three in a single opinion.

223. Md. Ann. Code art. 27, § 413(h) (1982) reads as follows:

(h) Weighing mitigating and aggravating circumstances—

(1) If the court or jury finds that one or more of these mitigating circum-
sion upon the defendant.\(^{224}\)

After examining its prior decisions interpreting section 413(h), the court concluded that it had never placed the burden of persuasion upon the defendant.\(^{225}\) In fact, on a number of occasions the court had held to the contrary.\(^{226}\) The defendants' assertions, therefore, were "flatly erroneous."\(^{227}\)

In *Bowers v. State*\(^ {228}\) the Court of Appeals held that a trial court need not make requested additions to Maryland's statutory list of mitigating factors.\(^ {229}\) Maryland provides an option on capital crime verdict sheets for juries to consider any other mitigating circumstances.\(^ {230}\) The *Bowers* court found this option sufficient to meet the Supreme Court's requirements under *Lockett v. Ohio*\(^ {231}\) that no relevant mitigating factors be precluded from consideration in capital sentencing procedures.\(^ {232}\)

In *Bowers v. State*\(^ {228}\) the Court of Appeals held that a trial court need not make requested additions to Maryland's statutory list of mitigating factors.\(^ {229}\) Maryland provides an option on capital crime verdict sheets for juries to consider any other mitigating circumstances.\(^ {230}\) The *Bowers* court found this option sufficient to meet the Supreme Court's requirements under *Lockett v. Ohio*\(^ {231}\) that no relevant mitigating factors be precluded from consideration in capital sentencing procedures.\(^ {232}\)

In Maryland, the legislature had determined seven factors that must be considered mitigating if found by a preponderance of the evidence in a capital case. In response to *Lockett*, an eighth point was appended to the Maryland statute, allowing the sentencing authority to consider any other factors it finds mitigating. 306 Md. at 150, 507 A.2d at 1087; *MD. ANN. CODE* art. 27, § 413(g)(8) (1982).
11. **Speedy Trial.**—In Ferrell *v.* State the Court of Special Appeals held that a thirteen-month trial delay had violated the defendant’s constitutional right to a speedy trial. The court noted that because a defendant does not have a constitutional right to stand trial within a specified period of time, all determinations as to possible violations of that right must occur on a case-by-case basis. The Supreme Court, in *Barker v. Wingo*, provided a four-prong balancing test to determine whether the State has denied a defendant’s right to a speedy trial. The four factors are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of the right, and (4) any prejudice to the defendant resulting from the delay.

The court found that the length of the delay, a total of eighteen months and twenty-six days between the initiation of prosecution and the date of trial, was of "constitutional dimension." As for the reason for this delay, five months of pretrial preparation and a one-month trial postponement were chargeable to neither party; however, the court did charge the remaining thirteen months of delay solely to the State. In addition, the court weighed the defendant’s timely motion for a speedy trial as favorable to his claim. Finally, the court considered the defendant’s six weeks of pretrial incarceration to be presumptively prejudicial. Balancing these

---

234. The defendant was arrested on October 12, 1983, for breaking and entering a storeroom. Trial was scheduled for March 6, 1984, but was postponed for plea bargaining purposes. The case was scheduled for trial four other times, but was postponed each time. The trial finally began on May 8, 1985. *Id.* at 461-62, 508 A.2d at 491.
235. *Id.* at 465, 508 A.2d at 493. The right to a speedy trial is guaranteed by the sixth amendment to the United States Constitution as well as by article 21 of the Maryland Declaration of Rights.
236. *Id.* at 462, 508 A.2d at 491.
238. *Id.* at 530. The length of the delay is to some extent a "triggering mechanism"; before the court can inquire into the other factors, there must be some delay that is "presumptively prejudicial." *Id.*
239. 67 Md. App. at 463, 508 A.2d at 492. The Court of Appeals had previously held that a delay of one year and 15 days was "presumptively prejudicial." *Epps v. State*, 276 Md. 96, 111, 345 A.2d 62, 72 (1975).
240. 67 Md. App. at 463-64, 508 A.2d at 492.
241. *Id.* Nine months of that delay were due to prosecutorial indifference. The court based this finding on the State’s lack of an excuse for the delay. *Id.*
242. *Id.* The defendant filed a motion to dismiss on December 19, 1983, for failure to grant a speedy trial. The trial court denied this motion during a pretrial hearing. *Id.* at 462, 508 A.2d at 491.
243. *Id.* at 464-65, 508 A.2d at 492-93. The court accorded the defendant’s six-week period of incarceration "some," but "not great weight in the balancing process." *Id.* In *Barker*, the Supreme Court stated that "[p]rejudice . . . should be assessed in the light of
factors, the court concluded that the defendant's right to a speedy trial had been violated.\textsuperscript{244}

\subsection*{B. Crimes}

\textit{I. Elements.—a. Criminal Attempt.—In Young v. State}\textsuperscript{245} the Court of Appeals adopted the \textit{Model Penal Code}'s “substantial step” test for determining whether a defendant is guilty of criminal attempt.\textsuperscript{246} The court thus alleviated the confusion concerning whether the offense of criminal attempt requires that the defendant commit an “overt act.” To demonstrate that a defendant has taken a “substantial step” toward the commission of a crime, it must be clear from the defendant's conduct that he or she performed an overt act beyond mere preparation.\textsuperscript{247}

Thus, for example, the court affirmed the defendant's conviction for attempted armed robbery: he had, \textit{inter alia}, reconnoitered or "cased" several banks, endeavoured to conceal his presence, disguised himself, and carried on his belt a scanner with a police band frequency.\textsuperscript{248} But even assuming that these acts constituted mere preparation, by attempting to enter a bank after hours, the defendant had committed the requisite overt act and had thus taken a substantial step towards the commission of a crime.\textsuperscript{249}

\textit{b. Assault.—}The crime of common-law assault encompasses two categories: (1) the act of attempted battery, or criminal assault; and (2) the act of placing another in reasonable fear of an imminent
battery, or tortious assault.\textsuperscript{250} In \textit{Harrod v. State}\textsuperscript{251} the Court of Special Appeals held that the victim's awareness of the defendant's actions is not an absolute prerequisite for criminal assault.\textsuperscript{252}

Reasoning by analogy, the court observed that every battery, including an attempted battery, contains or is preceded by an assault.\textsuperscript{253} A battery victim, however, may be totally unaware of the battery; for example, the victim might have been struck while asleep.\textsuperscript{254} Similarly, then, the victim of an attempted battery need not have been aware of the defendant's acts.\textsuperscript{255} On the other hand, "tortious" assault requires that the defendant place the victim in reasonable fear of imminent harm; therefore, this category of assault clearly requires that the victim be aware of the defendant's acts.\textsuperscript{256}

c. Gambling.—In \textit{State v. One Hundred and Fifty-Eight Gaming Devices}\textsuperscript{257} the Court of Appeals held that a "true amusement device"—a device that awards only free plays—is not an illegal slot machine unless the device itself is adapted for gambling.\textsuperscript{258} Specifically, the court rejected the State's contention that all free plays are "object[s] representative of and convertible into money," within the meaning of article 27, section 264B, the statute that outlaws slot machines.\textsuperscript{259}

The State had termed a free play the "functional equivalent" of

\textsuperscript{252} \textit{Id.} at 135, 499 A.2d at 962.
\textsuperscript{253} \textit{Id.} at 133, 499 A.2d at 961.
\textsuperscript{254} \textit{Id.} at 134, 499 A.2d at 962.
\textsuperscript{255} \textit{Id.} at 135, 499 A.2d at 962.
\textsuperscript{256} \textit{Id.} at 138, 499 A.2d at 964.
\textsuperscript{257} 304 Md. 404, 499 A.2d 940 (1985).
\textsuperscript{258} \textit{Id.} at 432, 499 A.2d at 954.
\textsuperscript{259} \textit{Id. MD. ANN. CODE} art. 27, § 264B (1982) provides in relevant part:

\begin{quote}
Any machine, apparatus or device is a slot machine within the provisions of this section if it is one that is adapted for use in such a way that, as a result of the insertion or deposit therein, or placing with another person of any piece of money, coin, token or other object, such machine, apparatus or device is caused to operate or may be operated, and by reason of any element of change or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any piece of money, coin, token or other object representative of and convertible into money, irrespective of whether the said machine, apparatus or device may, apart from any element of change or unpredictable outcome of such operation, also sell, deliver or present some merchandise or money or other tangible thing of value.

I. It shall be unlawful for any person, firm or corporation to locate, possess, keep, maintain or operate any slot machine within this State, whether as owner, lessor, lessee, licensor, licensee, or otherwise, except as provided in paragraph II hereof.
\end{quote}
the coin or token otherwise necessary to activate the machine; therefore, the State maintained, a free play fell within the ambit of section 264B. The court, however, distinguished free plays registered upon a true amusement device from those registered upon a gambling device. A gambling device contains features such as odds mechanisms and meters for recording the number of free plays released. A true amusement device, on the other hand, contains none of these features. The court accordingly found that a free play is not an "object representative of and convertible into money," within the meaning of section 264B, unless the free play is registered upon a machine adapted as a gambling device.

d. Homicide.—In Ferrell v. State the Court of Appeals held that the intent to kill expressed in a self-defense plea may not be sufficient evidence to establish premeditation. In Ferrell the jury rejected the defendant's self-defense claim and convicted him of first-degree murder. On appeal Ferrell questioned only the sufficiency of the evidence to establish premeditation for his first-degree murder conviction. Upholding the conviction, the Court of Special Appeals concluded that Ferrell could not on the one hand state that he had intended to kill, albeit in self-defense, but on the other hand claim that his actions were not premeditated.

While conceding that the Court of Special Appeals reached the proper result, the Court of Appeals found the lower court's reasoning erroneous. In some circumstances, one may unintentionally kill another in self-defense. Furthermore, the crime of premeditated murder requires more than the simple intent to kill; therefore, one might have intentionally killed another in self-defense, yet
not have formed the requisite intent for premeditated murder. Thus, courts must proceed on a case-by-case basis in determining whether a failed self-defense plea should yield a conviction for premeditated murder.  

In Stewart v. State the Court of Special Appeals held that a conviction for homicide is warranted if the defendant's act is the proximate cause of the victim's death, regardless of whether the defendant inflicted any physical injury on the victim. The defendant along with three accomplices robbed a sixty year old motel desk clerk. The desk clerk died of heart failure approximately two hours after the robbery. The defendant conceded that he participated in the robbery. Finding that the victim's death resulted directly from the robbery, the jury convicted the defendant of felony murder.  

At issue was whether the evidence presented at trial was sufficient to prove a causal relationship between the robbery and the victim's death. The defendant argued that an unarmed robbery was insufficient to be the legal cause of the victim's death. The court disagreed and stated that "if a direct causal link between the accused's actions and the victim's death can be established, no more is required." The court found particularly significant the expert testimony of two cardiologists, who concluded that the victim's emotional stress from the robbery resulted in an adrenaline-induced heart failure. Thus, after examining the evidence, the court held that a reasonable trier of fact could have found that the fright or shock of the robbery had caused this victim's heart failure.

273. 304 Md. at 688, 500 A.2d at 1055.
275. Id. at 386, 500 A.2d at 683. A number of other jurisdictions have also reached this result. See id. at 378-83, 500 A.2d at 679-82 and authorities cited therein.
276. 65 Md. App. at 374, 500 A.2d at 677.
277. Id. at 374-75, 500 A.2d at 677.
278. Id. at 375, 500 A.2d at 677.
279. Id.
280. Id.
281. Id. at 377, 500 A.2d at 678. The defendant did not use a gun during the robbery. He merely handed the victim a bag with a note attached, which read: "Don't say a word. Put all the money in this bag and no one will get hurt!" Id. at 374, 500 A.2d at 677.
282. Id. at 379, 500 A.2d at 679.
283. Id. at 386, 500 A.2d at 682-83.
284. Id., 500 A.2d at 683.
e. Sexual Act.—In Partain v. State the Court of Special Appeals held that the sexual act cunnilingus, as defined in article 27, section 461(e), does not require that the defendant’s mouth or tongue penetrate the victim’s genitals. Thus, even without penetration, the defendant’s act of licking the victim’s genitals was sufficient contact to support a sexual act conviction. This ruling is in accord with Thomas v. State, in which the Court of Appeals had held that the sexual act fellatio, which is also defined in section 461(e), does not require that the defendant’s penis penetrate the victim’s mouth.

f. Theft.—In Craddock v. State the Court of Special Appeals held that under Maryland’s consolidated theft statute, jurors could convict the defendant if they agreed that the defendant had committed a theft, even if they could not agree as to the type of theft involved. The court explained that the General Assembly had consolidated all theft offenses into one statute “to avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law.” Furthermore, “the gravamen of the offense of theft is the depriving of the owner of his rightful possession of his property,” regardless of what method is employed to do so. Thus, the jurors need not unanimously agree on how the theft was committed so long as they unani-

   (e) Sexual act.—“Sexual act” means cunnilingus, fellatio, anilingus, or anal intercourse, but does not provide for vaginal intercourse. Emission of semen is not required. Penetration, however slight, is evidence of anal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes.
287. 63 Md. App. at 266, 492 A.2d at 672. The court chose to rely on the ordinary meaning of “cunnilingus,” which is “a sexual activity involving oral contact with the female genitals.” Id. (quoting WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 445 (2d ed. 1977)).
288. Id. at 266-67, 492 A.2d at 672.
290. Id. at 321, 483 A.2d at 20.
293. 64 Md. App. at 278, 494 A.2d at 975.
294. Id. at 277, 494 A.2d at 975. The statute declares: “An accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this subheading.” Md. Ann. Code art. 27, § 341 (1982).
295. 64 Md. App. at 278, 494 A.2d at 975.
mously decide that the defendant committed a theft. 296

2. Defenses—Entrapment.—In Adcock v. State 297 the Court of Special Appeals held that, as a matter of law, a defendant cannot establish a prima facie case of entrapment if he or she denies commission of the crime. 298 Citing other commentators, 299 the court announced that to establish a prima facie case of entrapment, the defendant must produce sufficient evidence showing two dependent acts: (1) that the government improperly induced the defendant to commit the crime, and (2) that the defendant actually succumbed to that inducement. 300 The court ruled that Adcock failed the second requirement because during her testimony she had clearly denied committing the crime. 301

C. Procedure

1. Indictments.—In State v. Chaney 302 the Court of Appeals held that a murder indictment could confer jurisdiction upon a circuit court even though the indictment failed to list all the common-law or statutory elements of the crime. 303 The indictment omitted several terms that, by statute, must appear in a murder indictment; 304 nevertheless, the court held that the omitted terms were implicit in the indictment’s parenthetical reference to the statutes defining first-degree murder. 305 Therefore, the indictment reasonably in-

296. Id.
298. Id. at 456, 504 A.2d at 1161.
299. E.g., W. Lafave & A. Scott, Jr., Criminal Law § 48, at 371 (1972); C. Whitebread, Criminal Procedure § 27.01, at 564 (1980).
300. 66 Md. App. at 456, 504 A.2d at 1161.
301. Id. at 457-58, 504 A.2d at 1162. The defendant was accused of acting as an intermediary between a seller and buyer of cocaine. The buyer was a police informant. During testimony, the defendant swore unequivocally that she committed no crime and had no idea that any crime was to take place. Nevertheless, the jury found the defendant guilty of distribution of cocaine and the possession of cocaine with the intent to distribute. Id.
303. Id. at 27, 497 A.2d at 155.
304. Id. at 26, 497 A.2d at 154. The indictment charged that Chaney “did wilfully and deliberately, with premeditation kill and slay Elizabeth Ann Metzler, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government, and dignity of the State (Common Law and Art. 27, Sec. 407-410).”’
Id. at 23, 497 A.2d at 153 (quoting grand jury indictment).
Section 616 of article 27, however, requires that indictments for murder contain the words “felonious,” “malice aforethought,” and “murder.” Md. Ann. Code art. 27, § 616 (1982).
305. 304 Md. at 26, 497 A.2d at 154. The statutes cited in the indictment—sections
formed the defendant of the charges against him. The court acknowledged that if the defendant had challenged the defects in a pretrial motion, dismissal might have been appropriate; however, because he had raised the issue only on postconviction, the court found he had waived the challenge.

2. Discovery.—In Bailey v. State the Court of Appeals held that a defendant's statements to an out-of-state police officer are discoverable under former Maryland Rule 741 b 2. In Bailey statements that the defendant made to a New Jersey state trooper 407 through 410 of article 27—classify certain forms of common-law murder as murder in the first degree.

The court distinguished Brown v. State, 44 Md. App. 71, 410 A.2d 17 (1979), in which the Court of Special Appeals had held insufficient an indictment that, the Court of Appeals asserted, lacked even a parenthetical reference to "murder" or "malice aforethought." 304 Md. at 25-26, 497 A.2d at 154; 44 Md. App. at 79, 410 A.2d at 22. The deficient indictment in Brown read as follows:

THE GRAND JURY, for the State of Maryland, sitting in Anne Arundel County, upon their oaths and affirmations, charge that MICHAEL ALLEN BROWN, Defendant, did unlawfully, willfully, deliberately and with premeditation kill and slay George Wesley Jones on or about the twenty-second (22nd) day of July, 1978, in Anne Arundel County (Article 27, Section 407) MUR ¶ 1. 44 Md. App. at 73, 410 A.2d at 19.

While the Chaney court averred that the Brown indictment lacked any reference to murder, the statute cited in that indictment defines murder in the first degree. See Md. Ann. Code art. 27, § 407 (1982).

306. 304 Md. at 26, 497 A.2d at 155. Thus, the court found that the indictment did not contravene article 21 of the Maryland Declaration of Rights, which provides: "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him . . . ."

307. 304 Md. at 27, 497 A.2d at 155. Judge Cole dissented, noting that Chaney could only know of the charges against him through the parenthetical reference to the statute. Id. at 28, 497 A.2d at 155 (Cole, J., dissenting). Citing Ayre v. State, 291 Md. 155, 166-68, 433 A.2d 1150, 1158 (1981), Judge Cole asserted that the court may not consider citations to statutes in determining the sufficiency of an indictment. 304 Md. at 28-29, 497 A.2d at 155-56.

308. 303 Md. 650, 496 A.2d 665 (1985).

309. Id. at 652, 496 A.2d at 666. Former rule 741 was the applicable discovery rule for criminal cases. It has since been recodified as Md. R. 4-263. The pertinent provisions of former rule 741 are as follows:

a. Disclosure Without Request.—Without the necessity of a request by the defendant, the State's Attorney shall furnish to the defendant:

2. Any relevant material or information regarding: (a) specific searches and seizures, wire taps and eavesdropping, (b) the acquisition of statements made by the defendant, and (c) pretrial identification of the defendant by a witness for the State.

3. The State's Attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case.
were introduced at trial over the objections of defense counsel. The State had denied the existence of these statements when the defendant, pursuant to rule 741 b 2, requested the discovery of “the substance of each oral statement” and “a copy of all reports of each oral statement made by the defendant to a State agent which the State intends to use at trial.” The trial court held that the trooper was not a “State agent” under the rule and would thus be treated as a private citizen for discovery purposes.

The Court of Appeals disagreed, holding that a New Jersey state trooper was a “State agent” for purposes of rule 741 b 2. The court reasoned that any other interpretation would undercut the design of the rule, which is to minimize suppression motions during the course of trial. If rule 741 b did not apply to agents of other states, then rule 741 a would require that the State automatically disclose the means by which it obtained a statement; however, under rule 741 b, the defendant could not obtain the substance of that statement. Thus, in cases involving agents from other states, the defendant might not, until trial, have the information needed for a decision whether to move to suppress.

3. Injunctions.—In Levitt v. State the Court of Special Appeals heard two related appeals from orders issued by the Baltimore City Circuit Court. In the first appeal the court held that the circuit court had the authority to issue a prejudgment injunction limiting the defendant’s expenditures; in the second the court held

---

b. Discovery by the Defendant.—Upon the request of the defendant, the State shall:

2. Statements of the Defendant. As to all statements made by the defendant to a State agent which the State intends to use at a hearing or trial, furnish the defendant: (a) a copy of each written or recorded statement and (b) the substance of each oral statement and a copy of all reports of each oral statement.

Rule 4-263 is substantially identical to former rule 741.

310. 303 Md. at 653-54, 496 A.2d at 666-67.

311. Id.

312. Id. at 654, 496 A.2d at 667. The jury subsequently found the defendant guilty of robbery with a deadly weapon. Id. He was also convicted in New Jersey of receiving stolen goods. Id. at 660, 496 A.2d at 670.

313. Id. at 656, 496 A.2d at 668.

314. Id.

315. Id.


317. Id. at 526-27, 505 A.2d at 141.

318. Id. at 537, 505 A.2d at 147.
that the circuit court could enter a contempt judgment for disobedience of the same injunction.\textsuperscript{319}

In the first case the State of Maryland Deposit Insurance Fund Corporation (MDIF), the court-appointed conservator for Old Court Savings and Loan Association, brought suit against the defendants for fraudulent misappropriation of funds.\textsuperscript{320} MDIF sought an interlocutory injunction to prevent the dissipation of the defendant’s assets pending a decision on the merits.\textsuperscript{321} The defendants claimed that the circuit court lacked equity jurisdiction to provide this relief.\textsuperscript{322}

Although neither case law nor statute provides for prejudgment attachment on an allegation of fraud, “equitable principles are broad, and a court of equity is not deprived of jurisdiction because the subject before it is new.”\textsuperscript{323} The \textit{Levitt} court found that extraordinary circumstances called for extraordinary relief.\textsuperscript{324} Considering the massiveness of the alleged fraud, the “substantial likelihood” that the fraud had occurred, and the probability that the defendants would dissipate their assets, the court held that the circuit court had equity jurisdiction to enjoin assets under such unusual circumstances.\textsuperscript{325}

In the second case the defendants attacked a contempt conviction for failure to obey the modified consent order.\textsuperscript{326} The defend-

\begin{flushright}
\textsuperscript{319} Id. at 550, 505 A.2d at 153.
\textsuperscript{320} Id. at 527-28, 505 A.2d at 142.
\textsuperscript{321} Id. at 528, 505 A.2d at 142.
\textsuperscript{322} Id. The defendants had entered into a consent order enjoining dissipation of their assets, with an exception for ordinary and necessary personal, business, and legal expenses. As a condition of the consent order, they agreed to cooperate with MDIF’s discovery. When one defendant refused to comply with requests to produce documents and interrogatories, MDIF sought and obtained a modification of the consent order. The modification limited the defendants’ expenditures to $1000 per week, with certain exceptions. The defendants again asserted that the court lacked subject-matter jurisdiction to enter the original consent order, a deficiency that cannot be cured by consent. Id. at 529-33, 505 A.2d at 142-45.
\textsuperscript{323} Id. at 536, 505 A.2d at 146. \textit{See generally} Brown, \textit{The Law/Equity Dichotomy in Maryland}, 39 Md. L. Rev. 427, 436 (1980).
\textsuperscript{324} 66 Md. App. at 537, 505 A.2d at 147.
\textsuperscript{325} Id. The defendants claimed that the modification of the consent order was a punishment for the exercise of their fifth amendment right against self-incrimination. The circuit court, however, expressly recognized the defendants’ fifth amendment rights and modified the consent order only to aid its enforcement. A court must have the authority to amend orders as necessary to meet changing conditions. Id. at 538-44, 505 A.2d at 147-50.
\textsuperscript{326} Id. at 545, 505 A.2d at 151. Ninety days after the modified consent order took effect, MDIF alleged that the defendants had withdrawn $211,000 from five different accounts, in flagrant disregard of the court order. The defendants claimed that these violations were “technical.” They also alleged that they understood the order to mean
ants asserted that MDIF is a private party and therefore has no standing to bring criminal contempt charges. The court rejected this argument because the records showed that the circuit court appointed MDIF's counsel as prosecutors. The Levitt court further held that the defendants' jail sentences and fines for contempt did not amount to cruel and unusual punishment.

4. Pretrial Motions.—Maryland Rule 4-252(f) requires that with the exception of speedy trial motions, pretrial motions shall be determined prior to trial. In McMillian v. State the Court of Special Appeals held that generally the rule does not require a trial court to hold a hearing; however, a court must conduct an evidentiary hearing if a factual dispute is "central to the resolution of the motion." McMillian's suppression motion presented such a significant factual issue; therefore, the court remanded for an evidentiary hearing on the matter.

that the weekly $1000 limit was on personal expenses only and that they could continue to meet business expenses beyond that limit. Id. at 544-45, 505 A.2d at 150-51.

327. Id. at 546, 505 A.2d at 151.

328. Id. at 547, 505 A.2d at 151. Md. R. P.4.d.1 states: "The court may designate the State's attorney or any other member of the bar to prose..." Id. In addition, the defendants' guilty pleas cured all defects in the proceedings except jurisdiction. Furthermore, the challenge to MDIF's prosecutorial powers was not raised below and therefore was not properly before the Levitt court. 66 Md. App. at 547, 505 A.2d at 152.

329. Id. at 549, 505 A.2d at 153. On September 17, 1985, the court had limited the defendants to $1000 per week in expenditures. Between that date and December 4, 1985, the defendants withdrew $211,000 from various bank and savings and loan accounts. The court sentenced Jeffrey Levitt to 18 months in prison and payment of a $200,000 fine. Karol Levitt was sentenced to 30 days imprisonment, to be served over 15 weekends, and was fined $50,000. Id. at 544-45, 505 A.2d at 150-51.

330. According to Md. R. 4-252(f):

[M]otions filed pursuant to [rule 4-252] shall be determined before trial . . . except that the court may defer until after trial its determination of a motion to dismiss for failure to obtain a speedy trial. If factual issues are involved in determining the motion, the court shall state its findings on the record.


332. Id. at 30, 499 A.2d at 196.

333. The defendant sought an evidentiary hearing on his motion to suppress certain evidence seized in a warrantless search of a friend's apartment. Id. at 29, 499 A.2d at 196. The trial court denied this request, ruling that the defendant lacked standing to challenge the constitutionality of the search. Id. The Court of Special Appeals disagreed. An evidentiary hearing was necessary to determine whether, under the "totality of the circumstances," id. at 33, 499 A.2d at 198, the defendant had a "'legitimate expectation of privacy in the area invaded at the time of the search,'" id. at 31, 499 A.2d at 197 (quoting Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)). The court ordered a limited remand under Md. R. 1071 for the sole purpose of holding a suppression hearing. 65 Md. App. at 86-87, 499 A.2d at 199-200.
5. **Recusal.**—In *Brent v. State* the Court of Special Appeals had occasion to examine Maryland Rule 4-243(c)(5), which requires trial judges, upon objection, to recuse themselves from bench trials if they learn of a plea agreement from which the defendant has subsequently withdrawn. The *Brent* court broadened the applicability of rule 4-243(c)(5) to cases in which the "totality of the circumstances" suggest that the judge was presented with the "functional equivalent" of a formal plea agreement. As a result, the court agreed with the defendant that the trial judge in this case should have recused himself after he learned of the defendant's prior willingness to plead guilty and had heard facts that supported the defendant's guilt.

In *Cason v. State* the Court of Special Appeals held that trial judges must recuse themselves after learning that a defendant has failed a lie detector test. The court believed that, with the added insight acquired from knowledge of the test, a judge could not retain the impartiality necessary to preside over a case. Furthermore, the court noted that the request for recusal in this case had not been made in bad faith.

6. **Judicial Conduct.**—In *Smith v. State* the Court of Special Appeals discussed the discretionary right of a trial judge to question witnesses, noting that judges must take care not to inject themselves into a trial in such a way as to damage their roles as impartial arbiters. Although the trial judge erred in being overly inquisitional, his conduct did not influence the jury verdict; thus, the error

---

335. Md. R. 4-243(c)(5). Thus, the rule now applies even if the parties have not entered into a formal plea bargain agreement.
336. 63 Md. App. at 207, 492 A.2d at 642.
337. Id. at 202, 492 A.2d at 640.
339. Id. at 770, 505 A.2d at 926.
340. Id. The results of a lie detector test, as well as evidence that the defendant took such a test, are inadmissible at trial in Maryland. Guesfeird v. State, 300 Md. 653, 658-59, 480 A.2d 800, 803 (1984).
341. 66 Md. App. at 772-73, 505 A.2d at 927. The court also held that, having failed to recuse himself, the trial judge should have granted the defendant's motion to withdraw his waiver of the right to a jury trial. Id. at 770, 505 A.2d at 926.
343. Id. at 610-20, 505 A.2d at 567-72.
344. Id. at 618, 505 A.2d at 571. The court found that despite repeated defense objections, the trial judge rephrased many of the State's questions and frequently took over the questioning of the State's two primary witnesses. When the State attempted to introduce photographs into evidence without laying a foundation, the judge laid the foundation for the State. Id. at 611-18, 505 A.2d at 568-71.
was harmless.\textsuperscript{345} Similarly, the court held that the trial judge's conversations with the jury during deliberations were also harmless error.\textsuperscript{346}

7. \textit{Illegal Sentence}.—In \textit{Campbell v. State}\textsuperscript{347} the Court of Special Appeals held that an improper failure to merge two offenses for sentencing purposes can result in an illegal sentence, even if the trial court imposes concurrent sentences.\textsuperscript{348} The illegality occurs because the imposition of any additional sentence, even though concurrent, can affect the defendant's chance for parole.\textsuperscript{349}

In \textit{Valentine v. State}\textsuperscript{350} the Court of Appeals held that an appeal from the denial of a motion to correct an illegal sentence is not a direct appeal from the original sentence.\textsuperscript{351} Rather, such a motion is "in the nature of a collateral attack" on the original sentence.\textsuperscript{352} Thus, a challenge to the denial of a motion to correct an illegal sentence can reach the State's appellate courts only if the defendant follows the procedures of the Uniform Post Conviction Procedure Act.\textsuperscript{353} Because Valentine failed to follow those procedures, the court held that the Court of Special Appeals had correctly dismissed his appeal.\textsuperscript{354}

According to the court, Maryland Rule 4-345, which governs

\textsuperscript{345} \textit{Id.} at 620, 505 A.2d at 572. The court deemed the error harmless because the transcript did not indicate that the judge's questions reflected any opinion as to the defendant's guilt. \textit{Id.} at 619, 505 A.2d at 572. Furthermore, the court found that the State had established "overwhelming evidence" of the defendant's guilt prior to the judge's misconduct. \textit{Id.} at 619-20, 505 A.2d at 572.

The dissent, however, contended that the appearance of a fair trial was sacrificed when the trial judge took over the function of the prosecution. Viewing the trial as a whole, the dissent maintained that the judge's conduct prejudiced the defendant. The judge in effect conducted the prosecution's case, while demeaning the defense. Thus, the defense was waged against both the judge and the State's attorney. \textit{Id.} at 625-29, 505 A.2d 575-76 (Adkins, J., concurring in part and dissenting in part).

\textsuperscript{346} \textit{Id.} at 624-25, 505 A.2d at 574. The trial judge failed to follow Md. R. 4-326(c), which requires consultation with both the defense and the prosecution before the judge communicates with the jury during deliberations. \textit{Id.} at 625, 505 A.2d at 574.


\textsuperscript{348} \textit{Id.} at 510, 501 A.2d at 118. Md. R. 4-345(a) provides that a court may correct an illegal sentence at any time.

\textsuperscript{349} 65 Md. App. at 511, 501 A.2d at 118. The court held that the defendant's convictions for child abuse and battery did not merge and that the concurrent sentences were proper. \textit{Id.} at 513, 501 A.2d at 118-19.


\textsuperscript{351} \textit{Id.} at 120, 501 A.2d at 853.

\textsuperscript{352} \textit{Id.}

\textsuperscript{353} \textit{Id.} The Uniform Post Conviction Procedure Act is codified in Md. Ann. Code art. 27, \S\ 645(A) (1982).

\textsuperscript{354} 305 Md. at 120, 501 A.2d at 853.
motions to correct illegal sentences,\(^\text{355}\) is a "statutory remedy" governed by the Post Conviction Procedure Act.\(^\text{356}\) To reach this interpretation, the court looked to article IV, section 18(a) of the Maryland Constitution, which lends the "'force of law'" to "'rules and regulations concerning the practice and procedure . . . in the courts of this State.'"\(^\text{357}\) In arriving at this result, however, the court found it necessary to disapprove of "dictum" in the recent case of Coles v. State,\(^\text{358}\) relying instead on an older line of cases.\(^\text{359}\)

**D. Sentencing**

1. **Accessory After the Fact.** — In Osborne v. State\(^\text{360}\) the Court of Appeals held that the appropriate punishment for an accessory after the fact to first-degree murder is imprisonment for between eighteen months and five years, as prescribed by article 27, section 626.\(^\text{361}\) In so ruling, the court rejected the State's argument that the punishment for this offense should be governed by Maryland's murder statute,\(^\text{362}\) which prescribed a sentence of life imprisonment.\(^\text{363}\)

The court based its ruling upon several factors that distinguish the offense of acting as an accessory after the fact from that of acting as the principal in the commission of a crime. At early common law an accessory after the fact received the same punishment as did the principal.\(^\text{364}\) The courts, however, generally allowed an accessory after the fact the defense of benefit of clergy,\(^\text{365}\) a defense that the

\(^{355}\) Md. R. 4-345.  
\(^{356}\) 305 Md. at 120, 501 A.2d at 853.  
\(^{357}\) Id. (quoting Md. Const. art. IV, § 18(a)). In dissent, three judges contended that the term "statute" applies only to enactments of the General Assembly; therefore, even though the Rules have the force of law, they are not "statutes" and do not afford "statutory remedies." Id. at 123, 501 A.2d at 854 (Eldridge, J., dissenting).  
\(^{358}\) 290 Md. 296, 429 A.2d 1029 (1981).  
\(^{359}\) 305 Md. at 112-18, 120, 501 A.2d at 848-52, 853.  
\(^{360}\) 304 Md. 323, 499 A.2d 170 (1985).  
\(^{361}\) Id. at 337, 499 A.2d at 177. Md. Ann. Code art. 27, § 626 (1982) provides: All claims to dispensation from punishment by benefit of clergy are forever abolished; and every person convicted of any felony heretofore deemed clergy-able shall be sentenced to undergo a confinement in the penitentiary for any time not less than eighteen months nor more than five years, except in those cases where some other specific penalty is prescribed by this Code. And every person who shall be convicted of any felony heretofore excluded from the ben-efit of clergy, and not specified in this Code, shall be sentenced to undergo a confinement in the penitentiary for not less than five nor more than twenty years.  
\(^{363}\) See id.; 304 Md. at 332, 499 A.2d at 174.  
\(^{364}\) 304 Md. at 327, 499 A.2d at 172.  
\(^{365}\) The benefit of clergy was a common-law defense afforded to members of the clergy and later to all individuals who qualified to be admitted into the clergy by virtue
courts denied to all principal offenders and, in many cases, to access-
sories before the fact as well.\textsuperscript{366} Although Maryland initially recog-
nized this defense, the State abolished it in 1809\textsuperscript{367} and instead
prescribed a punishment of imprisonment for between eighteen
months and five years for "any felony heretofore deemed clergy-
able" except in cases in which the Maryland Code prescribed some
other specific penalty.\textsuperscript{368} Thus, because the offense of acting as an
accessory after the fact was clergyable at common law, it falls within
the class of crimes subject to the punishment prescribed in section
626.\textsuperscript{369}

The court rejected the prosecution's contention that the enact-
ment of the State's murder statute had altered the punishment for
the crime of acting as an accessory after the fact.\textsuperscript{370} Instead, the
court remarked that "neither the present version of the statute nor
past enactments show a legislative intent to include accessories after
the fact in the punishment for first degree murder."\textsuperscript{371} In addition,
the court stated that the offense of acting as an accessory after the
fact is distinct from that of acting as an accessory to the principal\textsuperscript{372}
in that an accessory after the fact, unlike the principal or an acces-
sory to the principal, plays no part in the commission of the
crime.\textsuperscript{373}

2. Restitution.—In \textit{In re Jose S.}\textsuperscript{374} the Court of Appeals held that
if restitution is sought against the parents of two unrelated
juveniles, each parent is potentially liable for the entire sum, pro-
vided he or she receives proper notice.\textsuperscript{375} In addition, the court
held that the juvenile court could not award restitution in an

\begin{thebibliography}{9}
\bibitem{367} \textit{Id.} at 329, 499 A.2d at 173.
\bibitem{368} \textit{Md. Ann. Code} art. 27, § 626 (1982).
\bibitem{369} 304 Md. at 336, 499 A.2d at 177.
\bibitem{370} \textit{Id.} at 332, 499 A.2d at 174.
\bibitem{371} \textit{Id.}
\bibitem{372} The court appears to use the term "accessory to the principal" to denote principals in the second degree. The court also appears to use the term "principal" to denote principals in the first degree. \textit{See id.}
\bibitem{373} \textit{Id.}
\bibitem{374} 304 Md. 396, 499 A.2d 936 (1985).
\end{thebibliography}
amount greater than the amount specified in the juvenile’s guilty plea.\textsuperscript{376}

In In re Herbert B.\textsuperscript{377} the Court of Appeals held that a juvenile court may order children or their parents to pay restitution even before an adjudication of delinquency.\textsuperscript{378} The sole prerequisite for an award of restitution is a finding that a juvenile has committed a delinquent act in which he or she has stolen, damaged, or destroyed the victim’s property.\textsuperscript{379}

3. Enhanced Punishment Statute.—In Blandon v. State\textsuperscript{380} the Court of Appeals held that rape in the second degree is a “crime of violence” for the purposes of Maryland’s enhanced sentencing statute for repeat offenders.\textsuperscript{381} The statute provides that if a person has been convicted on two separate occasions of crimes of violence not arising from the same incident and has served at least one term in prison, that person shall be sentenced to at least twenty-five years in prison upon the third conviction for a violent crime.\textsuperscript{382} In addition, the statute lists the crimes defined as “crimes of violence.”\textsuperscript{383}

The defendant contended that the list of violent crimes was ambiguous since the statute distinguishes “sexual offenses in the first

\textsuperscript{376} 304 Md. at 399-400, 499 A.2d at 938. The court had accepted the juvenile’s guilty plea. \textit{Id.} at 398, 499 A.2d at 937.

\textsuperscript{377} 303 Md. 419, 494 A.2d 680 (1980).

\textsuperscript{378} \textit{Id.} at 428, 494 A.2d at 684. The juvenile court, in an adjudicatory hearing, found that Herbert B. had committed a break-in. At a restitution hearing one month later, a master assessed restitution in the amount of $228.50 against Herbert B. and his mother. At the disposition hearing the same day, the juvenile court affirmed the restitution order, finding that Herbert B. was not a delinquent child even though he had committed a delinquent act. \textit{Id.} at 422, 494 A.2d at 681.

\textsuperscript{379} \textit{Id.} at 426-27, 494 A.2d at 683-84. The court found that its conclusion followed directly from the language of the applicable statute, Md. Cts & Jud. Proc. Ann. § 3-829(a) (1984):

\textsuperscript{379} (a) The court may enter a judgment of restitution against the parent of a child, or the child in any case in which the court finds the child has committed a delinquent act and during the commission of that delinquent act has:

\textsuperscript{(1)} stolen, damaged or destroyed the property of another;

\textsuperscript{(2)} inflicted personal injury on another, requiring the injured person to incur medical, dental, hospital or funeral expenses.

\textsuperscript{380} 304 Md. 316, 498 A.2d 1195 (1985).

\textsuperscript{381} \textit{Id.} at 318, 498 A.2d at 1196.


\textsuperscript{383} \textit{Id.} at § 643B(a). The statute reads:

As used in this section, the term “crime of violence” means abduction; arson; kidnapping; manslaughter, except involuntary manslaughter; mayhem; murder; rape; 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 other crime of violence; an attempt to commit any of the aforesaid offenses; assault with intent to murder; and assault with intent to rape.
degree" from "sexual offenses in the second degree," but it fails to specify degrees of rape.\textsuperscript{384} In rejecting the defendant's arguments, the court relied both on legislative history and on canons of statutory construction. Stressing that "a statute must be construed to effectuate the real and actual intention of the legislature,"\textsuperscript{385} the court stated that it should therefore "reject a proposed statutory interpretation if its consequences are inconsistent with common sense."\textsuperscript{386} The court then compared the statutes for rape and sexual offenses, noting that the only difference between second-degree rape and second-degree sexual offense was in the type of sexual act involved.\textsuperscript{387} The court reasoned that since the General Assembly had treated second-degree rape and second-degree sexual offenses equally in terms of regular sentencing,\textsuperscript{388} it must have intended to classify the crimes together for enhanced sentencing.\textsuperscript{389}

The legislative history of the rape statute and the enhanced sentencing statute also provided a basis for the court's holding. When the General Assembly enacted the original enhanced sentencing statute in 1975, rape had not yet been classified in degrees.\textsuperscript{390} In 1976, however, the General Assembly divided rape into two degrees and outlined four degrees of sexual offenses;\textsuperscript{391} furthermore, the General Assembly amended the enhanced sentencing statute to include the first and second degrees of sexual offenses as crimes of violence.\textsuperscript{392} The court found that this amendment reflected a clear legislative intent to include all degrees of rape in the statutory definition of a "crime of violence," so that the defendant's enhanced sentence under the statute was valid.\textsuperscript{393}

\textsuperscript{384} 304 Md. at 319, 498 A.2d at 1196.

\textsuperscript{385} Id. (citing State v. Intercontinental, Ltd., 302 Md. 132, 137, 486 A.2d 174, 176 (1985), in which the court construed Md. ANN. CODE art. 27, § 551(a) (1982 & Supp. 1984) as giving a judge power to issue a search warrant for evidence within the judge's jurisdiction even if the crime to which the evidence applies was committed elsewhere).

\textsuperscript{386} Id.

\textsuperscript{387} 304 Md. at 319-20, 498 A.2d at 1197. Rape and sexual offenses differ in the nature of the sexual act involved: rape involves vaginal intercourse, while a sexual offense involves almost any sexual act other than vaginal intercourse. Md. ANN. CODE art. 27, §§ 461(e), 462-464C (1982).

\textsuperscript{388} Both crimes merit imprisonment of not more than twenty years. Md. ANN. CODE art. 27, §§ 463(b), 464A(b) (1982).

\textsuperscript{389} 304 Md. at 321, 498 A.2d at 1197.

\textsuperscript{390} Id. at 322, 498 A.2d at 1198.

\textsuperscript{391} Id.; Md. ANN. CODE art. 27, §§ 462-464C (1982).

\textsuperscript{392} 304 Md. at 322, 498 A.2d at 1198.

\textsuperscript{393} Id. The court reasoned that because the General Assembly had placed express limitations on the "sexual offenses" that were "crimes of violence," but had made no similar qualifications concerning the degrees of rape, the General Assembly must have intended for all degrees of rape to remain classified as "crimes of violence." Id.
In *Teeter v. State* the Court of Special Appeals considered the type of evidence admissible at a sentencing hearing, the level of proof required concerning the existence of violence in the acts underlying prior convictions, and the constitutionality of a mandatory sentence.

The court reaffirmed the rule that the State cannot seek the mandatory sentence under the statute unless it establishes the defendant's prior convictions and incarceration beyond a reasonable doubt. But even though hearings under the enhanced sentencing statute differ from normal sentencing hearings, the court declared that cumulative hearsay evidence is admissible for sentencing purposes at both types of hearings. Thus, at the sentencing hearing the trial court did not err in admitting an affidavit prepared for litigation, even though the affidavit was hearsay.

The court also held that defendant's prior convictions could constitute "crimes of violence," within the meaning of the statute, even if the state did not prove that the prior convictions had actually involved violence. The court deferred to the General Assembly's compilation of "crimes of violence." Thus, the State may establish the requisite "violence" merely by demonstrating that a Maryland court had previously convicted the defendant of crimes enumerated in article 27, section 643(B)(a). In so holding, the court distinguished *Temoney v. State*, an earlier case under the enhanced sentencing statute, in which the Court of Appeals had required the State to prove that the defendant's prior convictions actually in-

---


395. Id. at 108-09, 499 A.2d at 504-05.

396. Id. at 112, 499 A.2d at 506 (citing *Sullivan v. State*, 29 Md. App. 622, 631, 349 A.2d 663, 669 (1976)).

397. Id. at 113-14, 499 A.2d at 507. Hearsay evidence is admissible in sentencing hearings because it is believed that the judge is able to weigh carefully the credibility of the evidence in imposing the sentence. *Id.* In a hearing under the enhanced sentencing statute, however, the lack of judicial discretion in determining the actual sentence imposed may diminish the need to admit hearsay evidence.

398. Id. at 114-15, 499 A.2d at 507-08. The affidavit established that the defendant had actually been incarcerated. Because the State had produced other evidence that was not hearsay to establish the existence of the prison term, the hearsay evidence was merely cumulative. Had the hearsay evidence been the only evidence establishing the defendant's prior imprisonment, the admission of the hearsay evidence could have been reversible error. *Id.*

399. Id. at 115, 499 A.2d at 508.

400. Id. at 117, 499 A.2d at 509. Section 643B(a), the statute that defines the term "crime of violence," is set out *supra* at note 383.

volved violence. The court pointed out that Temoney involved prior convictions for District of Columbia offenses; therefore, the State was obliged to prove that the earlier offenses met the Maryland definition of a "crime of violence."

Finally, the court addressed the constitutionality of the mandatory sentence set by the statute. The court held that the defendant had not been deprived of due process merely because the statute gives the prosecutor, rather than the judge, the discretion to invoke the statute. The court stressed that "there is no right under the Constitution to a judicially imposed sentence," and noted that "our criminal justice system bestows upon the prosecutor broad discretion at various stages of a criminal proceeding." Thus, the State's decision to invoke the enhanced sentencing statute against a particular defendant does not necessarily deprive the defendant of due process.

In Bryan v. State the Court of Special Appeals again upheld the constitutionality of Maryland's enhanced sentencing statute. A Baltimore County jury convicted Bryan of burglary and theft. Because of his two prior convictions involving crimes of violence, the trial court sentenced him to a mandatory twenty-five year term of imprisonment pursuant to the enhanced sentencing statute. The Court of Special Appeals stated that it found no evidence that this sentence contravened the eighth amendment's prohibition

402. Id. at 263, 429 A.2d at 1024.
403. 65 Md. App. at 115-16, 499 A.2d at 508. The defendant also asserted that a "crime of violence" must be a crime against a person, and that, therefore, housebreaking fell outside the statutory definition. Id. In Temoney, however, the Court of Appeals specifically stated that the statute enumerated offenses against both persons and property. Temoney, 290 Md. at 263, 429 A.2d at 1024; Teeter, 65 Md. App. at 116 n.3, 499 A.2d at 508 n.3.
404. 65 Md. App. at 119, 499 A.2d at 510. In addition, the court briefly addressed and dismissed the defendant's allegation that the mandatory sentence violated the constitutional prohibition against cruel and unusual punishment: "'[I]ndividualized' sentencing is not a constitutional mandate unless the death penalty is implicated." Id. at 118, 499 A.2d at 509.
405. Id. Examples of prosecutorial discretion cited include the decisions to call a grand jury, to charge with specified crimes, not to prosecute, to negotiate the terms of a plea agreement, and to recommend a particular sentence. Id.
406. Id.
409. 63 Md. App. at 212, 492 A.2d at 645.
410. The two prior convictions were: (1) robbery with a deadly weapon, and (2) robbery. Id.
411. Id.
against cruel and unusual punishment.\textsuperscript{412} To support its holding, the court relied upon the Supreme Court's decision in \textit{Rummel v. Estelle}\textsuperscript{413} as well as numerous other state and federal cases that have upheld the constitutionality of mandatory recidivist statutes.\textsuperscript{414}

In \textit{Middleton v. State}\textsuperscript{415} the Court of Special Appeals held that in this case the absence of a uniform statewide policy for applying the statute did not deprive the defendant of equal protection.\textsuperscript{416} Furthermore, the court ruled that while the State bears the burden of proving the existence of the underlying convictions and incarceration beyond a reasonable doubt, the State need not separately prove the constitutional validity of the convictions unless that issue is before the court.\textsuperscript{417}

The court ruled that the defendant would not have been denied equal protection unless he could prove that uneven enforcement "'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"\textsuperscript{418} The court acknowledged that the absence of a uniform statewide policy might mean that the statute had a discriminatory effect;\textsuperscript{419} however, the court held that the defendant had not established that the State was motivated by a discriminatory purpose in opting to apply the statute to him.\textsuperscript{420}

The court also refuted the defendant's argument that the State had failed to prove the constitutionality of the predicate convictions and incarceration. The State may not use a predicate conviction to obtain the mandatory sentence unless at the prior proceeding the defendant enjoyed the right to counsel; furthermore, the State may not invoke the defendant's prior guilty plea unless the defendant entered the plea freely and voluntarily.\textsuperscript{421} The court, however, declared that the State need not prove the constitutionality of every

\textsuperscript{412} \textit{Id.} at 216-17, 492 A.2d at 647.
\textsuperscript{413} 445 U.S. 263 (1980).
\textsuperscript{414} 63 Md. App. at 214-19, 492 A.2d at 646-48.
\textsuperscript{415} Id. at 172, 506 A.2d at 1198.
\textsuperscript{416} Id. at 179, 506 A.2d at 1201.
\textsuperscript{417} Id. at 170, 506 A.2d at 1196 (quoting \textit{Wayte v. United States}, 470 U.S. 598, 608 (1985), which held that passive enforcement of Selective Service registration is not necessarily unconstitutional).
\textsuperscript{418} Id. at 171, 506 A.2d at 1197. The defendant presented testimony concerning the existing policy in 18 Maryland jurisdictions. Of the 18, nine had had no cases involving the statute; of those nine, two had no policy for invoking the statute, six would apply the statute automatically, and one would proceed on a case-by-case basis. Of the nine that had had cases involving the statute, four invoked the statute automatically, and five approached the issue on a case-by-case basis. \textit{Id.} at 166-67, 506 A.2d at 1195.
\textsuperscript{419} Id. at 171-72, 506 A.2d at 1197.
\textsuperscript{420} Id. at 175, 506 A.2d at 1199.
predicate conviction as a separate matter unless the question of constitutional validity was raised by documentary evidence, by the circumstances of the case, or by the defendant. Since neither the existence nor the constitutionality of the prior convictions had been questioned at trial, the court ruled that the State had met its burden; therefore, the defendant's conviction could stand.

4. **Probation.**—In *Matthews v. State* the Court of Appeals held that a trial court may revoke a defendant's probation even before the probationary portion of the sentence has begun if, between the grant of probation and its formal commencement, the defendant commits a felony. In addition, the court held that the judge may not cause the probationary portion of a sentence to begin while the defendant is imprisoned on the same charge.

In *Donaldson v. State* the Court of Appeals held that a trial judge may extend the duration of a defendant's probation if the defendant has committed a probation violation. Neither statute nor the constitutional prohibition against double jeopardy deprives the trial judge of this power. The length of further probation is at the trial judge's discretion, provided it does not exceed five years.

In *Smith v. State* the Court of Appeals held that due process prevents the revocation of probation if the defendant's probation violation was not willful, but was rather the result of factors beyond

---

422. The State had introduced certified records of the prior convictions to establish the convictions and the prior incarceration. The court contrasted the situation in *Middleton* with that in *Burgett v. Texas*, 389 U.S. 109 (1967), in which the records on their face raised a presumption that the defendant had been deprived of counsel. 67 Md. App. at 176, 506 A.2d at 1200.

423. 67 Md. App. at 178, 506 A.2d at 1200-01.

424. *Id.* at 179, 506 A.2d at 1201.


426. *Id.* at 292, 498 A.2d at 660. Between the grant of probation and its formal commencement, the defendant is imprisoned. While imprisoned, however, defendants are under an implied obligation to obey all laws. *Id.*

427. *Id.* at 286, 498 A.2d at 657. Note that, by statute, the period of probation begins on the actual date of the defendant's release from prison. *Id.; Md. Ann. Code* art. 27, § 641A (1982). Note also that the term "imprisonment" includes a variety of state programs, such as work release, that are not characterized by confinement. *Id.* at § 645K.

428. 305 Md. 522, 505 A.2d 527 (1986).

429. *Id.* at 530, 531, 505 A.2d at 531, 532.


431. U.S. CONST. amend. V.

432. 305 Md. at 530, 531, 505 A.2d at 532.

433. *Id.* at 527, 505 A.2d at 530. The five-year limit is imposed by statute. See *Md. Ann. Code* art. 27, § 641A(a) (1982).

the defendant's control. Smith, for example, was indigent and thus unable to pay fines imposed as a condition of probation; therefore, the trial court could not constitutionally revoke Smith's probation.

In *Nelson v. State* the Court of Special Appeals held that if a trial court reinstates multiple sentences, but fails to specify whether the sentences are concurrent or consecutive, the sentences must be treated as concurrent. The court relied on the maxim that penal statutes are to be strictly construed against the State, especially in cases of doubt concerning the severity of a sentence.

In *Edwards v. State* the Court of Special Appeals held that if a defendant misses a payment on a schedule imposed by the probation division, a judge may revoke probation only if the sentencing judge required that payment be made pursuant to that schedule. This decision stems from the general rule that the probation division may not institute probation conditions harsher than those that the trial court established.

---

435. *Id.* at 7, 506 A.2d at 1168. The court relied on *Bearden v. Georgia*, 461 U.S. 660 (1983). In that case the United States Supreme Court held that if a defendant breaches a condition of probation by failing to pay a fine, a court cannot constitutionally revoke probation without inquiring whether the defendant willfully failed to pay. *Id.* at 672-73.

436. 306 Md. at 8, 506 A.2d at 1168.


438. *Id.* at 312, 503 A.2d at 1361. The court thus held that the defendant was entitled to resentencing. *Id.* at 314, 503 A.2d at 1362.

439. *Id.* at 314, 503 A.2d at 1362.


441. *Id.* at 281-82, 507 A.2d at 215-16. The judge ordered the defendant to pay a sum of money within a year's time. The probation division demanded payment in monthly installments. *Id.*

442. *Id.* at 281, 507 A.2d at 215. As the Court of Special Appeals held in *Costa v. State*, 58 Md. App. 474, 473 A.2d 942 (1984), the probation division may only institute rules that lie within the ambit of the special probation conditions imposed by the trial court. *Id.* at 484, 473 A.2d at 947.
VI. Evidence

A. Relevance

In *Hopper v. State*¹ the Court of Special Appeals determined that the trial court erred in preventing the cross-examination of the victim of an attempted robbery concerning his award from the Criminal Injuries Compensation Board. This testimony, the court stated, would have been probative of the victim's pecuniary interest in falsifying his testimony.² The defendant, a male prostitute, had testified that the victim's injury occurred accidentally after the two had argued about payment for sexual services.³ In an earlier proceeding, however, the victim had received a monetary judgment from the Criminal Injuries Compensation Board only after establishing that he had no sexual relationship with the defendant and had not contributed in any way to his own injuries.⁴

The Court of Special Appeals stressed that a witness' possible bias is always relevant, and evidence of bias is admissible as to the credibility of the witness or the weight of his or her testimony.⁵ The witness stood to lose an earlier award if he admitted the sexual relationship with the defendant; thus, the court found that the issue of the award was relevant to show bias or pecuniary interest, and that the jury should have been allowed to consider this testimony in its

2. *Id.* at 106, 494 A.2d at 712-13.
3. *Id.* at 100, 494 A.2d at 710. During the argument the defendant pulled out a knife, and, according to the defendant, in the ensuing conflict the victim was accidentally cut. The defendant denied any intent to kill, injure, or rob the victim. *Id.*
4. *Id.* at 101, 494 A.2d at 710. According to the defendant, the Board initially denied the victim an award, invoking the "family crime" exclusion of article 26A of the Maryland Code, which disallows awards to "any person maintaining a sexual relationship" with the person inflicting the injury. *See id.* at 101 n.2, 494 A.2d at 710, 710 n.2 (quoting Md. Ann. Code art. 26A, § 5(b) (Supp. 1985)). In addition, § 12(e) of the same article disallows awards if the victim contributed to the infliction of the injury. Md. Ann. Code art. 26A, § 12(e) (1987). The Board subsequently granted the victim an award after he submitted a written denial of a sexual relationship with the defendant. 64 Md. App. at 99, 494 A.2d at 109.
5. 64 Md. App. at 102-05, 494 A.2d at 711-12. *See Caldwell v. State*, 276 Md. 612, 349 A.2d 623 (1976) (scope of cross-examination is normally left to the trial judge); *Mulligan v. State*, 18 Md. App. 588, 308 A.2d 418 (1973) (same); *State v. DeLawder*, 28 Md. App. 212, 344 A.2d 446 (1975) (jury has right to hear testimony that could affect credibility of a witness); *see also* *Davis v. Alaska*, 415 U.S. 308 (1974) (sixth amendment right to confrontation includes the right to cross-examine a witness on matters affecting bias, interest, or motive to falsify).
The court further ruled that the error in disallowing the cross-examination was prejudicial to the defendant; therefore, the court remanded the case for a new trial.

B. Character and Reputation—Prior Bad Acts

In *Foster v. State* the Court of Appeals held that the trial court did not err in admitting evidence of a witness' entire judgment of conviction, including the sentence imposed, for the purpose of impeaching her testimony. The court recognized the lack of a consensus of opinion in other jurisdictions on this issue. Nevertheless, it found support in the Maryland cases and elsewhere for the trial judge's decision to admit the evidence. The court concluded that the sanction imposed "reflects upon the nature of the conviction and, hence, is relevant to the credibility issue" and should be admitted.

In *Cason v. State* the Court of Appeals held that the trial court abused its discretion by admitting evidence of prior convictions for possession of heroin in order to impeach the defendant's credibility. The court observed that while evidence of a conviction for an infamous crime is always admissible for purposes of impeachment, the admissability of a witness' prior conviction of a non-infamous crime is left to the sound discretion of the trial judge. Possession of heroin is not considered an infamous crime.

7. Id.
9. Id. at 470, 499 A.2d at 1252.
10. Id. at 469 n.14, 499 A.2d at 1251 n.14.
11. Id. at 470-71, 499 A.2d at 1252.
12. Id. at 470, 499 A.2d at 1252.
14. Id. at 774-76, 505 A.2d at 929.
15. The court stated:
   "The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery and those other offenses, classified generally as crimen falsi, which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the public administration of justice."

   *Id.* at 774-75, 505 A.2d at 928 (quoting Garitee v. Bond, 102 Md. 379, 383, 62 A. 631, 633 (1905)).
or a crime involving moral turpitude. Accordingly, the evidence of the defendant's convictions should only have been admitted if, in the discretion of the trial court, the probative value of the convictions outweighed the prejudice to the defendant in asserting his defense.

In this case, however, the prior convictions were more than ten years old, and were very similar in nature to the crime for which the defendant was on trial; therefore, the prejudicial effect of those convictions was greater than their probative value. Thus, the court held that the trial court committed reversible error by admitting the prior convictions.

In Anaweck v. State the Court of Special Appeals held that "other crimes" evidence was admissible in the defendants' trial for possession of cocaine with intent to distribute. Generally, evidence of other crimes is inadmissible. This rule, however, contains "a built in limitation when the evidence of 'other crimes' has a direct bearing on an issue in the case." Examples of this limitation occur in cases in which the evidence tends to show motive, intent, absence of mistake, a common scheme or plan, or the identity of the person charged. In the instant case, the court found that the sale of drugs at the defendants' home on each of the two days prior to their arrest for possession of cocaine with intent to distribute tended to establish each of the factors listed above. Thus, the trial judge did not abuse his discretion in admitting the evidence.

Similarly, in Waddell v. State the Court of Special Appeals ruled that the defendant's out-of-court statement concerning his previous drug dealings with the victim was admissible in the defendant's trial for first degree murder. Since the defendant's prior statement tended to establish both motive and identity, the court found

18. Id. see supra note 15.
19. Id.
20. Id. at 775, 505 A.2d at 928.
21. Id.
23. Id. at 259, 492 A.2d at 669.
24. Id. at 256, 492 A.2d at 667 (quoting Ross v. State, 276 Md. 664, 669, 350 A.2d 680, 684 (1976)).
25. Id.
26. Id. at 256-57, 492 A.2d at 667.
27. Id. at 257-59, 492 A.2d at 668.
28. Id. at 259, 492 A.2d at 669.
the statement admissible.\textsuperscript{30}

In \textit{Savoy v. State}\textsuperscript{31} the Court of Special Appeals clarified the extent to which a court may admit evidence under the so-called "open door" theory.\textsuperscript{32} The defendant contended that the prosecution acted prejudicially by establishing that the defendant had previously been arrested for a narcotics violation and was presently suspected of involvement in the sale of narcotics.\textsuperscript{33} The Court of Special Appeals agreed, holding that the trial court committed reversible error by admitting this testimony.\textsuperscript{34}

In cross-examination, the arresting officer stated that after the defendant assaulted him, he had chased the fleeing defendant, rather than merely filing charges, because he hoped that additional charges might arise out of an arrest.\textsuperscript{35} On redirect, the officer stated that he expected to bring additional charges because the defendant had previously been arrested for controlled dangerous substance violations and was then involved in the sale of controlled dangerous substances.\textsuperscript{36} This evidence of other crimes was irrelevant for any purpose other than to show the accused’s bad character; therefore, in order to have the evidence admitted, the State maintained that by inquiring into the officer’s motivation, the defendant’s counsel initiated the inquiry and thus opened the door to the evidence of other crimes.\textsuperscript{37}

The court rejected this argument, stating that "evidence admitted under the ‘open door’ theory does not give an unbridled license to introduce otherwise inadmissible evidence beyond the extent necessary to remove any unfair prejudice which might have ensued from the original evidence."\textsuperscript{38} The arresting officer was properly permitted, on cross-examination, to explain his motivation for stopping the defendant. The “questioning on cross-examination,” how-
ever, "did not mandate an outlet for the introduction of specific past unrelated criminal conduct of the accused when he had not placed his character in issue."\(^{39}\)

In *Howard v. State*\(^{40}\) the Court of Special Appeals held that a trial court may not preclude criminal defendants from disclosing their prior convictions on direct examination.\(^{41}\) While not addressing this precise issue, the court previously ruled in *Whitehead v. State*\(^{42}\) that defendants are entitled to a limiting instruction concerning evidence of prior convictions if the defendants had themselves introduced the evidence.\(^{43}\) And in *Chadderton v. State*,\(^{44}\) the court permitted the prosecution to anticipate attacks on witnesses' credibility by questioning them on direct examination about their prior convictions.\(^{45}\) The reasoning in *Whitehead* and *Chadderton* led the court to conclude that the trial court erred in forbidding the defendant to disclose prior convictions on direct examination.\(^{46}\) The court, however, found that the trial court's error in this case was harmless.\(^{47}\)

**C. Hearsay**

1. Prior Recorded Testimony.—In *Huffington v. State*\(^{48}\) the Court of Appeals held that the trial judge did not abuse his discretion by refusing to allow the defendant to introduce the prior testimony given by a State's witness at the trial of the defendant's alleged accomplice.\(^{49}\)

Deno Kanaras, Huffington's alleged accomplice, was convicted in an earlier proceeding of felony murder, theft, and daytime housebreaking.\(^{50}\) At Kanaras' trial, Stephen Rassa testified on behalf of the State that Kanaras was involved in drugs only a few days before

\(^{39}\) *Id.*


\(^{41}\) *Id.* at 289-90, 503 A.2d at 747. As a matter of trial strategy, criminal defendants often prefer to disclose prior convictions on direct, rather than cross, examination.


\(^{43}\) *Id.* at 437-38, 458 A.2d at 910-11.

\(^{44}\) 54 Md. App. 86, 456 A.2d 1313 (1983).

\(^{45}\) *Id.* at 94-95, 456 A.2d at 1318.

\(^{46}\) 66 Md. App. at 290, 503 A.2d at 747.

\(^{47}\) *Id.* at 290, 503 A.2d at 747-48. The court reasoned that since the other evidence against the defendant was substantial, the disallowed testimony would not have altered the trial's outcome. *Id.*


\(^{49}\) *Id.* at 574, 500 A.2d at 279.

\(^{50}\) *Id.* at 564, 500 A.2d at 274; Kanaras v. State, 54 Md. App. 568, 460 A.2d 61, *cert. denied*, 297 Md. 109 (1983).
the incident in question.\textsuperscript{51} Huffington sought to admit this testimony in order to show that Kanaras might have killed the victim in the case at bar.\textsuperscript{52}

The court looked to the Federal Rules of Evidence, which allow introduction of former testimony as long as the party against whom the testimony is now offered, or the party's predecessor in interest, had an opportunity and a similar motive to develop the testimony in a prior proceeding.\textsuperscript{53} The court concluded that since Rassa was the State's witness at the earlier trial, and since Huffington sought to use Rassa's testimony against the State, the party against whom the testimony was offered before did not have a motive in developing the testimony similar to that of the party against whom it was later offered.\textsuperscript{54} Therefore, the trial judge did not err by refusing to admit the testimony.\textsuperscript{55}

In \textit{Cordovi v. State} the Court of Special Appeals ruled that a court may admit the prior recorded testimony of an absent witness, provided certain requirements are met concerning the witness' unavailability and the character of the recorded testimony. During the trial, the State introduced the recorded testimony of a witness who, on the trial date, was in South America.\textsuperscript{57} The defendant argued on appeal that his constitutional right of confrontation had thus been violated.\textsuperscript{58}

The court noted the valid reasons underlying the right of criminal defendants to confront witnesses against them.\textsuperscript{59} Citing a recent United States Supreme Court decision,\textsuperscript{60} however, the court held that the admission of the prior recorded testimony of an absent witness does not violate the confrontation clause if the State proves

\textsuperscript{51} 304 Md. at 565, 500 A.2d at 274-75.
\textsuperscript{52} Id. at 565, 500 A.2d at 275.
\textsuperscript{53} FED. R. EVID. 804(b)(1).
\textsuperscript{54} 304 Md. at 574, 500 A.2d at 279.
\textsuperscript{55} Id.
\textsuperscript{57} Id. at 461, 492 A.2d at 1331. At a preliminary hearing, the witness had stated on the record that although he was going to South America for the holidays, he would return in time for the trial. \textit{Id.} at 465, 492 A.2d at 1332-33.
\textsuperscript{58} Id. at 460, 492 A.2d at 1330. The sixth amendment states in part that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONSTR. amend. VI.
\textsuperscript{59} 63 Md. App. at 461-62, 492 A.2d at 1331. Confrontation allows the defendant an opportunity to challenge the accuracy of the witness' testimony by cross-examination. Furthermore, the right of confrontation enables the fact-finder to judge the witness' credibility and demeanor. \textit{Id.} at 462, 492 A.2d at 1331.
\textsuperscript{60} Ohio v. Roberts, 448 U.S. 56 (1980).
that the witness is unavailable, and that the recorded testimony contains a "particularized guarantee of truthfulness."

Because the witness was in South America, and because the State had not in bad faith failed to procure his presence, the witness was truly "unavailable." Furthermore, the defendant had the opportunity in a prior judicial proceeding to confront and to cross-examine this witness; therefore, the witness' testimony contained the requisite "guarantee of truthfulness." Thus, the trial court properly admitted the recorded testimony.

2. Business Records Exception.—In Evans v. State the Court of Appeals appears to have broadened the scope of the business records exception to the hearsay rule. The defendant attacked the admissibility of a Baltimore City Jail visitor's card and a hotel registration form on the theory that these records were made by third persons, rather than by custodians or officials under a duty to make a truthful report. The court rejected this argument, stating that "[e]ach document was clearly a record made in the regular course of business within the contemplation of the . . . statutory language." Thus, the court refused to distinguish the situation in which a business official fills out a form with information supplied by a third per-

61. The State must demonstrate that it undertook " 'a good faith effort to obtain [the witness'] presence at trial.' " Id. at 74 (quoting Barber v. Page, 390 U.S. 719, 724-25 (1968) (emphasis in original)). If, however, the witness is abroad, a simple showing of unavailability should suffice. 63 Md. App. at 463-64, 492 A.2d at 1392. As the Supreme Court stated in Roberts:

The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists . . ., "good faith" demands nothing of the prosecution. But, if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.

448 U.S. at 74-75.


63. Id. at 464-65, 492 A.2d at 1392-33. The witness was a resident alien, was employed in the area, had family nearby, had come forward to testify at the preliminary hearing, and had agreed to return for the trial. Thus, the court concluded that the State had acted in good faith in relying on the witness' promise to return. Id.

64. Id. at 465-66, 492 A.2d at 1383.


66. Id. at 516, 499 A.2d at 1276.

67. Id. at 517, 499 A.2d at 1277. The jail visitor normally enters the names of those visiting and their relationship to the prisoner. And hotel guests normally fill out their names and addresses. Thus, neither of these forms are filled out by the custodians or officers of the entity for which the forms are required in the normal course of business. Id. at 516-17, 499 A.2d at 1276-77.

68. Id. at 519, 499 A.2d at 1277.
son from the situation in which the third person actually fills out the form.\(^69\)

3. Present Sense Impression Exception.—In *Booth v. State*\(^70\) the Court of Appeals adopted the present sense impression exception to the hearsay rule.\(^71\) The court discussed the history and status of the present sense impression exception,\(^72\) noting that the Federal Rules of Evidence\(^73\) and a majority of states have adopted it.\(^74\) Invoking an analogy to the excited utterance exception, which Maryland had previously adopted,\(^75\) the court concluded that the present sense impression exception was based on a "firm foundation of trustworthiness," and that Maryland would adopt it in the form in which it appears in the Federal Rules of Evidence.\(^76\)

In addition, the court further considered problems in applying the exception.\(^77\) Statements offered under this exception must have been uttered contemporaneously with or very close in time to the event perceived.\(^78\) Declarants need not have participated in per-

---

\(^69\) Id.

\(^70\) 306 Md. 313, 508 A.2d 976 (1986).

\(^71\) Id. at 316, 508 A.2d at 977. The witness testified that on the day of the murder she telephoned the victim. As they were speaking, the victim told her that a friend was about to leave. The witness testified that she heard the door and questioned the victim as to who was there. The victim told her that "some guy" was at the door talking with the departing guest. The witness further testified that the tone of the conversation with the victim was normal and the victim did not sound nervous or anxious. Id.

\(^72\) Id. at 317-23, 508 A.2d at 977-79. The court traced the exception from the nineteenth century scholar James Bradley Thayer, through the scholarly writings of Wigmore, to current approval in *E. Cleary, McCormick's Handbook on the Law of Evidence* § 298, at 860 (3d ed. 1984).

\(^73\) 306 Md. at 320, 508 A.2d at 976. *Fed. R. Evid. 803*(1) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

\(^74\) 306 Md. at 321, 508 A.2d at 979. The court noted that at least 28 states recognized the present sense impression exception to the hearsay rule. Id.

\(^75\) Id. at 323, 508 A.2d at 981. See, e.g., Mouzone v. State, 294 Md. 692, 452 A.2d 661 (1982) (excited utterance exception); Stevens v. State, 232 Md. 93, 192 A.2d 73, cert. denied, 375 U.S. 886 (1963) (excited utterance exception); Wright v. State, 88 Md. 705, 41 A. 1060 (1898) (res gestae exception).

\(^76\) 306 Md. at 324, 508 A.2d at 981. The court reasoned that both the excited utterance and present sense impression exceptions are based on the same rationale: both "preserve the benefit of spontaneity [sic] in the narrow span of time before a declarant has an opportunity to reflect and fabricate." Id.

\(^77\) Id. at 324-31, 508 A.2d at 981-85.

\(^78\) Id. at 324, 508 A.2d at 981. The court noted that the appropriate test for spontaneity is whether, considering the circumstances, sufficient time had elapsed to permit
ceived events, but they must at least speak from personal knowledge. A court may admit a statement containing a present sense impression even if the statement appears merely to express the declarant's opinion. Finally, the court rejected the view that corroboration by an independent and equally percipient observer is a requirement of admissibility.

4. Excited Utterance Exception.—In Johnson v. State the Court of Special Appeals ruled that statements made by an eighty-nine year old victim shortly after she had been beaten and robbed were admissible under the excited utterance exception to the hearsay rule, even though the victim was incompetent to testify at the time of trial. The court thus rejected the defendant's contention that the trial court had erred in not determining whether the victim was competent at the time she made the statements.

The court noted its holding in Moore v. State that testimonial incompetence did not bar admissibility of spontaneous declarations of a young child; however, rather than concluding that testimonial competence is always irrelevant, the court stated that the admissibil-

reflexive thought. The court recognized that precise spontaneity is not always possible and that a slight delay in converting observation into speech is acceptable. Id.

79. Id. at 325, 508 A.2d at 981. The court defined personal knowledge as "the declarant's own sensory perceptions." As to the quantity and quality of evidence required to support personal knowledge, the court stated that in some instances the statement itself might be enough, while in others extrinsic evidence might be required to permit admissibility. Identification of the declarant is not a condition of admissibility. Id., 508 A.2d at 981-82.

80. Id. at 325-27, 508 A.2d at 982. Noting the difficulty sometimes encountered in distinguishing between fact and opinion, the court stated:

A statement that at first blush appears to represent the opinion of the speaker may prove upon more careful analysis to be non-judgmental in character, or it may represent a shorthand rendition of facts. Additionally, we recognize that evidence which enjoys a significant presumption of reliability, and which may be of significant assistance to the trier of facts . . . may be lost if it is excluded because perceptions are cast in opinion form.

Id. at 325, 508 A.2d at 982.

81. 306 Md. at 330, 508 A.2d at 984. The court did conclude that just as extrinsic evidence may sometimes be required in order to prove contemporaneity or personal knowledge, so, too, corroboration of the declarant's perception may in some cases be required. Id.


83. Id. at 494, 492 A.2d at 1347-48. The victim was 90 years old at the time of the trial and confined to a nursing home. The State conceded at the beginning of the trial that the victim was incompetent to testify at trial. Id. at 490, 492 A.2d at 1345.

84. Id. at 488, 492 A.2d at 1344-45.


86. 63 Md. App. at 491, 492 A.2d at 1346.
ity of spontaneous declarations is best determined on a case-by-case basis. Reviewing the facts in *Johnson*, the court observed that the victim had maintained herself in her own apartment and, in an excited state, was able to tell a neighbor that she, the victim, had been beaten and robbed. The court thus ruled that the victim’s statements were reliable and trustworthy; therefore, they qualified as excited utterances when made, despite her inability to testify later in court.

5. **"Catch-All" Exception.**—In *Cain v. State* the Court of Special Appeals refused to establish a “catch-all” exception to the hearsay rule, despite the declarant’s unavailability at trial and the trial court’s determination that the hearsay statement contained substantial indicia of reliability. The declarant had refused to testify at trial concerning the contents of a written, unsworn statement which he had previously made to police and which implicated the defendant. The trial court then permitted the State to introduce the statement through the testimony of a police officer. The appellate court, however, determined that the statement was hearsay and that it did not fit any recognized exception to the hearsay rule. Maryland has not recognized a “catch-all” exception, which permits the admission of any hearsay evidence if the evidence contains sufficient indicia of reliability; therefore, the court reversed the defendant’s conviction.

87. Id. at 493, 492 A.2d at 1347. The court stated that a review of case law led to the conclusion that a single rule governing admissibility or rejection of excited utterance testimony was inappropriate. While imbecility or hopeless insanity would rule out admissibility, an individual’s simple inability to comprehend an oath is not enough to determine rejection of the testimony. Id.

88. Id. at 494, 492 A.2d at 1347-48.

89. Id. The court also concluded that the victim’s statements to a police officer who arrived shortly after the robbery satisfied the excited utterance exception. Id. at 495, 492 A.2d at 1348.


91. See, e.g., Fed. R. Evid. 803(24).

92. 63 Md. App. at 232-34, 492 A.2d at 654-56.

93. Id. at 230-31, 492 A.2d at 653-54.

94. Id. at 231, 492 A.2d at 654.

95. Id. at 232-34, 492 A.2d at 654-56. Because the witness would not testify, the statement was not past recollection recorded. Id. at 232, 492 A.2d at 655. Nor did the statement fall within the business records exception as a police report. Id. at 293, 492 A.2d at 655. Because the statement was not former sworn testimony, the unavailable witness exception was also inapplicable. Id. at 233-34, 492 A.2d at 655-56.

96. Id. at 234, 492 A.2d at 656.
D. Failure to Preserve Evidence; Spoliation

In Bailey v. State\(^97\) the Court of Special Appeals ruled the State's failure to follow standard forensic procedures and properly to preserve evidence was relevant to the defendant's case; therefore, the trial court should have admitted this evidence.\(^98\) The defendant, on trial for rape, kidnapping, robbery, and murder, was not allowed to question an FBI agent concerning standard procedures for examining the pubic hairs of the alleged rape victims.\(^99\) The defendant also sought to prove that because the State had contaminated the only semen slides available, the State was unable to perform routine forensic procedures that could have provided better scientific proof of the defendant's guilt or innocence.\(^100\)

In Eley v. State\(^101\) the Court of Appeals had held that "where a better method of identification may be available and the State offers no explanation whatsoever for its failure to come forward with such evidence, it is not unreasonable to allow the defendant to call attention to its failure to do so."\(^102\) Applying this rule in Bailey, the court found that the trial court had erred in barring testimony concerning the State's failure to follow routine forensic procedures.\(^103\)

In addition, the Court of Special Appeals found no error in the trial court's refusal to instruct the jury that it could draw an adverse inference from the State's failure to preserve and analyze the hair and semen samples.\(^104\) The decision whether to issue a "missing
evidence" instruction is within the trial court's discretion.\textsuperscript{105}

In \textit{Miller v. Montgomery County}\textsuperscript{106} the Court of Special Appeals held that the alleged destruction of evidence by a party to a civil suit does not give rise to a separate cause of action.\textsuperscript{107} According to the court, spoliation (i.e., the destruction, mutilation, or alteration of evidence by a party to the action)\textsuperscript{108} gives rise only to inferences or presumptions unfavorable to the spoliator, and the correct remedy is appropriate jury instructions.\textsuperscript{109}

\section*{E. Qualification of Expert Witness}

In \textit{Miller v. Montgomery County}\textsuperscript{110} the Court of Special Appeals also held that an expert witness was competent to offer an opinion concerning an alleged defect in a traffic light, despite the witness' lack of expertise in the repair and maintenance of the particular piece of equipment involved.\textsuperscript{111} The expert witness, a civil engineer with a specialty in traffic engineering, had been qualified as an expert in "traffic signalization" in other judicial proceedings.\textsuperscript{112} He rendered an opinion concerning a possible signal malfunction that may have contributed to the automobile accident at issue in the case.\textsuperscript{113} The court reiterated the Court of Appeals' statement in \textit{Wilson v. State}:\textsuperscript{114} Expert testimony is admissible if it will assist the jury in an unfamiliar area and if the court is satisfied that the expert's inference at trial and had argued it to the jury during closing remarks. \textit{Id.} Moreover, the court noted that no Maryland court has ever held that a party is entitled to a missing evidence instruction. This is perhaps because, as with missing witness instructions, the failure to give a missing evidence instruction neither removes the inference nor renders the inference weightier than other inferences. \textit{Id.} at 611-12, 493 A.2d at 404; see \textit{Yuen v. State}, 43 Md. App. 109, 403 A.2d 819 (1979), \textit{cert. denied}, 444 U.S. 1076 (1980) (failure to grant missing witness instruction is not error).

\textsuperscript{105} 63 Md. App. at 612, 493 A.2d at 405.
\textsuperscript{107} \textit{Id.} at 214, 494 A.2d at 768. \textit{Miller} involved a personal injury suit resulting from an automobile accident. \textit{Id.} at 205, 494 A.2d at 763.
\textsuperscript{108} \textit{Id.} at 214, 494 A.2d at 767.
\textsuperscript{109} \textit{Id.} at 213-15, 494 A.2d at 767-68.
\textsuperscript{110} \textit{Id.} at 202, 494 A.2d at 761.
\textsuperscript{111} \textit{Id.} at 211-13, 494 A.2d at 766-67. In a negligence action for personal injuries that Miller suffered in an automobile accident, the lower court directed a verdict in favor of Montgomery County and two other parties. The primary point at issue was the functioning of a traffic light at the site of the accident. \textit{Id.} at 205, 494 A.2d at 763.
\textsuperscript{112} \textit{Id.} at 211-12, 494 A.2d at 766. The expert witness had a Ph.D. in civil engineering and taught courses at Georgia Tech in traffic signals and coordinated systems. \textit{Id.} at 211, 494 A.2d at 766.
\textsuperscript{113} \textit{Id.} at 212, 494 A.2d at 766.
\textsuperscript{114} 181 Md. 1, 26 A.2d 770 (1942).
background is credible.\textsuperscript{115} The court found the expert witness in \textit{Miller} to have met this standard\textsuperscript{116} even though the witness was personally unable to repair the allegedly faulty component.\textsuperscript{117}

\textbf{F. Sequestration}

In \textit{McCray v. State}\textsuperscript{118} the Court of Appeals held that a trial court errs by invoking a sequestration rule violation\textsuperscript{119} to bar a defense witness from testifying, if the State had not requested sequestration and if the court has not entered a sequestration order.\textsuperscript{120} The court recognized that trial judges possess broad discretion in the conduct of trials.\textsuperscript{121} Nonetheless, the sequestration rule requires judges to enter an order of sequestration before they may impose sanctions for violation of the rule.\textsuperscript{122} Without an order, therefore, a judge lacks the power to prevent a witness from testifying.

\textbf{G. Testimonial Competence}

In \textit{Myers v. State}\textsuperscript{123} the Court of Appeals held that under section 9-104 of the Courts and Judicial Proceedings Article, a person found guilty of perjury, but given probation before judgment,\textsuperscript{124} is competent to testify.\textsuperscript{125} In doing so, the court analyzed the meaning

\textsuperscript{115} \textit{Id.} at 6, 26 A.2d at 773.
\textsuperscript{116} 64 Md. App. at 212, 494 A.2d at 766-67.
\textsuperscript{117} \textit{Id.} The expert witness testified that he did not and could not perform the actual repair of signal components, but that he relied on an electronic technician to do so. \textit{Id.}, 494 A.2d at 766. That an expert witness with sufficient factual knowledge in an area has never actually performed a particular procedure is not a disqualifying factor. \textit{Rodman v. Harold}, 279 Md. 167, 367 A.2d 472 (1977).
\textsuperscript{118} 305 Md. 126, 501 A.2d 856 (1985).
\textsuperscript{119} \textit{Id.} at 128, 501 A.2d at 857.
\textsuperscript{120} \textit{Id.} at 133, 501 A.2d at 860.
\textsuperscript{121} \textit{Id.} at 134, 501 A.2d at 860.
\textsuperscript{122} \textit{Id.} at 134, 501 A.2d at 860.
\textsuperscript{123} 303 Md. 639, 496 A.2d 312 (1985).
\textsuperscript{124} \textit{MD. ANN. CODE art. 27, § 641 (Supp. 1986) provides in part:}
\textit{(a) Probation after plea or finding of guilt; power of court to provide terms and conditions; waiver of right to appeal from judgment of guilt—(1)(i) Whenever a person accused of a crime pleads guilty or nolo contendere or is found guilty of an offense, a court exercising criminal jurisdiction, if satisfied that the best interests of the person and the welfare of the people of the State would be served thereby, and with the written consent of the person after determination of guilt or acceptance of a nolo contendere plea, may stay the entering of judgment, defer further proceedings, and place the person on probation subject to reasonable terms and conditions as appropriate.}
\textsuperscript{125} \textit{MD. CTS. & JUD. PROC. CODE ANN. § 9-104 (1984) provides that “a person convicted of perjury may not testify.”}
of the term "conviction" in section 9-104 and concluded that "a person is not 'convicted' of an offense until the court enters a judgment upon the verdict of guilty." The court then turned its attention to whether the disposition of probation before judgment alters its determination as to the meaning of "conviction.

Citing the legislative history of Maryland's probation before judgment statute, the court held that "probation before judgment...is not a 'conviction,' and a person who receives probation before judgment is not convicted of the crime for which he has been found guilty, unless the person violates the probation order and a court enters a judgment on the finding of guilt." The court rejected the argument that its holding frustrated the legislature's intent, reasoning that if the General Assembly had intended for those found guilty but not convicted of perjury to be disqualified, it could easily have done so by avoiding the use of the words "convicted of perjury.

H. Arguing Law

In White v. State the Maryland Court of Special Appeals held that the concepts of reasonable doubt and circumstantial evidence may not be argued to the jury. During final argument, the prosecution read passages from two Maryland appellate cases concerning reasonable doubt and circumstantial evidence. The defendant contended that the trial court erred in allowing the reading of these

126. 303 Md. at 645, 496 A.2d at 315. The court found that the term "convicted" has two different meanings: (1) in the general sense it means the establishment of guilt, independent of the judgment of the court; and (2) in its "legal" sense it means "the final judgment and sentence rendered by a court pursuant to a verdict or plea of guilty, and it is frequently used to denote the judgment or sentence." Id. at 642-43, 496 A.2d at 313-14. The court concluded that "conviction" has generally been defined in its legal and technical sense when a legal disability is at stake. Id. at 643, 496 A.2d at 314.

127. Id. at 645, 496 A.2d at 315.

128. Id. at 645-47, 496 A.2d at 315-16.

129. Id. at 647-48, 496 A.2d at 316. The Court of Special Appeals recently addressed this issue and similarly concluded that probation before judgment does not constitute "conviction." Tate v. Board of Educ. of Kent County, 61 Md. App. 145, 149, 485 A.2d 688, 690, cert. denied, 303 Md. 42, 491 A.2d 1197 (1985).

130. 303 Md. at 648-49, 496 A.2d at 317. The court refused to "attribute the legislature's choice of words to careless draftsmanship or accident." Id.


132. Id. at 120, 502 A.2d at 1094-95.

passages, because it constituted an invasion of the court’s prerogative to instruct the jury, and because the passages were inconsistent with the actual instructions given. 134

The Court of Special Appeals held that its prior decision in *Newman v. State* 135 was dispositive. 136 According to *Newman*, counsel may argue law to the jury only if a dispute exists concerning the "law of the crime." 137 In the absence of a dispute, counsel may not argue law even if the argument is "consistent" with the court’s instructions. 138

Applying *Newman*, the court ruled that the trial court erred in allowing the prosecutor to explain the concepts of reasonable doubt and circumstantial evidence. 139 The court, however, determined that this error was harmless 140 and found that the jury would have returned the same verdict without the prosecutor's improper argument. 141 The court cautioned, nonetheless, that it might not reach

---

134. 66 Md. App. at 117, 502 A.2d at 1093.
136. 66 Md. App. at 117, 502 A.2d at 1093.
137. *Id.* at 118, 502 A.2d at 1093. In *Stevenson v. State*, 289 Md. 167, 423 A.2d 558 (1980), the Court of Appeals distinguished matters of law for the court from matters of law for the jury. In *Montgomery v. State*, 292 Md. 84, 437 A.2d 654 (1981), the court further refined the distinction by listing six characteristics of our criminal justice system that are not the law of the crime and cannot be argued by counsel:
   (1) The accused is presumed innocent until proved guilty by the State by evidence beyond a reasonable doubt.
   (2) The State has the burden to produce evidence of each element of the crime establishing the defendant’s guilt.
   (3) The defendant does not have to testify and the jury may infer no guilt because of his silence.
   (4) The evidence to impeach the defendant bears only on his credibility and may not be used to prove the substance of the offense.
   (5) The evidence is limited to the testimony (and reasonable inferences therefrom) and the exhibits admitted into evidence.
   (6) Evidence does not include the remarks of the trial court or arguments of counsel.

*Id.* at 91, 437 A.2d at 658.
139. *Id.* at 120, 502 A.2d at 1094-95.
140. *Id.* at 120-21, 502 A.2d at 1095.
141. *Id.* at 122-23, 502 A.2d at 1095-96. Since the passages read by the prosecutor were very similar to the instructions given by the trial court, the error was harmless. *Id.*
the same result in all cases involving this type of error, and that its decision was not intended to encourage prosecutorial embellishment of trial court instructions.\textsuperscript{142}

\textbf{Annabelle L. Lisic}

\textbf{Michael J. Snider}

\textsuperscript{142} \textit{Id.} at 123-24, 502 A.2d at 1096.
VII. FAMILY LAW

A. Monetary Award Under the Marital Property Act

The Marital Property Act\(^1\) was designed to adjust the equities between a husband and a wife in a divorce proceeding.\(^2\) The statute calls for a determination of a financial award based upon nonmonetary as well as monetary contributions to a marriage.\(^3\) In addition, since Maryland's title system of property traditionally discriminated against women,\(^4\) the Act rejects a legalistic notion of property.

Under the Marital Property Act a trial judge must follow a three-step process in adjusting the rights and equities of the parties. These steps involve: (1) the determination of what is marital property;\(^5\) (2) the valuation of all marital property;\(^6\) and (3) the determination of the amount of the award on the basis of ten statutory factors.\(^7\) The trial judge must perform each step separately and in strict succession.

Many disputes have arisen in Maryland under the Marital Property Act. Some have involved the general purpose of the Act or the judge's application of the three-step process. But while all three steps are necessary for any monetary award, appeals have often focused on one of the steps. The following cases will be grouped accordingly.

1. Three-Step Process: General Provisions of the Marital Property Act.—Administration of the Marital Property Act rests upon the traditional presumption that judges know and will properly apply the law. In reviewing a trial court's monetary award, an appellate

---


[I]t is the policy of this State that marriage is a union between a man and a woman having equal rights under the law . . . . [W]hen a marriage is dissolved the property interests of the spouses should be adjusted fairly and equitably, with careful consideration being given to both monetary and nonmonetary contributions made by the respective spouses to the well-being of the family . . . .

1978 Md. Laws 2305.
6. Id. at § 8-204.
7. Id. at § 8-205.
court should reverse only in cases of clear error. Nonetheless, this presumption will give way when the trial record does not indicate adequate support for the judge’s decision.

In *Campolattaro v. Campolattaro* the Court of Special Appeals held that the record below did not adequately reflect that the chancellor properly applied the three-step process for determining the amount of the monetary award. The appellate court questioned the chancellor’s application of each of the three necessary steps. His oral opinion did not specifically designate marital property, and it erroneously used the date of the separation agreement, rather than the date of the divorce decree, to determine what were marital assets. It did not value any of the spouses’ property. Finally, the opinion gave no indication of which of the ten statutory factors the chancellor had considered in determining the amount of the award.

The presumption that judges know and properly apply the law does not require that a judge enumerate every step in the decision-making process. But if the circumstances of the case do not indicate a well-reasoned decision, the presumption will be rebutted. The court did not mandate a particular form of opinion or checklist, but it warned that failure to recite a standard checklist of issues may give the impression that the trial court neglected the law. Therefore, the trial court should set forth in some detail the basis for its conclusions.

Based upon the incomplete trial record, the Court of Special Appeals vacated the chancellor’s monetary award. In addition, the court vacated the alimony award despite support from the record,

9. *Id.* at 68, 502 A.2d at 1068.
10. *Id.* at 78, 502 A.2d at 1073.
11. *Id.* at 82, 502 A.2d at 1075. The chancellor thus failed to consider a home acquired by the husband in his name after separation but before divorce.
12. *Id.* at 78, 502 A.2d at 1073.
14. 66 Md. App. at 78, 502 A.2d at 1073.
15. *Id.* at 79-80, 502 A.2d at 1074. In fact, in Zorich v. Zorich, 63 Md. App. 710, 717-18, 493 A.2d 1096, 1099-1100 (1985), the court found that the chancellor properly applied the law in an oral opinion in which he neither discussed all of the statutory factors nor articulated all of the bases for his conclusions. The court held that the circumstances supported the presumption that the chancellor properly understood and applied the law.
16. 66 Md. App. at 80, 502 A.2d at 1074.
17. *Id.* at 81, 502 A.2d at 1075.
18. *Id.*
19. *Id.* at 83, 502 A.2d at 1076.
since alimony and monetary awards are so closely intertwined.  

In Spessard v. Spessard21 the Court of Special Appeals held that the traditional rules of contribution for cotenants do not apply in establishing a monetary award under the Maryland Marital Property Act. The court therefore remanded without affirmance or reversal.22

The husband in Spessard sought contribution for home expenses as part of the monetary award upon divorce.23 Traditionally, one cotenant who pays the mortgage, taxes, and carrying costs of jointly owned property is entitled to collect proportionately from the other cotenant.24 In the event of an ouster, however, the tenant in possession generally forfeits the right to contribution.25

The Court of Special Appeals held that the common-law doctrine should not apply so strictly to a divorce proceeding.26 The court stated that a trial judge must apply the three-step statutory process by determining what constitutes marital property, assessing its value, and adjusting the equities in the instant case.27

Although an ouster may affect contribution in setting a monetary award, it is not determinative, but merely another factor for consideration.28 While it may request contribution as part of a monetary award, the court is not required to do so. Any other holding would negate the equitable purpose of the Marital Property Act.29 In determining whether to require contribution, the court must consider what equitable adjustment will conform to the statute's intent.30

20. Id. at 75, 502 A.2d at 1071. Even though the purposes of alimony and monetary awards differ, the court must consider the awards in their "mutual context" to provide an equitable result. See Cotter v. Cotter, 58 Md. App. 529, 535, 473 A.2d 970, 973 (1984).


22. Id. at 96, 494 A.2d at 708.

23. Id. at 87, 494 A.2d at 703.

24. Id. at 88, 494 A.2d at 704.

25. Id. In this case, the Court of Special Appeals found the record unclear as to whether an ouster had in fact occurred, although the lower court held that there was no ouster. Since the basis for establishing no ouster was unclear on the record and therefore not clearly erroneous, the Court of Special Appeals remanded for determination of that issue. Id. at 90, 494 A.2d at 705.

26. The court stressed that the rules of contribution are time-honored and are not to be overruled. Rather, the rules no longer apply in the same way under the Marital Property Act. Id. at 93, 494 A.2d at 706.

27. Id.

28. Id. at 95, 494 A.2d at 707.

29. Id. at 96, 494 A.2d at 708.

30. Id.
The Spessard decision illustrates the equitable nature of the Marital Property Act. There are no hard and fast rules, such as the strict common-law rules of contribution. Every aspect of the case is simply a factor for the judge to consider in fashioning an appropriate remedy.

2. Determination of Marital Property.—a. Definition of "Property."—The first determination that a Maryland court must make in establishing a monetary award under the Marital Property Act is which assets of the husband and wife constitute "marital property" subject to equitable distribution. The Maryland Code defines "marital property" generally as all "property, however titled, acquired by 1 or both parties during marriage." The scope of marital property is often the subject of litigation. Frequently a case will center on whether the "property" in question is a present interest or a mere expectancy of future benefit.

One area of particular controversy in the law has been the extent to which professional degrees constitute marital property. In the usual scenario, one spouse has supported the other through school, and wishes to share in the financial benefits associated with the degree upon divorce. The Maryland Court of Appeals addressed this issue for the first time in Archer v. Archer.32 In Archer the Court of Appeals held that a medical degree and license earned during marriage did not constitute marital property subject to equitable distribution upon divorce under the Marital Property Act.33 The court acknowledged that a broad concept of property is appropriate under Maryland's statute, the purpose of which is to recognize all monetary and nonmonetary contributions to a marriage.34 Other Maryland cases have construed "property" under the statute to include goodwill, obligations, and rights.35

The court wrote, however, that a professional degree does not contain the traditional attributes of property, as it is "neither trans-

33. Id. at 357-58, 493 A.2d at 1079-80.
34. Id. at 352, 493 A.2d at 1077.
35. See Schill v. Remington Putnam Co., 179 Md. 83, 88-89, 17 A.2d 175, 177-78 (1941) (quoting Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193 (1936): "The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns.").
36. Bouse v. Hutzler, 180 Md. 682, 686, 26 A.2d 767, 769 (1942) ("[P]roperty... may reasonably be construed to involve obligations, rights and other intangibles as well as physical things.").
ferable, assignable, devisable, nor subject to conveyance, sale, pledge, or inheritance." A degree is merely an intellectual attainment, not a present property interest, and it remains personal to the holder. There is neither an assignable value that can be ascribed to a degree, nor a guarantee of future income. A mere potential to increase earning capacity is too uncertain and speculative to be considered marital property within the Maryland statute, and nothing within the Marital Property Act suggests that the legislature meant to extend the scope of property to include a professional degree.

The court reached its conclusion after reviewing similar rulings in other jurisdictions and reinforced the trend away from recognizing professional degrees as marital property. Of the twenty-four jurisdictions that had considered the issue, all but two had clearly held that a degree does not constitute marital property. Most courts reasoned that a professional degree simply lacks the traditional attributes of property.

In addition, the Court of Appeals distinguished a medical de-

37. 303 Md. at 353, 493 A.2d at 1077.
38. Id. at 357, 493 A.2d at 1080.
39. Id. ("[A]t best it represents a potential for increase in a person's earning capacity . . . .").
40. Id., 493 A.2d 1079.
41. Id. at 352-56, 493 A.2d at 1077-79. The other two jurisdictions, Michigan and New York, were less clear, yet they also seemed to agree with the majority view. In Woodworth v. Woodworth, 126 Mich. App. 258, 261, 337 N.W.2d 332, 334 (1983), the Michigan Court of Appeals, an intermediate court, held that a professional degree was marital property. Two subsequent Court of Appeals decisions, however, cast doubt on the strength of this holding. A professional degree was held not to be marital property in Olah v. Olah, 135 Mich. App. 404, 354 N.W.2d 359 (1984), and in Watling v. Watling, 127 Mich. App. 624, 339 N.W.2d 505 (1983), the court held that the benefits the wife received during the marriage sufficiently compensated her for her contributions to the degree. Two New York cases advanced the notion that the need to reach an equitable solution outweighed the fact that a degree is not traditional property. Both cases were reversed on appeal. Kutanovski v. Kutanovski, 109 A.D.2d 822, 486 N.Y.S.2d 338 (1985), vacated, 502 N.Y.S.2d 218 (1985); O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 505 (1983), modified, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

Note, however, that on December 26, 1985, six months after the Archer decision, the New York Court of Appeals reversed O'Brien and held a professional degree to be marital property. 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).

42. 303 Md. at 353-54, 493 A.2d at 1077-78. Other rationales given by courts include: (1) a degree is too speculative in value; (2) if spousal contribution is viewed as an investment, it demeans the concept of marriage; (3) future earnings are personal to the worker and constitute a mere expectancy; and (4) a degree is best considered when establishing alimony. See, e.g., Wisner v. Wisner, 129 Ariz. 333, 339-41, 631 P.2d 115, 121-23 (1981) ("[E]ducation is an intangible property right, the value of which, because of its character, cannot properly be characterized as property subject to division between the spouses.").
gree from vested pension rights, which have been held to constitute "property" within the meaning of the statute. The court concluded that although pension rights also were not traditional property interests, they were contractual rights that could be valued, not the mere expectancy of value associated with a professional degree.

The court noted that a professional degree is not without significance in a divorce proceeding, since the court may consider a spouse's earning capacity when establishing an alimony award. Using one spouse's degree as a factor under the alimony statute is the most appropriate means of providing economic compensation to the other spouse, if public policy warrants such compensation.

In Unkle v. Unkle the Court of Appeals held, in a case of first impression, that an inchoate personal injury claim which arose during the time between separation and divorce, and for which the injured spouse had communicated with an attorney but had not filed an action, is not "marital property." The court deemed the husband's injuries to be uniquely personal. Although an inchoate personal injury claim has some aspects of property, it is a mere expectancy, not an existing property interest. It is therefore not considered an asset "acquired during marriage" for purposes of the Marital Property Act.

The court defended its conclusion despite the broad construction to be given "marital property" under the Marital Property Act. Explicit in the legislative history of the Act is the notion that equity...
ble distribution of property upon divorce recognizes the duty of each spouse to contribute his or her best efforts to the marriage. However, the husband did not acquire his inchoate personal injury claim, which was purely fortuitous, while attempting to acquire marital assets. Thus, the claim is not the type of resource contemplated by the legislature in drafting the Marital Property Act.

The court further held that the trial court abused its discretion in establishing an in futuro modification of child support. The trial court may modify child support only upon an affirmative showing of a material change in the child's needs or a parent's ability to pay. The court may not anticipate that such changes will occur. Therefore, the trial court's decree was vacated, and the case was remanded for further proceedings.

In *Green v. Green* the Court of Special Appeals reviewed a chancellor's monetary award. The court focused primarily on whether unexercised stock options constituted marital property, and how certain property should be valued.

In *Green* a wife claimed that the trial court had incorrectly excluded from marital property unexercised stock options provided to her husband through employment. In a case of first impression, the Court of Special Appeals agreed. The court compared stock options to pension funds, and characterized both as forms of compensation that granted an employee a chose in action if the employer tried to rescind them. Although the stock options were not assign-
able, they were "an economic resource" that could be valued. Thus, they constituted property. Since the husband received the stock options during the term of the marriage, the options qualified as marital property. The court remanded the case to the chancellor for an adjustment of the monetary award based on this holding.

b. *Time Limit: The Ninety-Day Rule.*—The court must determine what constitutes marital property when the court grants a divorce decree or within ninety days of the decree, unless the court extends the deadline before the ninetieth day and the parties consent to the extension. Thus, in *Ticer v. Ticer* the Court of Special Appeals held that a trial court lost its jurisdiction to designate a pension fund as marital property because the court failed to make a designation within ninety days and the parties did not properly consent to an extension. The parties must give consent within ninety days.

In *Zorich v. Zorich* the Court of Special Appeals stated an exception to the ninety day rule. The court held that the trial judge did not err in granting a monetary award to the wife even though the supplemental decree granting the award was filed more than ninety days following the divorce decree. The trial judge had orally reserved the issues of monetary awards and alimony when granting the divorce decree, and had requested that the wife’s counsel draft a supplemental decree granting the monetary award.

The court acknowledged the general rule that a party’s failure to initiate an action within the statute of limitations will serve as a bar to the action. In this instance, however, the arbiter of the controversy was responsible for the delay. The trial judge bears the responsibility for filing the supplemental decree; merely requesting a

---

64. *Id.* at 137, 494 A.2d at 728.
65. *Id.* at 136, 494 A.2d at 728.
66. *Id.* at 138, 494 A.2d at 729.
69. The court held that a 1982 amendment to the statute authorizing extension by mutual consent still required that the parties give consent within 90 days. *Id.* If, as here, parties attempt to extend the deadline by consenting *after* the 90 day period, they are in essence privately conferring jurisdiction, which is impermissible. In sum, if the parties consent within 90 days to extend the deadline beyond the 90th day, the court has jurisdiction to designate marital property. But if the consent itself is given after the 90th day, there is no jurisdiction. *Id.* at 737-38, 493 A.2d at 1110.
71. *Id.* at 713, 493 A.2d at 1097.
72. *Id.* at 715, 493 A.2d at 1098.
party to draft a document does not shift that duty.\textsuperscript{73} The Court of Special Appeals declined to bar the wife's action for monetary relief solely on the basis of the judge's failure to act.\textsuperscript{74}

c. Separation Agreements and Marital Property.—The Marital Property Act provides that what might otherwise be marital property may be "excluded by valid agreement."\textsuperscript{75} Parties often attempt to alter the character of marital property through antenuptial or separation agreements. Appellate cases in the past year considered both the specificity of an exclusion from marital property and the validity of the agreement itself.

In \textit{Falise v. Falise}\textsuperscript{76} spouses had entered into a separation agreement containing a waiver of ownership provision as to property then held or after-acquired.\textsuperscript{77} After the agreement, the parties reconciled, and built and titled a house in both names.\textsuperscript{78} Following a brief reconciliation, the parties filed for divorce. The question presented was what impact the separation agreement had upon the classification of the land and house as marital or nonmarital property under the Marital Property Act.\textsuperscript{79}

The Court of Special Appeals held that to be excluded from the statute, property must be specifically designated in a separation agreement as nonmarital.\textsuperscript{80} In this case, when the spouses executed the agreement, the court had no jurisdiction to make a marital distribution, and the spouses had not yet acquired the land and house; therefore, the wife could not release a right that she did not have

\begin{footnotes}
\item[73] \textit{Id.} at 716, 493 A.2d at 1099. The court noted that the trial judge "could and should have imposed strict guidelines for the submission of the decree, and, in any event, made sure that it was submitted prior to the expiration of the 90th day." \textit{Id.} at 716 n.5, 493 A.2d at 1099 n.5.
\item[74] \textit{Id.} at 716, 493 A.2d at 1099. In this instance the parties were not attempting to confer jurisdiction by consent where none existed. Jurisdiction still existed because of the nature of the delay. \textit{See id.} at 714, 493 A.2d at 1098.
\item[77] The agreement provided, in part: "[T]he parties do hereby mutually release all rights which said parties might now have or may hereafter have as the husband, wife, or otherwise, in and to any property, real or personal, that either of said parties may own or hereafter acquire..." 63 Md. App. at 578 n.1, 493 A.2d at 387 n.1.
\item[78] The husband originally purchased a tract of land in his name only. As the parties began discussing a possible reconciliation, they jointly planned construction of a home on the land. When the parties received financing for the house, a new deed was issued titling the property in both names. \textit{Id.} at 577-78, 493 A.2d at 387.
\item[79] \textit{Id.} at 579, 493 A.2d at 388.
\item[80] \textit{Id.} at 581, 493 A.2d at 389 ("[T]he parties must specifically provide that the subject property must be considered 'non marital' or in some other terms specifically exclude the property from the scope of the Marital Property Act.").
\end{footnotes}
and could not fairly anticipate.\(^1\) The "after acquired" property provision in the separation agreement was by no means specific enough to exclude the land and house from consideration under the Marital Property Act.\(^2\)

If the separation agreement does not categorize property, the court must make a determination under the statutory "source of funds" test for purchased goods: if marital assets fund a particular property item, then the item is considered marital property.\(^3\) Because the source of funds for the land and house was traceable to the Falises' marital assets, and the couple acquired the property before the divorce decree, the land and house were marital property that the court should distribute equitably.\(^4\) The Court of Special Appeals remanded the case for a readjustment of the equities.\(^5\)

In *Carsey v. Carsey*\(^6\) a husband abandoned his wife of fourteen years. Upon leaving, he left two notes and a tape in which he relinquished all rights to the marital estate.\(^7\) Both spouses petitioned for divorce, and the court granted the husband a divorce on no-fault grounds. In a subsequent hearing concerning distribution of marital property, the husband argued that the notes and tape were invalid.\(^8\) The trial judge determined that the three communications

---

\(81.\) *Id.* (citing *Smith v. Smith*, 72 N.J. 350, 358-59, 371 A.2d 1, 5-6 (1977)).

\(82.\) *Id.*

\(83.\) *Id.* at 582-83, 493 A.2d at 389-90.

\(84.\) *Id.* at 582-85, 493 A.2d at 388-91. The court further upheld the trial judge's determination that titling the property jointly did not create a presumption that the husband intended the house to be a gift to his wife. The legalistic notion of property is not appropriate in establishing a monetary reward: "source of funds" remains the yardstick. *Grant v. Zich*, 300 Md. 256, 269-72, 477 A.2d 1163, 1167-69 (1984).

\(85.\) The trial judge granted the wife a monetary award of $2500 "as her interest in the real estate." 63 Md. App. at 584, 493 A.2d at 390. The facts of the case indicate that the husband should have received a monetary award. Apparently, the judge believed that his action denied the wife any interest in the real estate other than the $2500. *Id.* Such a settlement would effectively constitute a transfer of title to the property. But "the court may not transfer the ownership of personal or real property from 1 party to the other." *MD. FAM. LAW CODE ANN.* § 8-202(a)(3) (Supp. 1986). Furthermore, the court may not grant a fixed sum monetary award, in settlement of the one party's interest in property, without carefully considering the ten statutory factors listed in § 8-205. 63 Md. App. at 585, 493 A.2d at 391; *see Ward v. Ward*, 48 Md. App. 307, 311, 426 A.2d 443, 446 (1981). Accordingly, the appellate court remanded the case for further proceedings. 63 Md. App. at 585-86, 493 A.2d at 391.


\(87.\) *Id.* at 547, 508 A.2d at 534. The first of the two notes contained the following: "I hereby irrevocably, and for the future, relinquish all claims to any estate of J.N. & N.S. Carsey. I also disclaim any responsibility for liabilities related to that estate." *Id.*

\(88.\) *Id.* at 549, 508 A.2d at 535. The husband advanced three arguments: the agreement was simply a statement of intention and thus lacked specificity; there was no con-
constituted an offer, accepted by the wife,\textsuperscript{89} that precluded the husband's estate from being categorized as marital property.\textsuperscript{90} Pursuant to the agreement, the court declared the wife the sole owner of her husband's abandoned estate.\textsuperscript{91}

The Court of Special Appeals upheld the decision below as not clearly erroneous.\textsuperscript{92} The court distinguished \textit{Falise} on the ground that the instant agreement specifically dealt with identifiable property in the parties' possession at the time of the agreement. The specificity of the husband's description created "a valid agreement" for purposes of the Marital Property Act.\textsuperscript{93} The court ordered title in the estate transferred to the wife.\textsuperscript{94}

3. \textit{Valuation of Marital Property}.—The second step in determining a proper monetary award under the Marital Property Act is the valuation of all marital assets.\textsuperscript{95} The court seeks to assign each asset a current fair market value, which is defined as "the amount at which property would change hands between a willing buyer and a willing seller."\textsuperscript{96} The determination of value is an arduous and often speculative endeavor, frequently requiring detailed expert testimony,\textsuperscript{97} but it is a necessary step towards fair distribution of marital assets.

In \textit{Green v. Green},\textsuperscript{98} the Court of Special Appeals held that a husband's unexercised stock options constituted marital property.\textsuperscript{99} The court then turned its attention to valuing the stocks options and partnership interests.

The court recommended an elastic approach to valuing stock options, which would not compel the holder to exercise the op-
tion. By determining the market value of the stock at the date of the decree and the cost to exercise the option, and then establishing a percentage by which profits would be divided, if, as, and when the options are exercised, the court can assign a value to the options.

The trial court had classified the husband's interest in a partnership as marital property. The Court of Special Appeals reversed the lower court's method of valuing this interest, holding that the lower court erred in deducting the losses incurred in a bad partnership investment from the value of the marital estate. A partnership with liabilities in excess of assets has a value of zero, not a negative value.

The court further found that the trial court incorrectly categorized certain indebtedness of the husband as marital debts. Marital debts are "directly traceable to the acquisition of marital property." Marital property represented by a marital debt has not yet been acquired for purposes of distribution upon divorce. Thus, the court must decrease the value of marital property by the amount of any attaching marital debt. On the other hand, a nonmarital debt does not affect the value of the marital property, but does offset the balancing of the equities in determining a monetary award.

The court applied this distinction to several debts in reclassifying them as nonmarital. The first was a debt that the husband incurred in financing a loan to his partnership. While the court could trace the debt directly to the acquisition of a promissory note from the partnership to the husband, marital debt may only reduce the value of the corresponding marital property. Since the court had previously declared the note valueless, the debt could not reduce

100. Id. at 137, 494 A.2d at 729. To compel the option holder to exercise the option for valuation purposes would deprive the holder of the essence of the property interest, which is the right to choose whether to purchase.

101. Id. at 137-38, 494 A.2d at 729. This valuation method has been used for unmatured pensions. See Deering v. Deering, 292 Md. 115, 129-30, 437 A.2d 883, 890-91 (1981).

102. 64 Md. App. at 141-42, 494 A.2d at 731.

103. Id. at 146, 494 A.2d at 733 (quoting Schweitzer v. Schweitzer, 301 Md. 626, 636, 484 A.2d 267, 272 (1984)).

104. Id.

105. In practice, therefore, either type of debt may affect the monetary award. The difference concerns the stage at which the debt is considered. Marital debt affects the value of marital property, the second step in the three-step process. Nonmarital debt affects the amount of the actual award, the third step. See id. at 146, 494 A.2d at 733.

106. Id. at 138-39, 494 A.2d at 729.
the note's value further. The court also held that federal and state income taxes due upon a sale of stock, the proceeds of which were used to buy a new home, did not constitute a marital debt, since the tax liability could not be traced directly to the purchase of the home. The court thus ordered that on remand the trial judge should increase the value of the marital property by the amount of these improper deductions.

B. Alimony

Maryland courts award alimony under the principle of rehabilitation. Alimony payments aim to help the economically dependent spouse become self-supporting, and therefore should end when that spouse is financially independent. Under certain circumstances, however, the trial court may order that alimony payments continue indefinitely. The case of Brandon v. Brandon concerned the propriety of an indefinite alimony award.

In Brandon the chancellor had held, after multiple remands for factual findings by the Master for Domestic Relations Causes (master), that a husband was to provide alimony payments for an indefinite period of time. The husband, citing section 11-106(c) of the Family Law Article, appealed on the ground that the award of indefinite alimony was clearly erroneous. Section 11-106(c) pro-

107. Id. at 146, 494 A.2d at 733.
108. Id. at 147, 494 A.2d at 733-34.
109. Id. at 148, 494 A.2d at 734.
   It is apparent, therefore, that the concept of alimony as a lifetime pension enabling the financially dependent spouse to maintain an accustomed standard of living has largely been superceded by the concept that the economically dependent spouse should be required to become self-supporting, even though that might result in a reduced standard of living.
113. The master is a ministerial officer who conducts a full evidentiary hearing, then reports findings of fact and recommendations to the chancellor. The chancellor is charged with determining the parties' legal status. The chancellor gives great deference to the master's findings of fact, but the master's recommendations serve as nothing more than a guide. See Wenger v. Wenger, 42 Md. App. 596, 602-08, 402 A.2d 94, 97-100 (1979) (distinguishing between the master's findings of fact, which are based on first-hand observation of the witnesses, and the master's recommendations, which are findings of law).
114. The trial court set alimony at $450 per month, awarded the wife a 50% vested interest in her husband's pension, and awarded attorney's fees to the wife. 66 Md. App. at 227, 503 A.2d at 271.
115. Id. at 224, 503 A.2d at 269.
vides that the court may award indefinite alimony payments only if: (1) the party seeking alimony cannot reasonably be expected to become self-supporting; or (2) even after that party becomes self-supporting, the respective living standards of the parties will be unconscionably disparate.\textsuperscript{116}

The Court of Special Appeals noted that the master had never made either of the two findings necessary to justify indefinite alimony.\textsuperscript{117} Upon reviewing the master’s findings, the chancellor chose to set no termination date for alimony, thus in effect creating indefinite alimony.\textsuperscript{118} While the court could not deem the chancellor’s actions erroneous, it did remand the case to the chancellor to review the evidence, test it against the two statutory criteria, and determine if any basis existed for indefinite alimony.\textsuperscript{119}

Alimony issues were also raised in \textit{Rosenberg v. Rosenberg}. These issues are discussed in subpart C, below.

\textbf{C. Rosenberg v. Rosenberg}

Perhaps the most publicized family law case in Maryland in the past year was the Rosenberg divorce proceeding.\textsuperscript{120} Henry Rosenberg, Jr. is the Chairman of the Board and Chief Executive Officer of the Crown Central Petroleum Corporation (Crown). His net worth approached $33,000,000 at the time of the divorce trial.\textsuperscript{121} The Court of Special Appeals’ lengthy opinion examined many issues concerning the determination and valuation of marital property, and the establishing of a proper monetary award and alimony. While the precedential value of the court’s opinion is not yet clear, \textit{Rosenberg} stands as a vivid illustration of the type of detailed analysis that trial and appellate courts must conduct when dividing a marital estate.

On June 15, 1984, a chancellor in Baltimore City granted a di-
orce decree ending the thirty-two year Rosenberg marriage. The chancellor found that both parties had committed adultery; grounds for absolute divorce lay in either these adulterous acts or the parties' two year separation.

The chancellor ordered that: (1) the husband pay his wife a monetary award of $1,750,000; (2) the husband pay alimony of $275,000 per year; (3) the marital home and its contents be sold at public auction if the parties could not reach an agreement regarding disposition of the property within eighteen months; (4) the husband pay the wife's attorney's fees; and (5) the husband pay the wife's court costs. Following slight revisions of the court order, the chancellor held a hearing on the wife's litigation expenses, and ordered Mr. Rosenberg to pay approximately $225,000 to his wife's attorney for those expenses.

On appeal Mr. Rosenberg raised four issues: the amount of the monetary award; the amount of the alimony award; the award of attorney's fees; and the award of litigation expenses. On cross-appeal Ms. Rosenberg raised the issue whether the court should have included the increased value of certain gifts in marital property.

1. Monetary Award.—a. Inclusion of Loans and Cash Advances.—The chancellor's determination of marital property included an interest-free promissory note from Dorothy Bohny, the interest foregone on that note, and the amount of cash advances made to Ms. Bohny. Mr. Rosenberg contended that the court erred in deeming these items marital property, because there was no evi-

122. Id. at 498, 497 A.2d at 490.
123. Id. at 493-94, 497 A.2d at 488.
124. Id. The court's opinion does not specify on which ground the divorce a vinculo matrimoni was granted.
125. Id. at 498-99, 497 A.2d at 490-91.
126. On July 13, 1984, the trial court issued a supplemental opinion finding that the wife obtained her interest in the marital residence by personal gift, and that the husband intended his wife to be the sole owner of jewelry he had given her as gifts. On August 6, 1984, the court granted Mr. Rosenberg's motion to stay the payment of the monetary award upon his posting a bond, and delayed the sale of the marital residence until after he paid the monetary award, but denied motions to stay the payment of alimony and counsel fees. Id. at 499-500, 497 A.2d at 491.
127. Id. at 500, 497 A.2d at 491.
128. Id.
129. Id. at 500-01, 497 A.2d at 491-92. Though Ms. Rosenberg designated two issues in her cross-appeal, they were virtually identical.
130. Ms. Bohny is apparently Mr. Rosenberg's new wife. Id. at 501 n.2, 497 A.2d at 492 n.2.
131. Id. at 501, 497 A.2d at 492.
dence that he intentionally dissipated the marital estate through these transactions.\textsuperscript{132}

The Court of Special Appeals declared that the evidence supported the trial court's findings.\textsuperscript{133} Specifically, Mr. Rosenberg lent money to Ms. Bohny after announcing his intention to end the marriage, and he channelled the funds through a Texas bank account and lawyer to Ms. Bohny.\textsuperscript{134} Nevertheless, he denied knowledge of the transaction during his deposition.\textsuperscript{135} The promissory note for the loan provided for repayment to a straw corporation used by Mr. Rosenberg.\textsuperscript{136} These facts, taken together, demonstrated Mr. Rosenberg's intent to conceal the transactions and thereby dissipate the marital estate.\textsuperscript{137}

In addition to including the value of the promissory note and cash advances as part of marital property, the chancellor properly included all interest foregone on the interest-free note.\textsuperscript{138} Had Mr. Rosenberg lent this money in the ordinary course of business, he would have earned interest. Through the fraudulent loan to Ms. Bohny, Mr. Rosenberg wrongfully deprived his wife of an opportunity to increase the marital estate.\textsuperscript{139} Thus, the trial court did not err by including imputed interest on the loan in its determination of marital property.\textsuperscript{140}

b. Valuation of Pension Plans and Retirement Accounts.—A large portion of the marital property came from four pension and retire-
ment plans maintained by Crown for Mr. Rosenberg. He objected both to the date and method of valuing these plans.

Mr. Rosenberg first contended that the trial court erred in valuing the pension and retirement plans as of the date the trial ended, rather than the date of the divorce decree. He argued that Maryland case law requires the chancellor to value marital property independently after the trial. The Court of Special Appeals noted that such a requirement would be burdensome and impractical. The chancellor is required only to make a reasonable effort to approximate the value of marital property as of the divorce decree. Since the chancellor based his valuations on evidence produced at trial, and the trial ended only one month before the divorce decree, the court found no error as to the valuation date.

The trial court valued two retirement plans based upon a September 30, 1983, Crown benefit statement. Mr. Rosenberg argued that figures contained in the statement were outdated. Because this was the most recent statement available, and because Mr. Rosenberg did not object to its use at trial, the court affirmed the chancellor's use of the statement in valuation.

Mr. Rosenberg also complained about the method of valuing his Crown Retirement Income Plan benefits. First, he objected to the trial court's assumption that his salary would increase by 9.5 percent per year until retirement. Second, he argued that the court did not properly consider the effects of the 1982 Tax Equity and Fiscal Responsibility Act (TEFRA) on the retirement plan.

At trial, both parties had presented expert witnesses to assign a present value to Mr. Rosenberg's Retirement Income Plan. The key

141. Those plans were: (1) an employee savings plan; (2) an employee stock ownership plan; (3) an employee pension trust; and (4) a retirement income plan. The trial court found that a fifth plan, a supplemental retirement income plan, was not marital property, because Mr. Rosenberg could not participate in the plan during marriage. Even when Mr. Rosenberg became eligible, the Board of Directors would have to approve his membership in the plan. Id. at 504-06, 497 A.2d at 493-94.
142. Id. at 507, 497 A.2d at 494-95. The trial ended on May 17, 1984, and the decree was granted on June 15, 1984—28 days later.
143. See, e.g., Dobbyn v. Dobbyn, 57 Md. App. 662, 676, 471 A.2d 1068, 1075 (1984) (requiring that marital property "be valued as of the date of the decree of absolute divorce based upon evidence produced at trial").
144. 64 Md. App. at 507, 497 A.2d at 495.
145. Id. at 507-08, 497 A.2d at 495.
146. The employee savings plan and stock ownership plan. Id. at 508, 497 A.2d at 495.
147. Id. Crown issued benefit statements only once a year, and Mr. Rosenberg failed to provide a more recent valuation.
148. Id.
difference between the parties’ actuarial evaluations was the allowance for a 9.5 percent yearly salary increase by Ms. Rosenberg’s witness. The trial court accepted the allowance as reasonable, since Mr. Rosenberg’s annual salary increase as Chairman of the Board at Crown had been 12.8 percent. The Court of Special Appeals in turn held that the chancellor’s decision to allow for an expected salary increase was within his sound discretion.

Mr. Rosenberg claimed, at trial and on appeal, that in valuation the court must consider limits imposed by TEFRA upon qualified pension plans such as the Income Retirement Plan. The chancellor ignored the TEFRA limits because Crown’s Supplemental Retirement Income Plan, already deemed nonmarital property, “was created to provide [Mr. Rosenberg] . . . with the benefits TEFRA would have denied.” The Court of Special Appeals affirmed on the same grounds; since the Supplemental Plan “indicate[s] a means through which the company can provide accrued benefits that exceed the limits imposed” by TEFRA, those limits are “not relevant to a determination of the present value of Mr. Rosenberg’s pension benefits.”

Mr. Rosenberg next contended that the trial court failed to consider the effect of the federal income taxes that he would owe when he realized the retirement benefits. The court responded that any income tax consideration should be an “other factor” in setting the amount of the monetary award, rather than an adjustment to the value of the benefits. The court therefore reserved the issue until it considered the amount of the monetary award.

Finally, Mr. Rosenberg argued that in valuing the employee stock ownership plan, the chancellor should have considered the

---

149. Both actuaries considered mortality, interest, and retirement age, but Mr. Rosenberg’s witness did not build a growth factor into Mr. Rosenberg’s salary. Id. at 509, 497 A.2d at 496.
150. Id. at 510, 497 A.2d at 496.
151. Id.
152. Id. at 506, 497 A.2d at 494.
153. Id. at 510, 497 A.2d at 496. The court considered the likelihood of Mr. Rosenberg’s being denied membership into the plan and found it to be negligible.
154. Id. at 511, 497 A.2d at 497.
156. 64 Md. App. at 512, 497 A.2d at 497.
157. This illustrates the very structured way in which a Maryland court must apply the Marital Property Act. While the effect of income tax considerations may be the same in either event, i.e., to decrease the monetary award, the court took great care to point out that this determination must be made in step three of the three-step process (setting an amount), rather than step two (valuation).
time restrictions on distributions under the plan and the chance that
the value of the plan might change before distributions would be
permitted.\(^{158}\) The court pointed out that "retirement plans, by defi-
nition, involve restrictions in one form or another."\(^ {159}\) Yet this does
not preclude valuation of all retirement and pension plans. In addition,
the chance of fluctuation is too speculative to affect the trial
court's calculation of present value.\(^ {160}\)

c. Trust Interest—Nonmarital Assets.—In 1934 Mr. Rosenberg's
grandfather created a number of trusts that gave Mr. Rosenberg a
remainder interest, subject to a life interest and a testamentary
power of appointment in his mother.\(^ {161}\) Between 1953 and 1972
Mr. Rosenberg's mother and grandmother created four "spendthrift
trusts"\(^ {162}\) giving him a life interest and his descendants remainder
interests.\(^ {163}\) The trial court classified all of these trust interests as
nonmarital property because they were acquired directly by gift or
inheritance.\(^ {164}\) Mr. Rosenberg challenged the valuation of both
types of trust interests.

As to the remainder interests, the chancellor had accepted the
valuation method that Ms. Rosenberg's expert witness advanced. On
appeal, Mr. Rosenberg objected to the method used, because his
interest was neither fully vested nor freely transferrable, and was
subject to his mother's power of appointment. The court stated that
he had failed to preserve his objections to the valuation by raising
the issue below.\(^ {165}\) The chancellor had also accepted calculations by

\(^ {158}\) 64 Md. App. at 512, 497 A.2d at 497. "In a qualified [employee stock ownership
plan], such as the one here, shares of stock allocated to each participant's account must
remain in trust for eighty-four months before being distributed, unless the employee
dies, is disabled or is terminated." \textit{Id.; see I.R.C. § 409(d) (Supp. III 1985) (establishing
criteria for employee stock ownership plans).}

\(^ {159}\) 64 Md. App. at 512, 497 A.2d at 497.

\(^ {160}\) \textit{Id.}

\(^ {161}\) \textit{Id.} at 513, 497 A.2d at 498. The grandfather, Louis Blaustein, helped create the
Rosenberg family wealth. \textit{See id.} at 494, 497 A.2d at 488.

\(^ {162}\) \textit{See id.} at 517-18, 497 A.2d at 500. A spendthrift trust is one "created to provide
a fund for the maintenance of a beneficiary, and at the same time to secure it against his
improvidence or incapacity. . . . Most states permit spendthrift trust provisions that
prohibit creditors from attaching a spendthrift trust." \textit{BLACK'S LAW DICTIONARY} 1256
(5th ed. 1979) (citations omitted).

Spendthrift trusts are valid in Maryland. Smith v. Towers, 69 Md. 77, 14 A. 497
(1888). The key feature of the trust is that income remains beyond the reach of credi-
tors. \textit{See Safe Deposit & Trust Co. v. Robertson, 192 Md. 653, 659, 65 A.2d 294, 295
(1949) (tracing the development of spendthrift trusts in Maryland).}

\(^ {163}\) 64 Md. App. at 513, 497 A.2d at 498.

\(^ {164}\) \textit{Id.; see Md. Fam. Law Code Ann. § 8-201(e)(2)(ii) (1984).}

\(^ {165}\) 64 Md. App. at 514-15, 497 A.2d at 498-99. The court rejected Mr. Rosenberg's
Ms. Rosenberg's experts concerning the value of Mr. Rosenberg's life interests. After describing, in detail, the method of valuation used, the Court of Special Appeals concluded that Mr. Rosenberg's "fundamental complaint is that the chancellor was not persuaded by his experts. That does not constitute error." Given the thoroughness of the chancellor's opinion, it was clear that he did not act arbitrarily or erroneously in accepting the testimony of Ms. Rosenberg's expert.

Mr. Rosenberg's life interests arose from four spendthrift trusts. Under the terms of each trust all payments were to go directly to the beneficiary, not to creditors or assignees. While Mr. Rosenberg acknowledged that a spendthrift trust has an economic value, he argued that a traditional market determination was inapplicable since the trust was inalienable. The appellate court noted that "difficulty in valuing an asset, however, does not preclude it from being valued." In fact, the chancellor recognized his obligation to value the spendthrift trusts. Ms. Rosenberg's experts again presented testimony on the value of the trusts. While Mr. Rosenberg did voice an objection to these figures, he offered no alternative method that would account for the trusts' spendthrift nature. The court held that the chancellor did not abuse his discretion by accepting Ms. Rosenberg's expert testimony.

d. Determining the Monetary Award.—Under Maryland law, the chancellor must consider ten statutory factors in making a final determination of the monetary award. Mr. Rosenberg specifically

claim that he had accepted Ms. Rosenberg's stipulations on value simply to expedite the trial.

166. Basically, Ms. Rosenberg's expert had calculated the value of Mr. Rosenberg's life interests in two ways. First, he used actuarial methods and divided the total value of the trust between the life and remainder interests. Second, he determined the present value of the income that the trust would produce during Mr. Rosenberg's lifetime. Because the second method was more speculative, being based on projections of future dividend income, the expert gave the first method three times greater weight and then averaged the figures. Id. at 516-17, 497 A.2d at 499-500.

167. Id. at 517, 497 A.2d at 500 (emphasis added).

168. Id.

169. Id. at 518, 497 A.2d at 500; see Deering v. Deering, 292 Md. 115, 129, 437 A.2d 883, 891 (1981) (recognizing that "trial courts are presented with a complex task in properly valuing and allocating" benefits).

170. 64 Md. App. at 518, 497 A.2d at 500; see Md. Fam. Law Code Ann. § 8-204 (1984) ("The court shall determine the value of all marital property.").

171. 64 Md. App. at 518, 497 A.2d at 500.

172. Those factors are:

(1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
objected to the application of five of these factors. The court found little merit in his objections.

The chancellor must consider each party’s contribution to the well-being of the family. Mr. Rosenberg disputed the chancellor’s findings that Ms. Rosenberg bore the full responsibility of child-rearing while he neglected his family obligations. The Court of Special Appeals upheld the findings below as supported by the evidence.

Another statutory factor is "the economic circumstances of each party at the time the award is to be made." Mr. Rosenberg argued that the trial court should have treated Ms. Rosenberg’s attorney's fees and costs, which he was ordered to pay, as his debts for purposes of assessing the spouses’ economic standing. The appellate court agreed that since the chancellor knew the amount of attorney's fees when he made the monetary award, he should have considered the fees as Mr. Rosenberg’s debt. The chancellor had reserved judgment on the issue of costs, however; therefore, he could not yet have considered costs as part of the "economic circumstances." The court instructed the chancellor to reconsider this factor on remand.

(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 or interest in the pension, retirement, profit sharing, or deferred compensation plan, was acquired, including the effort expended by each party in accumulating the marital property or the interest in the pension, retirement, profit sharing, or deferred compensation plan, or both;
(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 or transfer of an interest in the pension, retirement, profit sharing, or deferred compensation plan, or both.

Md. Fam. Law Code Ann. § 8-205(b) (Supp. 1986) (the July 1, 1986 amendment to the statute rewrote subsections (8) and (10)).

173. 64 Md. App. at 519-23, 497 A.2d at 501-03.
175. 64 Md. App. at 519, 497 A.2d at 501.
177. 64 Md. App. at 519-20, 497 A.2d at 501.
178. Id.
179. Id. at 520, 497 A.2d at 501.
The circumstances surrounding the divorce may also affect the monetary award. There was testimony at the trial that Mr. Rosenberg supported Ms. Rosenberg's drug dependency and had numerous affairs during the marriage. The chancellor found such testimony credible, and the appellate court upheld this assessment of witness credibility.

The fourth factor that Mr. Rosenberg specified was "the effort expended by each party in accumulating the marital property." He argued that the trial court confused this factor with a consideration of the contribution to familial well-being by crediting Ms. Rosenberg for homemaking contributions. The chancellor stated that Ms. Rosenberg "contributed, though non-monetarily, substantially more than [Mr. Rosenberg] toward the marital property," yet did not specify which of her efforts produced any of the marital property described. Mr. Rosenberg contended that most of the marital property derived from his personal efforts at Crown Petroleum. Again, based upon a "clearly erroneous" standard of review, the court affirmed the chancellor's findings.

Finally, Mr. Rosenberg challenged the trial court's reliance on his substantial borrowing capacity as an additional relevant factor in ordering him to pay his former wife large sums of cash. Neither Ms. Rosenberg nor the Court of Special Appeals could find direct evidence of Mr. Rosenberg's borrowing capacity. Therefore, the court found the chancellor's determination in error and remanded the issue for reconsideration.

180. Md. Fam. Law Code Ann. § 8-205(b)(4) (Supp. 1986). Query whether Maryland is truly a "no-fault" divorce state when the trial court can use Mr. Rosenberg's adultery to increase the monetary award.
181. 64 Md. App. at 520, 497 A.2d at 501-02.
182. Id., 497 A.2d at 502; see Md. R. 1086.
184. 64 Md. App. at 521, 497 A.2d at 502 (emphasis added).
185. Id. It is undisputed that a substantial portion of the marital estate was derived through Crown. See id. at 494-96, 497 A.2d at 488-89.
186. Id. at 521, 497 A.2d at 502. Mr. Rosenberg's argument seems to have merit. The Marital Property Act's recognition of nonmonetary contributions to a marriage is laudable. But to state that a housewife contributed "substantially more" towards acquiring benefits from Crown than the husband who worked there for thirty years is farfetched.
187. Id. at 522, 497 A.2d at 502; see Md. Fam. Law Code Ann. § 8-205(b)(10) (Supp. 1986) (allowing the court to consider "any other factor that the court considers necessary and appropriate").
188. Mr. Rosenberg claimed that counsel mentioned his borrowing capacity only during closing argument. 64 Md. App. at 522, 497 A.2d at 502.
189. Id. at 523, 497 A.2d at 503. Even a man as wealthy as Henry Rosenberg must borrow to pay a $1,750,000 award.
The court next returned to the issue of what effect the trial court should give to income tax consequences when valuing marital property and making a monetary award. Mr. Rosenberg argued that the chancellor erred by not considering: (1) income tax on the interest imputed to his loan to Ms. Bohny; (2) deferred income taxes upon realizing the benefits of his retirement plans; and (3) gain on assets he would have to sell to pay the monetary award.¹⁹⁰

In addressing this issue for the first time in Maryland,¹⁹¹ the Court of Special Appeals examined the decisions of other jurisdictions¹⁹² and then focused on the Maryland law concerning equitable distribution. "Value" in Maryland means fair market value:¹⁹³ "[t]he amount at which property would change hands between a willing buyer and a willing seller."¹⁹⁴ Value is the "appraised worth"¹⁹⁵ including taxes.¹⁹⁶ Thus, the court should not consider taxes in the valuation process.¹⁹⁷ Rather, taxes are an "other factor"¹⁹⁸ that may affect the determination of the monetary award.¹⁹⁹

The court held that in revising his monetary award on remand, the chancellor should consider the tax liability of the interest income imputed to the marital estate.²⁰⁰ But the court found future tax liabilities associated with the retirement plans and sale of other assets too speculative for consideration.²⁰¹

¹⁹⁰. Id. at 523-24, 497 A.2d at 503.
¹⁹¹. Id. at 524, 497 A.2d at 503 (noting that "appellate courts . . . have not previously determined whether tax consequences should be considered").
¹⁹⁴. BLACK'S LAW DICTIONARY 537 (5th ed. 1979).
¹⁹⁵. Id. at 1391.
¹⁹⁶. 64 Md. App. at 526, 497 A.2d at 504.
¹⁹⁷. Id.
¹⁹⁹. 64 Md. App. at 526, 497 A.2d at 504.
²⁰⁰. Id. These liabilities are "easily and specifically ascertainable" based on Mr. Rosenberg's recent tax returns. Id.
²⁰¹. Id. at 526, 497 A.2d at 504-05.
e. Computation of the Monetary Award.—Mr. Rosenberg charged that the chancellor overstated the value of marital property by at least $1,000,000. Adjusting the figure accordingly, and subtracting the value of the marital home, Mr. Rosenberg computed a total value of the marital estate that was less than the court-ordered monetary award.202

The court rejected the proposition that the chancellor had overvalued the retirement plan by $1,000,000, thereby rejecting Mr. Rosenberg’s contention that the monetary award exceeded the marital estate.203 But the court agreed that the chancellor had erred by including Ms. Rosenberg’s jewelry, which he had previously designated a personal gift from Mr. Rosenberg, as joint personal property to be divided equally by the spouses.204 Therefore, on remand the chancellor should reduce joint personal property by the value of the jewelry and increase Ms. Rosenberg’s personal assets by the same amount.205

2. The Cross Appeal.—Ms. Rosenberg cross-appealed on the ground that the chancellor erred in failing to include as marital property the increased value of the four trusts under which Mr. Rosenberg was a lifetime beneficiary. The corpus of these trusts included stock in the American Trading and Production Corporation (ATAPCO), which held approximately fifty percent of the voting stock in Crown. ATAPCO stock had risen greatly in value since creation of the trusts.206 While the trusts themselves were nonmarital property since they were gifts or inheritances,207 Ms. Rosenberg argued that any accretion in the trusts and stock resulted from Mr. Rosenberg’s efforts during marriage, and therefore should augment the marital estate.208 She cited cases on the “continuing acquisition” doctrine: if property is acquired over time, the property is nonmarital to the extent of any nonmarital funds used to pay for it.209

202. Id. at 526-27, 497 A.2d at 505. Mr. Rosenberg fixed the value of marital property at $1,340,000, as compared with the modified monetary award of $1,609,000.
203. Id. at 527, 497 A.2d at 505.
204. Id.
205. Id. In light of the chancellor’s great care with other aspects of the case, the court deemed this mistake “an oversight.”
206. Id. at 527-28, 497 A.2d at 505. Mr. Rosenberg’s family created the trusts between 14 and 33 years ago, so the increase in value had been substantial. See id. at 497, 497 A.2d at 490.
208. 64 Md. App. at 528, 497 A.2d at 505.
The trial court had examined the financial success of ATAPCO and Crown in detail. The chancellor found that Ms. Rosenberg had "not proven that [Mr. Rosenberg's] personal efforts at Crown or as a member of the Board of Directors of ATAPCO either directly or indirectly contributed to the increase in value of [his] life interests in ATAPCO." Too many factors contributed to ATAPCO's success to assign credit to Mr. Rosenberg. Therefore, the chancellor held that the increased value in ATAPCO stock was nonmarital property. The Court of Special Appeals upheld the chancellor's findings as not clearly erroneous.

3. Alimony.—a. Indefinite Alimony.—The trial court had awarded Ms. Rosenberg indefinite alimony because the respective standards of living of the parties would remain "unconscionably disparate" while Mr. Rosenberg would remain in a position of power at Crown, Ms. Rosenberg had developed no marketable skills during her thirty-two years as a homemaker, and could not be expected to develop such skills at her age. Mr. Rosenberg originally opposed the award of indefinite alimony, but then apparently abandoned the argument. In either event, the court held that the chancellor did not err in awarding indefinite alimony.

b. Amount of the Award.—The chancellor awarded annual alimony of $275,000. Mr. Rosenberg attacked this figure as "grossly excessive," since his wife's monthly allowance had been between $6000 and $7000 during marriage. He argued that the alimony payment, plus the investment income generated by the monetary award, would give Ms. Rosenberg a yearly income "vastly in excess" of her reasonable, proven, and claimed needs. A trial judge must consider eleven statutory factors in determining the amount of alimony. Among these are "the financial needs and financial resources of each party," including any mone-
tary award ordered concurrently. The appellate court could not determine from the record whether the chancellor considered the monetary award in setting alimony. Even if he did, his consideration must have been superficial, since he failed to mention that the income produced by the large monetary award would exceed the amount of alimony. Therefore, the court ordered the chancellor to reexamine the financial status of the parties and review the alimony award.

4. Fees and Costs.—The lengthy divorce trial produced huge attorneys' fees and litigation costs for both parties. The chancellor awarded Ms. Rosenberg nearly $700,000 in fees and costs. Mr. Rosenberg claimed that Ms. Rosenberg incurred most of the costs needlessly during her unsuccessful attempt to have the ATAPCO stock deemed marital property, and therefore the fees were not "reasonable and necessary" as required by law.

The court admitted that Ms. Rosenberg incurred much of the costs and fees while litigating the ATAPCO issue. But the mere failure of her attempt to characterize the ATAPCO stock and its accre-
tion as marital property did not render the attempt "frivolous." The ATAPCO stock was a large portion of Mr. Rosenberg's personal holdings, and Ms. Rosenberg's lawyer would have neglected his adversarial duties had he not tried to prove the stock was marital property.

The chancellor determined that the fees and costs were reasonable and necessary, based upon his knowledge and experience. Because the Court of Special Appeals could not label that decision an abuse of discretion, it affirmed the full award of fees and costs.

In sum, the Court of Special Appeals affirmed much of the chancellor's opinion, but remanded the case so that the chancellor could consider: (a) the effect on the monetary award of designating Ms. Rosenberg's jewelry as personal property; (b) the monetary award in light of the tax liability for the imputed interest on the loan to Ms. Bohny; (c) the awards of fees and costs as an economic circumstance in making the monetary award; (d) the monetary award in light of Mr. Rosenberg's ability to pay or borrow; and (e) the investment income from the monetary award in adjusting the alimony award.

The Rosenberg decision illustrates not only the complexity of a divorce proceeding under the Marital Property Act, but also the great deference given a trial judge. Under the "clearly erroneous" standard of review, appellate courts in Maryland respect the wisdom and experience of the chancellor in fashioning an equitable remedy.

---

223. 64 Md. App. at 538, 497 A.2d at 510.
224. Id.
225. Id. at 539, 497 A.2d at 511; see Sharp v. Sharp, 58 Md. App. 386, 406, 473 A.2d 499, 508 (1984) (allowing chancellor to consider his observations of counsel's trial conduct in determining fee award).
227. 64 Md. App. at 539, 497 A.2d at 511. Normally, the award of fees and costs varies according to the alimony and monetary award. Thus, the remand of the issues of alimony and the monetary award would generally necessitate reconsideration of the litigation expenses as well. But since the court affirmed a full award of the costs and fees requested, it saw no need for further modification of the award on remand.
228. Id. at 539-40, 497 A.2d at 511.
229. Md. R. 1086.
D. Child Support

1. Scope of Parental Duty.—In Presley v. Presley the issue was whether the trial court had erred in ordering a father to make support payments and pay a share of the medical expenses for his mildly retarded adult daughter. Generally, a parent’s obligation to support a child ends when the child reaches the age of eighteen. But when the adult child cannot support himself or herself due to mental or physical infirmity, and the parent can provide assistance, the parental obligation continues. In this instance, the daughter was employed and partially supporting herself. The Court of Special Appeals remanded the case for a factual determination of the daughter’s expenses and available funds, with instructions to order support payments if she lacked sufficient resources.

2. Support Agreements.—In Boucher v. Shomber divorcing spouses entered into a separation agreement that provided that the father would assume payments for the daughter’s college education. The court later modified this agreement to provide that the father would pay for “continual expenses” until the daughter completed four consecutive years of college. When the father ceased to make educational support payments, the mother filed for contempt. The father cross-petitioned on the ground that his daughter had not fulfilled the continuity requirement of the agreement.

231. Id. at 268, 500 A.2d at 323.
232. Id. at 274, 278, 500 A.2d at 326, 328. This rule applies to both general support and medical care.
233. Md. Fam. Law Code Ann. §§ 13-101, -102 (1984). The statute conditions the duty of support on two factors: (1) the adult child must have “no means of subsistence . . . and cannot be self-supporting,” id. at § 13-101(b); and (2) the parent must have “sufficient means . . . to provide . . . food, shelter, care and clothing,” id. at § 13-102(b). The court read a reasonableness standard into the first factor; the child need not be totally without means of survival for the parental duty of support to exist. 65 Md. App. at 277-78, 500 A.2d at 328.
234. 65 Md. App. at 271, 500 A.2d at 325. She was earning $14,200 per year working at the National Institute of Health. Her net income fell short of general living expenses by $2400 per year, and she incurred unreimbursed medical expenses of $900 per year. Id. at 271-72, 500 A.2d at 325.
235. Id. at 279, 500 A.2d at 328-29.
237. The subsequent divorce decree incorporated the separation agreement. Id. at 473, 501 A.2d at 98.
238. Id.
239. Id. at 473-74, 501 A.2d at 98-99.
240. Id. at 474-75, 501 A.2d at 99.
While admitting that the daughter failed to meet the "four-year consecutive course of studies" clause of the separation agreement, the trial court nonetheless held that because a serious illness had interrupted her studies, her father should not be released from his support obligation. The Court of Special Appeals found that the trial court's refusal to relieve the father of his financial obligations to his daughter was "reasonable under the circumstances," and thus affirmed the lower court's finding of liability.

3. Enforcement of Support Obligations.—The failure of parents to honor their support obligations has become a nationwide problem. In 1984 Maryland passed the Tax Refund Interception Program (TRIP) as a means of obtaining child support payments from delinquent parents. TRIP authorizes the withholding of income tax refunds to satisfy overdue support obligations. In McClelland v. Massinga the United States Court of Appeals for the Fourth Circuit analyzed the procedural framework of TRIP, and upheld the constitutionality of the statute on due process grounds. The impact of this holding upon family law is simply that TRIP may con-

---

241. Id. at 474, 501 A.2d at 99.
242. Id. at 480, 501 A.2d at 102. The daughter was hospitalized twice due to illness. The court also noted that the daughter made good faith efforts to reduce her father's liability as much as possible by delaying her education until she was a state resident, seeking grants and loans, and working while in school. Id.
243. Id.
244. The father had opposed the contempt charge on the ground that one cannot be held in contempt for failing to pay an indefinite sum such as "continuing college expenses" or "reasonable medical expenses." The seminal case on this point is Kemp v. Kemp, 287 Md. 165, 175-76, 411 A.2d 1028, 1035 (1980), which held that contempt "power could not be exercised until the payment of a sum certain had been ordered". The Court of Special Appeals agreed with Kemp, but noted that in this case the trial court was merely "determining the relative rights and obligations of the parties to its prior decree," 65 Md. App. at 479, 501 A.2d at 101-02, even though it was responding to a complaint for contempt. Only when the court has determined a definite sum, and the father has failed to pay, may the court hold him in contempt. Id., 501 A.2d at 102.
246. Id. at § 10-113(f).
247. 786 F.2d 1205 (4th Cir. 1986).
248. Id. at 1216.
continue to protect the interests of the children, who are often the innocent victims of a divorce proceeding.

E. Custody and Visitation

1. Custody.—"Joint custody" is a system of shared parental responsibility that is emerging as an alternative to traditional sole custody arrangements. The term "joint custody" can be used to describe two very different types of custody: legal custody and physical custody. Legal custody is the right and obligation to make long-range decisions involving the child's education, religious training, medical care, and other significant matters affecting the child's general welfare. Physical custody is the right and obligation to provide a home and make day-to-day decisions for the child while he or she is in the parent's presence. As joint custody in both its forms continues to challenge the traditional custody model, courts are forced to consider whether they have the power to issue a joint custody resolution.

In Taylor v. Taylor the Court of Appeals held that a trial judge has the authority to grant joint custody. The court defined the two types of joint custody and delineated several criteria to be considered when issuing a joint custody resolution. The court remanded the case for reconsideration in light of these principles.

After experiencing marital difficulties, the spouses in Taylor separated and sought divorce. Both parties requested custody of the children. The trial court granted "a sort of joint custody," and the mother appealed. The Court of Appeals granted certiorari to consider two questions: (1) whether the trial judge had the authority to grant joint custody; and (2) whether he abused his discretion.

249. See Joint Custody and Shared Parenting, ch. 1, at 6-7 (J. Folberg ed. 1984); see generally Ester, Maryland Custody Law—Fully Committed to the Child's Best Interests?, 41 Md. L. Rev. 225 (1982).
250. See Berman & Kirsh, Definitions of Joint Custody, 5 Fam. Advoc. 2 (Fall 1982).
252. Id. at 301, 508 A.2d at 969.
253. Id. at 296-97, 508 A.2d at 967.
254. See infra note 268.
255. 306 Md. at 313, 508 A.2d at 975.
256. Id. at 294, 508 A.2d at 965-66.
257. Id., 508 A.2d at 966.
258. Id. at 295, 508 A.2d at 966. The trial judge upheld an arrangement set forth in a "visitation agreement" between the parties whereby the marital home served as the children's primary residence.
in awarding joint custody under the facts of this case.\textsuperscript{259}

As to the first issue, the mother contended that a court of equity lacks jurisdiction to grant custody.\textsuperscript{260} The Court of Appeals declared that the authority to grant joint custody is inherent in the broad equitable power of the court to "accomplish the paramount purpose of securing the welfare and promoting the best interest of the child."\textsuperscript{261} When deciding whether to grant joint custody, the trial judge must separately consider the concepts of legal custody and physical custody, and state specifically the court's decision as to each.\textsuperscript{262}

The question of whether the trial judge abused his discretion in awarding joint custody in the instant case was more difficult to answer.\textsuperscript{263} The Maryland Court of Appeals had not considered the issue of joint custody since 1934.\textsuperscript{264} At that time courts denounced joint custody as an "evil" to be avoided whenever possible.\textsuperscript{265} Society has changed in the ensuing fifty years, as has its view of proper child rearing. The court found that these changes mandated a reexamination of the concept of joint custody.\textsuperscript{266} In today's society, in proper circumstances, joint custody may be beneficial to both the child and the parents.\textsuperscript{267}

To aid judicial determination of the proper circumstances for joint custody, the court delineated thirteen criteria, all designed to protect the best interests of the child.\textsuperscript{268} The factors enumerated

\begin{itemize}
  \item [259] Id.
  \item [260] Id. at 297-98, 508 A.2d at 967-68. The mother argued that absent express statutory authority, a court of equity could not make such an award.
  \item [261] Id. at 301-02, 508 A.2d at 970. Because joint custody is within a court's broad equitable powers, the Court of Special Appeals did not need to address whether the child custody statutes implicitly authorize joint custody. Id. at 298, 508 A.2d at 968.
  \item [262] Id. at 297, 508 A.2d at 967.
  \item [263] "The resolution of a custody dispute continues to be one of the most difficult and demanding tasks of a trial judge." Id. at 311, 508 A.2d at 974.
  \item [265] Id. at 172, 173 A. at 10. Joint custody was viewed as "fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child." Id.
  \item [266] 306 Md. at 302, 508 A.2d at 970.
  \item [267] Id. Joint custody is still widely criticized as creating confusion and instability for children at a time when certainty is important, but when the circumstances warrant joint custody, it can be of enormous advantage to both parents and children. Thus, a trial judge should consider carefully its feasibility. Id. at 302-03, 508 A.2d at 970.
  \item [268] The criteria include:
    \begin{itemize}
      \item (1) the parents' capacity to communicate with each other and to reach shared decisions affecting the child's welfare;
      \item (2) the parents' willingness to share custody;
      \item (3) the parents' fitness;
    \end{itemize}
are not intended to be all-inclusive; rather, the trial judge must consider all relevant factors in reaching the solution most beneficial for the child.\textsuperscript{269} In the case at bar the trial judge had neglected to stipulate whether he was awarding joint physical or legal custody.\textsuperscript{270} The Court of Appeals remanded the case for this designation as well as for reconsideration in light of the aforementioned criteria.\textsuperscript{271}

In Olson \textit{v. Olson}\textsuperscript{272} the Court of Special Appeals construed Maryland's Uniform Child Custody Jurisdiction Act (UCCJA)\textsuperscript{273} to authorize a Maryland Circuit Court to modify a Rhode Island child custody decree.\textsuperscript{274} In doing so, the court nullified a pre-divorce agreement between the mother and father that purported to confine subject matter jurisdiction to Rhode Island.\textsuperscript{275} In addition, the court reaffirmed that the "continuing jurisdiction rule"\textsuperscript{276} no longer applies under the UCCJA as a basis for denying jurisdiction.\textsuperscript{277}

In February 1979 a married couple residing in Rhode Island with their two children entered into a Property Settlement Agreement.\textsuperscript{278} The agreement provided that "the support, maintenance and custody of said minor children shall be determined by the Family Court of the State of Rhode Island, which shall continue to retain [sic] jurisdiction over such matters, including the power to modify the same."\textsuperscript{279} The couple was divorced by a decree of the Rhode Island Family

(4) the relationship existing between the child and each parent;
(5) the child's preference;
(6) the possible disruption of the child's social and school life;
(7) the geographic proximity of the parents' homes;
(8) the demands of parental employment;
(9) the age and number of the children;
(10) the sincerity of each parent's request;
(11) the financial status of the parents;
(12) the impact on state or federal assistance; and
(13) the benefit to the parents.

\textit{Id.} at 304-11, 508 A.2d at 971-74.

\textsuperscript{269} Id. at 311, 508 A.2d at 974.

\textsuperscript{270} Id. at 311-12, 508 A.2d at 975. The judge stated only that the visitation agreement constituted "a sort of joint custody." \textit{Id.} at 295, 508 A.2d at 966.

\textsuperscript{271} Id. at 313, 508 A.2d at 975.

\textsuperscript{272} 64 Md. App. 154, 494 A.2d 737 (1985).

\textsuperscript{273} Md. Fam. Law Code Ann. \S\S 9-201 to -214 (1984). Besides Maryland, 47 other states, including Rhode Island, have adopted the UCCJA. 64 Md. App. at 159, 494 A.2d at 740 (citing A. Haralambie, \textit{Handling Child Custody Cases} 9.02 (1983)).

\textsuperscript{274} 64 Md. App. at 169, 494 A.2d at 745.

\textsuperscript{275} Id. at 159, 494 A.2d at 739.

\textsuperscript{276} Under the continuing jurisdiction rule a court might retain jurisdiction over the custody of children even after their removal from the state. \textit{Id.} at 167, 494 A.2d at 744.

\textsuperscript{277} Id. at 167-68, 494 A.2d at 744.

\textsuperscript{278} Id. at 157, 494 A.2d at 739.

\textsuperscript{279} Id. (emphasis added).
Court in July of the same year. The court awarded the father physical custody of the children, but neglected to address the issues of visitation and support. The decree made no mention of the Property Settlement Agreement.

In 1984, after moving to Maryland, the father petitioned the Circuit Court for St. Mary's County to modify the Rhode Island custody decree, so as to grant the mother "liberal but specified visitation rights" and to order her to pay "a reasonable amount of child support." On the mother's motion, the court dismissed the claim "for lack of jurisdiction over the subject matter."

On appeal, the Court of Special Appeals rejected the notion that consent of the parties may confer jurisdiction upon a court, stating that "[o]nly the court may decide whether it has jurisdiction to proceed." The court thus dismissed the Property Settlement Agreement and held that in interstate child custody disputes the UCCJA governs the issue of jurisdiction. The court framed the issues as: "(1) whether the Maryland court has jurisdiction under [the] statute; and (2) whether it should exercise its jurisdiction."

The court began its analysis with section 9-204(a) of the UCCJA, which sets forth the grounds upon which a Maryland court has jurisdiction to make or modify a child custody decree.

280. Id.
281. Id.
282. Id.
283. The father and the children moved to Maryland in September, 1979. Over the next five years, the children spent four consecutive weeks every summer with their mother, either at her home in Rhode Island or at her mother's home in Virginia. In August of 1984, however, the mother informed the father that she intended to keep the children in Rhode Island beyond the normal time. When she refused to agree in writing to return the children before school began, the father became concerned that she might try to keep the children in Rhode Island indefinitely.

He then sought and obtained an injunction against the mother, requiring the sheriff to take custody of the children and to return them to the father. The injunction restricted the mother from visiting the children except in their father's home. The chancellor, however, dissolved the injunction upon learning of the mother's visitation record of the previous five years. The father also petitioned the court to modify the child custody decree issued by the Rhode Island court in 1979. Id. at 157-58, 494 A.2d at 739.

284. Id. at 158, 494 A.2d at 739.
285. Id. The Court of Special Appeals later stated that it did not know "the precise basis upon which the chancellor concluded that the court lacked subject-matter jurisdiction—his terse order did not explain his rationale." Id. at 159, 494 A.2d at 740.
286. Id., 494 A.2d at 739.
287. Id.
288. Id., 494 A.2d at 740 (emphasis added).
290. Section 9-204(a)(1) provides that:

A court of this State which is competent to decide child custody matters has
The father argued that the court had jurisdiction under section 9-204(a)(1)(i), because Maryland was the children's "home state"; that is, the children had lived with their father in Maryland for at least six consecutive months prior to the suit. The court agreed that Maryland was indeed the children's home state and accordingly found jurisdiction on that ground.

According to section 9-214(a) of the UCCJA once a court of another state has made a custody decree, no Maryland court can modify that decree unless: (1) the court that rendered the decree no longer has jurisdiction or has declined to assume jurisdiction; and (2) the Maryland court has jurisdiction. Thus, the court was compelled to examine whether the Rhode Island court might still have jurisdiction over the case.

The mother contended that Rhode Island retained its jurisdiction under its version of the UCCJA because she and the children had a "significant connection" with the state. The court, however, denied her claim, stating that the purpose of the Uniform

jurisdiction to make a child custody determination by initial decree or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this State because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this State.

291. "Home state" is defined in § 9-201(f) as:

the state in which the child, immediately preceding the time involved, lived with the child's parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

292. 64 Md. App. at 163, 494 A.2d at 741-42. The court next concluded that Maryland was not precluded from exercising its jurisdiction by the existence of a related action pending in another state or by any improper conduct on the part of the father. Id. at 163-64, 494 A.2d at 742; see Md. Fam. Law Code Ann. §§ 9-206(a), 9-208(b) (1984).


294. Id.


296. 64 Md. App. at 164, 494 A.2d at 742. The bases of the mother's claim were that: (1) the initial decree was rendered in Rhode Island; (2) she continued to live there; (3) the children visited her there regularly and "for long periods of time"; and (4) the children's only connections with Maryland were established by the father's "unilateral action." Id. at 164-65, 494 A.2d at 742.
Act is "to limit jurisdiction, not proliferate it," and that the parties must have maximum, not minimum, contacts with the state for jurisdiction to exist. The court noted that one of the major purposes of the UCCJA was to "'assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available.' " Yet the mother had introduced no evidence concerning the children's "care, protection, training, and personal relationships."

Last, the court rejected the mother's argument on the "continuing jurisdiction rule," under which "a court would continue to have jurisdiction over the custody of the children even after they were removed from [the] State." The court pointed out that it had abrogated that rule in 1977 in Howard v. Gish.

2. Visitation.—In L.F.M. v. Department of Social Services the Court of Special Appeals held that when the court has terminated the rights of the natural parents and has placed a child in a confidential adoption, Maryland courts may not award visitation rights to the child's natural grandparents, if a guardian with the right to consent to adoption and the prospective adoptive parents object.

The court rejected the argument that Maryland's adoption statute was unconstitutional because some interested parties, including grandparents, do not receive notice and an opportunity to be heard before termination of parental rights and adoption. Historically, grandparents' visitation rights have been granted through parental permission. At common law, no legal right to visitation

297. Id. at 165, 494 A.2d at 743 (citing UNIF. CHILD CUSTODY JURISDICTION ACT § 3 commissioners' note, 9 U.L.A. 124 (1979), and McCarron v. District Court, 671 P.2d 953, 957 (Colo. 1983)).
298. Id.
299. Id. at 165-66, 494 A.2d at 743 (quoting MD. FAM. LAW CODE ANN. § 9-202(a)(3) (1984)).
300. Id. at 167, 494 A.2d at 744.
301. Id.
304. Id. at 397, 507 A.2d at 1160. The natural parents had consented to the adoption; the Baltimore County Department of Social Services petitioned for and was granted guardianship and the right to consent to an adoption of the children. Id. at 381, 507 A.2d at 1152.
306. 67 Md. App. at 385-86, 507 A.2d at 1153-54.
307. Id. at 386, 507 A.2d at 1154.
Although the grandparents' desire for visitation may spring from sincere affection for the grandchild, it does not rise to the level of a constitutionally protected right.\textsuperscript{309}

Although the court recognized that freedom of personal choice in matters of marriage and the family is a constitutionally protected liberty, it stressed that this "liberty interest" is most frequently recognized in parent-child and husband-wife relationships. While other relationships sometimes fall within the scope of this constitutionally protected interest, the grandparents' request for visitation does not.\textsuperscript{310}

The court also rejected the argument that visitation could be awarded in the child's best interests.\textsuperscript{311} The court acknowledged that strong arguments exist for allowing any person having an affectionate relationship with the child to petition for visitation. Nevertheless, the court held that there must be some point at which the adoptive parents are presumed to act in the child's best interests. The courts must then defer to the adoptive parents' determination of what is best for the child.\textsuperscript{312}

\section*{F. Adoption}

In \textit{Bridges v. Nicely}\textsuperscript{313} the Court of Appeals held that a natural father may adopt his child born out of wedlock, with or without the natural mother's consent.\textsuperscript{314} In Maryland, a court may grant a decree of adoption without the consent of the child's natural parent to any individual who has cared for a child for one year.\textsuperscript{315} Therefore,

\begin{itemize}
\item \textsuperscript{308} Id.
\item \textsuperscript{309} Id.
\item \textsuperscript{310} Id. at 386-87, 507 A.2d at 1154-55. The court distinguished Supreme Court decisions that have extended the "family life" liberty interest beyond the husband-wife or parent-child context, on the ground that the petitioning party in each of those cases had actual or legal custody of the child at some point. In this case, the grandparents sought only visitation rights; they never had, nor sought, custody of their grandchildren. \textit{Id.} at 387, 507 A.2d at 1155-54.
\item \textsuperscript{311} Id. at 388, 507 A.2d at 1155. \textit{Md. Fam. Law Code Ann.} § 1-201(a)(6) (1984) provides that an equity court has jurisdiction over visitation of the child.
\item \textsuperscript{312} 67 Md. App. at 397, 507 A.2d at 1160. The court looked to the legislative purpose of the adoption statutes, which are designed to protect the child, the adoptive parents and the natural parents; the sealing of adoption records, which suggests a premium on confidentiality; and the provisions for an interlocutory decree of adoption, which treats the child as legally adopted by the prospective parents during a trial adjustment period. \textit{Id.} at 392-93, 507 A.2d at 1157-58.
\item \textsuperscript{313} 304 Md. 1, 497 A.2d 142 (1985).
\item \textsuperscript{314} \textit{Id.} at 12-13, 497 A.2d at 147-48.
\item \textsuperscript{315} \textit{See Md. Fam. Law Code Ann.} § 5-312(b) (1984).
\end{itemize}
if the natural father has had custody of his child for at least one year, he may unilaterally petition the court in an adoption proceeding.

In 1980 the unmarried defendant, Beverly Ann Nicely, gave birth to a son, Jerry Wayne Bridges, Jr. The birth certificate stated that Jerry Wayne Bridges, Sr., was the child's father, and the Circuit Court for Allegany County issued a paternity decree to that effect. The decree granted legal custody to the mother and required the father to provide financial support. For the three years preceding this litigation, however, the father had retained physical custody of the child.

In 1984 the father filed a petition in circuit court to adopt his son. The mother moved to dismiss the petition. The circuit court granted her petition, holding that Maryland's adoption statute does not permit a father to adopt his own natural child. The father appealed, and the Maryland Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals to "decide the significant issue presented in the case."

The court considered whether Maryland's adoption statute permits a natural father to adopt his own child born out of wedlock. Because adoption proceedings in Maryland are solely of statutory origin, the answer to this question depends upon the "applicable statutory provisions and the legislative intention in their enactment."

The Maryland adoption statute states that "[a]ny individual...may be adopted" by "[a]ny adult..." The father asserted that if adopted, his son would have greater rights to inheritance, support and maintenance, and social security. Similarly, the father would benefit by obtaining "greater rights to the adoptee's services and income, to inheritance, and to support and maintenance if the adoptive parent becomes destitute." The mother contended that "adoption is the taking of a child, not related by blood, to be one's own child." Therefore, a natural parent cannot adopt his or her own child. She also contended that the father already possessed a right to parenthood and therefore could not obtain judicially what he already had. Finally, she argued that the father's adoption of Jerry, Jr., would divest her of all parental rights, duties and obligations, contrary to the State's public policy against unnecessarily separating a child from the natural parent.

The court held that in light of this "broad, unqualified word-

316. 304 Md. at 2-3, 497 A.2d at 142-43.
317. Id. at 3, 497 A.2d at 143.
318. Id. The father asserted that if adopted, his son would have greater rights to inheritance, support and maintenance, and social security. Similarly, the father would benefit by obtaining "greater rights to the adoptee's services and income, to inheritance, and to support and maintenance if the adoptive parent becomes destitute." Id. at 3-4, 497 A.2d at 143.
319. Id. at 3, 497 A.2d at 143. The mother contended that "adoption is the taking of a child, not related by blood, to be one's own child." Therefore, a natural parent cannot adopt his or her own child. She also contended that the father already possessed a right to parenthood and therefore could not obtain judicially what he already had. Finally, she argued that the father's adoption of Jerry, Jr., would divest her of all parental rights, duties and obligations, contrary to the State's public policy against unnecessarily separating a child from the natural parent. Id. at 4, 497 A.2d at 143.
320. Id. at 3, 497 A.2d at 143. The statute permits "any person" to adopt. The circuit court, however, defined adoption as an act which establishes a legal relationship between two persons not related in blood. Id.
321. Id.
322. Id. at 4, 497 A.2d at 143.
323. Id. at 5, 497 A.2d at 144.
ing," it was impossible to conclude that the "[l]egislature intended to prohibit adoption in all circumstances by a natural parent of a child born out of wedlock." The court further stated that there are circumstances in which adoption may be more socially beneficial to the child than legitimation.

In the case at bar, because the father had custody of his son for over a year, he would be eligible to adopt without the mother’s consent. This would effectively eliminate the mother as the child’s parent. In light of such drastic consequences, and of the State’s public policy of not separating a child from the natural parent unnecessarily, the Maryland Code requires clear and convincing evidence that termination of the natural parent’s rights is in the best interests of the child. The applicable statute specifies factors for the court to consider as well as factors for an investigating agency to employ.

The Court of Appeals remanded the case to the trial court for reconsideration in light of the statutory factors and considerations. Maryland’s adoption statute certainly permits the father to adopt his son. The goal is to determine “whether it is in the best interests of Jerry, Jr. to grant the adoption and thus terminate all of

325. 304 Md. at 12, 497 A.2d at 147.
326. Id. In reaching this conclusion, the court wrote that it was influenced by the ambiguity of the legitimation statute, Md. Est. & Trusts Code Ann. § 1-207 (1974), as to whether a legitimated child is placed in the same legal posture as an adopted child.
327. 304 Md. at 12, 497 A.2d at 147. The court cited several examples, such as when the natural mother of an illegitimate child has died or has abandoned the child and the natural father seeks adoption. Id. at 12-13, 497 A.2d at 147-48.
331. Id. at § 5-312(b). The clear and convincing standard applies when a parent does not consent to the adoption.
332. 304 Md. at 13, 497 A.2d at 148.
333. To make such a determination, the court must consider the following factors: (1) whether the child has been out of the natural parent’s custody for at least three years; (2) whether the child has developed significant feelings and emotional ties with the petitioner; (3) whether the natural parent has maintained meaningful contact with the child; and (4) whether the natural parent has contributed to the child’s physical care and support. Md. Fam. Law Code Ann. § 5-312(b) (1984).
334. The agency should consider: (1) the child’s feelings toward the natural parent, siblings, petitioner, and any significant others; (2) the child’s adjustment to his or her surroundings; and (3) if the natural parent is absent, the petitioner’s attempts to locate the natural parent. Id. at § 5-312(c).
335. 304 Md. at 14, 497 A.2d at 148.
his parental ties to his mother.” 336

G. Enforceability of Private Agreements

Separation agreements have already been discussed in relation to exclusions from marital property 337 and parental support obligations. 338 Two other appellate cases in the past year addressed the enforceability of private agreements in a divorce proceeding.

1. Agreement Not to Litigate.—In Head v. Head 339 a couple had entered into an antenuptial agreement. 340 When the marriage failed, the wife sued for divorce and sought to set aside the agreement based upon her husband’s unanticipated financial success. 341 The parties subsequently entered into a new agreement that gave the wife much more money than she would have received under the antenuptial agreement. 342 In consideration for this new contract, she in effect promised not to litigate for additional funds and agreed to a contract clause mutually waiving counsel fees. 343

During the divorce proceeding the husband moved for summary judgment based upon this new agreement. The wife opposed, alleging that her husband fraudulently induced her to sign the new agreement. 344

The circuit court bypassed the fraud issue, ruling instead that her opposition to summary judgment constituted default under the terms of the new contract. 345 Pursuant to that contract, the finding of default against the wife negated the clause mutually waiving counsel fees, and consequently the husband was entitled to reason-

336. Id.
337. See supra notes 75-94 and accompanying text.
338. See supra notes 236-44 and accompanying text.
341. 66 Md. App. at 660, 505 A.2d at 870. Mr. Head developed and patented the oversized “Prince” tennis racquet.
342. Id.
343. Id. The agreement included a provision mutually waiving counsel fees except for “any reasonable fees incurred in effecting compliance with the agreement in event of default.” Id. By agreeing to pay the other party the cost of defending the new agreement, each party was in effect agreeing not to litigate the matter.
344. Id. At the time the new agreement was signed, the husband represented to his wife that the Prince stock had a book value of $2,551,000. Six months later, however, he sold the stock for $45,000,000. Id. at 664, 505 A.2d at 872.
345. Id. The chancellor found that the wife’s defense was “clearly aimed at forestalling the purposes and provisions of that contract.” Id.
The wife appealed the case to the Court of Special Appeals, contending that the trial court erred in finding her in default on the marriage settlement agreement. She argued that she was merely “litigating a defense that the agreement was induced by fraud,” and this alone could not constitute default. The court rejected this argument. Since default is defined as a “failure to perform a legal or contractual duty,” the trial court properly concluded that the wife’s actions constituted default.

The Court of Special Appeals never directly addressed the fraud issue. The court held only that the wife defaulted by attempting to set aside the terms of the settlement agreement. The wife, therefore, was in a “Catch 22” position: if she attempted to demonstrate fraud, she was considered in default. She attempted to prove that her right to litigate the fraud defense was thereby infringed. The court responded that it was “chilled perhaps, but not infringed.” The court then remanded the case for a determination of reasonable attorney’s fees.

2. Unconscionability.—In *Williams v. Williams* the Court of Appeals held that “judicial power exists to void a separation agreement when its terms are so unjust and unfair as to be unconscionable.” The court then affirmed the trial judge’s finding that the instant separation agreement was unconscionable as to the husband. The agreement provided for total weekly financial obligations in excess of the husband’s income. The court termed the agreement unfair

346. *Id.* at 660, 505 A.2d at 871. The court awarded the husband $120,000 in legal fees.

347. *Id.* at 661, 505 A.2d at 871.


349. 65 Md. App. at 664, 505 A.2d 872.

350. *Id.* at 662, 505 A.2d at 872.

351. The wife had contended that the amount of legal fees awarded to her husband was unreasonable. The court agreed, holding that the chancellor clearly abused his discretion in awarding the husband $120,000 in fees for only 227 hours of legal work. The matter was remanded to enable the chancellor to determine a proper fee. *Id.* at 675, 505 A.2d at 878.


353. *Id.* at 342, 508 A.2d at 990.

354. *Id.* at 343, 505 A.2d at 941. An “unconscionable” contract is one that “shocks the conscience” of the court. *Id.* at 336, 508 A.2d at 987. The doctrine of unconscionability states that the court will not enforce a grossly unfair bargain, even when the contracting parties wish to be bound. See *Restatement (Second) of Contracts* § 208 (1981).

355. 306 Md. at 334, 508 A.2d at 986. Under the agreement, the wife also received
and inequitable, since it oppressively burdened the husband. Based upon the doctrine of unconscionability, the court properly set aside the separation agreement.

H. Other Developments

1. Subject Matter Jurisdiction.—In Williams v. Williams a former wife sued for specific performance of support payment provisions in a separation and property settlement agreement that by its terms was not incorporated into the divorce decree. Her former husband defended on the ground that an equity court lacks subject matter jurisdiction to render a money judgment. The courts below held for the wife, and the husband appealed.

The Court of Appeals noted that while courts generally do not decree specific performance of agreements to pay money, a recognized exception exists when the court is enforcing agreements between spouses for alimony or support payments. Thus, the equity court had the power to render a money decree arising out of noncompliance with the terms of the agreement. The court ordered the husband to pay his arrearages in support.

2. Infants.—In In re Colin R. the Court of Special Appeals held that the lower court correctly adjudicated Colin, a young boy, as a child in need of assistance (C.I.N.A.), and properly placed him under the protective supervision of the Charles County Department of Social Services.

property valued at approximately $131,000, while the husband received property valued at $1100. Id.

356. Id. at 341, 508 A.2d at 990 ("[T]he consideration was grossly inadequate and the burdens on the husband were oppressive to the point that they were impossible to perform.")

357. Id. at 343, 508 A.2d at 991.
359. The circuit court approved the agreement, but did not incorporate it into the decree. Id. at 3, 501 A.2d at 433.
360. Id. at 7, 501 A.2d at 435.
361. The circuit court ordered the father to pay $58,748.81 in arrearages. Id. at 5, 501 A.2d at 434. The Court of Special Appeals, in an unreported opinion, dismissed his jurisdictional argument as "without merit." Id.

362. See Zouck v. Zouck, 204 Md. 285, 292, 104 A.2d 573, 576 (1954). In Zouck, as in the instant case, the agreement was not incorporated into the divorce decree. Id. at 296, 104 A.2d at 578.

363. 305 Md. at 8, 501 A.2d at 435.
364. Id. at 8-9, 501 A.2d at 435-36.
366. Id. at 697, 493 A.2d at 1089-90.
In 1982 Colin, then three years old, began suffering from severe physical illness. After performing extensive testing, doctors found the presence of a diuretic, Lasix, in Colin's urine.\textsuperscript{367} The doctors believed that Colin's parents were injecting the drug into Colin; therefore, they denied the parents unsupervised access to the child. The doctors' theory was confirmed when, after the parents were denied access, Colin's urine was found to be free of diuretics.\textsuperscript{368}

The physicians notified the Charles County Department of Social Services of their findings and advised that the hospital would not release Colin to his parents.\textsuperscript{369} In turn, the Department of Social Services filed a petition with the court alleging that Colin was a C.I.N.A., and obtained a search warrant for the parents' home. In executing the warrant, police officers seized hypodermic syringes and two vials of Lasix from the parents' bedroom.\textsuperscript{370} The court adjudicated Colin as a C.I.N.A. and placed him under the protective supervision of the Department of Social Services.\textsuperscript{371}

On appeal the parents contended that the lower court was clearly erroneous in adjudicating Colin a C.I.N.A.\textsuperscript{372} The Maryland Code defines a C.I.N.A. as a child "who is not receiving ordinary and proper care and attention" and whose parents are unwilling or unable to give such care and attention to the child.\textsuperscript{373} Taking into consideration the medical testimony, the hospital records,\textsuperscript{374} the diuretics and syringes found in the parents' home, as well as the parents' failure to respond to this damaging evidence, the court

\begin{itemize}
\item \textsuperscript{367} \textit{Id.} at 688-90, 493 A.2d at 1085-86.
\item \textsuperscript{368} \textit{Id.} at 690, 493 A.2d at 1086. Based upon these findings, the doctors diagnosed Colin as having suffered Munchausen Syndrome by Proxy, an aberration whereby parents induce an illness in their child so that it appears that the child is actually suffering from a disease.
\item \textsuperscript{369} \textit{Id.} at 690-91, 493 A.2d at 1086.
\item \textsuperscript{370} \textit{Id.} at 691, 493 A.2d at 1086.
\item \textsuperscript{371} \textit{Id.}
\item \textsuperscript{372} \textit{Id.} at 688, 493 A.2d at 1085. Md. Cts. & Jud. Proc. Code Ann. § 3-819(d) (1984) states that allegations that a child meets the definition of C.I.N.A. must be proved by a preponderance of the evidence. The parents argued that constitutional safeguards demand that such allegations be supported by clear and convincing evidence. The record revealed that the parents raised no objection to the standard of proof at the trial and therefore failed to preserve this issue for appeal. 63 Md. App. at 695, 493 A.2d at 1088. The Court of Appeals assumed that the lower court actually did apply the higher standard in adjudicating Colin a C.I.N.A. \textit{Id.} at 696, 493 A.2d at 1089.
\item \textsuperscript{374} The parents objected to the introduction into evidence of both the testimony of court-appointed physicians who examined Colin and 16 memoranda that showed the level of diuretics in his urine. The Court of Special Appeals dismissed both arguments. 63 Md. App. at 691-93, 698-99, 493 A.2d at 1086-87, 1090.
\end{itemize}
affirmed that Colin was properly adjudicated a C.I.N.A.\textsuperscript{375}

3. Restitution.—In \textit{In re Ramont K.}\textsuperscript{376} the Court of Appeals held that a grandmother who stands \textit{in loco parentis} does not fall within the meaning of the word "parent" in the Maryland statute that makes the parent liable for restitution if a child commits a delinquent act.\textsuperscript{377} The trial court had used language from an earlier Court of Appeals decision, \textit{In re James D.},\textsuperscript{378} in concluding that those \textit{in loco parentis} are liable. The \textit{Ramont K.} court wrote that while dictum in \textit{James D.} had acknowledged that the term "parent" is sometimes used to include persons standing \textit{in loco parentis},\textsuperscript{379} the case did not stand for the principle that such persons should be treated as parents under the restitution statute.\textsuperscript{380} Furthermore, a subsequent Court of Appeals decision expressly refused to extend parental liability under the statute to the State standing \textit{in loco parentis}.\textsuperscript{381}

The Court of Appeals held that the word "parent" in the restitution statute carries its common meaning as a mother or father, and not a grandmother.\textsuperscript{382} The court noted that when the legislature intends commonly used words to mean something other than their everyday interpretation, the statute explicitly defines the scope of the words.\textsuperscript{383} Absent a clearly expressed legislative intent, the
court refused to extend the duty of restitution to a juvenile's grandmother and reversed the trial court's order for restitution.\textsuperscript{384}

Laura B. Black
John A. Messina
Deborah A. Silverman

\textsuperscript{or other person who has permanent or temporary care or custody or responsibility for the supervision of a child . . . ." (emphasis added). 305 Md. at 489, 505 A.2d at 511. 384. 305 Md. at 489, 505 A.2d at 511.}
VIII. HEALTH CARE

A. Cost Containment—Certificates of Need

In an attempt to stem escalating health care costs, Maryland has recently passed legislation providing for a systematic, statewide approach to the planning and development of health care facilities. Generally, a health care facility that desires to increase its bed capacity must first obtain a certificate of need from the State Health Resources Planning Commission (the Commission). The Commission evaluates whether the certificate of need application is consistent with both the State health plan and the Commission's own review criteria, as codified in the Code of Maryland Regulations (COMAR).

2. Id. at § 19-101(b) defines "certificate of need" as a certification of public need for the proposed purchase of new equipment or facilities issued by the Commission under this subtitle for a health care project. "Commission" refers to the State Health Resources Planning Commission. Id. at § 19-101(c).
3. Id. at § 19-115(h). The Commission is an independent body that functions in the Department of Health and Mental Hygiene. Id. at § 19-103.
4. Id. at § 19-114(a) provides as follows:
   (a) Duty of Commission; contents of plan.—(1) At least every 5 years, beginning no later than October 1, 1983, the Commission shall adopt a State health plan that includes local health plans.
   (2) The plan shall include:
      (i) A description of the components that should comprise the health care system;
      (ii) The goals and policies for Maryland's health care system;
      (iii) Identification of unmet needs, excess services, minimum access criteria, and services to be regionalized;
      (iv) An assessment of the financial resources required and available for the health care system;
      (v) The methodologies, standards, and criteria for certificate of need review; and
      (vi) Priority for conversion of acute capacity to alternative uses where appropriate.
5. See id. at § 19-118(c)(1), which provides that the Commission's decision on a certificate application shall be based on both the State health plan and the Commission's own standards for review. The Commission adopts its own rules and regulations concerning certificate review pursuant to § 19-115(c).
6. The Commission must consider thirteen criteria before granting a certificate of need. Some of these criteria appear at Md. Regs. Code tit. 10, § 24.01.07(H)(2) (1984), which states in relevant part:
   (a) The State Health Plan. The application will be reviewed to determine its consistency with the Commission approved Health Systems Plan of the appropriate local health planning agency when the State Health Plan so specifies.
In *Doctors' Hospital v. Maryland Health Resources Planning Commission*\(^7\) the Court of Special Appeals reaffirmed that a certificate of need application must comply with State Health Plan Standards as well as COMAR criteria.\(^8\) Doctors' Hospital had applied to the Commission for a certificate of need for an increase in bed capacity.\(^9\) Pursuant to the Commission's denial of the application, the hospital appealed to the circuit court, which affirmed.\(^10\) The hospital appealed once again, contending in part\(^11\) that the Commission's decision was not supported by "substantial evidence"\(^12\) and that the Commission imposed an "illegal moratorium" on the issuance of...
certificates of need.\textsuperscript{13}

The court found that while the applicant may have met the standards of the State and regional health plans,\textsuperscript{14} it had not demonstrated compliance with the COMAR criteria.\textsuperscript{15} Substantial evidence supported the Commission’s finding that the need criterion\textsuperscript{16} was not satisfied.\textsuperscript{17} The court specifically rejected the hospital’s argument that the Commission’s role was merely to lay the groundwork for calculating future needs, in this case the number of additional beds necessary, and then to cease its analysis once that number was fixed.\textsuperscript{18} Instead, the court determined that the Commission was welcome to consider present and future “utilization factors” in assessing “need” for a particular project.\textsuperscript{19}

Concerning the “financial feasibility” criterion,\textsuperscript{20} the court held that a mere projection that investors will contribute to a project,
even if unrebutted, is not sufficient to meet the criterion.\textsuperscript{21} The court adopted the rule that the Commission could reject uncontradicted evidence in a certificate application for substantial reasons that it adequately explains.\textsuperscript{22}

Additionally, the court held that the Commission's decision to await receipt of necessary information on the appropriate location of additional beds before issuing a certificate of need for a hospital to increase bed capacity did not constitute the imposition of an "illegal moratorium."\textsuperscript{23} The Commission had not suspended any law or the execution of any law, for it had reviewed the merits of the hospital's application.\textsuperscript{24} Instead, the Commission had simply decided that it lacked certain information relating to bed location essential to a favorable decision.\textsuperscript{25} The hospital's insistence on a decision before the Commission had received this information did not change the hospital's failure to meet its burden of producing the evidence required to support a certificate of need application.\textsuperscript{26}

In Perini Services, Inc. \textit{v.} Maryland Health Resources Planning Commission\textsuperscript{27} the Court of Special Appeals held that the Commission did not abuse its discretion by basing its decision on proposed State health plan regulations that had not yet become effective under Maryland law.\textsuperscript{28} The court found that in its certificate review the Commission correctly used current available data concerning the need for nursing home beds even though the data became available only in the process of drafting a proposed State health plan.\textsuperscript{29} The court distinguished the appropriate use of current available data from the actual application of a new State health policy.\textsuperscript{30} Specifically, the Commission could use new information in assessing a certificate of need's consistency with current State health plan

\textsuperscript{21} 65 Md. App. at 671-72, 501 A.2d at 1331-32.
\textsuperscript{22} \textit{Id.} at 672, 501 A.2d at 1332 (citing 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:26, at 456 (2d ed. 1984)).
\textsuperscript{24} \textit{Id.} at 675-76, 501 A.2d at 1334.
\textsuperscript{25} \textit{Id.} at 676, 501 A.2d at 1334.
\textsuperscript{26} \textit{Id.}
\textsuperscript{28} \textit{See id.} at 216, 506 A.2d at 1221. All parties and the court admitted that the 1981 State Health Plan applied to Perini's application. \textit{Id.} at 197, 506 A.2d at 1211. The proposed State health plan, which embodied health planning through 1988, became effective later in 1984. This new plan projected that Washington County would need no additional beds. Only 148 beds had been allocated to the entire Western Maryland area, with priority given to Frederick County. \textit{Id.} at 196-97, 506 A.2d at 1210-11.
\textsuperscript{29} \textit{Id.} at 216, 506 A.2d at 1221.
\textsuperscript{30} \textit{Id.} at 214, 506 A.2d at 1219.
regulations concerning maldistribution and outmigration.\textsuperscript{31} Otherwise, health care decisions in this state would be based on outdated information.\textsuperscript{32}

The \textit{Perini} court also affirmed the principle, discussed in \textit{Doctors' Hospital},\textsuperscript{33} that proposed projects must comport not only with the statistical bed need projections of the current State health plan, but with other criteria as well.\textsuperscript{34}

\section*{B. Medical Malpractice—Arbitration}

The Health Care Malpractice Claims Act,\textsuperscript{35} adopted by the Maryland legislature in 1976, sets forth a process for the adjudication of health claims outside the traditional tort framework. Specifically, the Act requires malpractice claims against health care providers seeking damages in excess of $10,000 to be filed with the Health Claims Arbitration Office.\textsuperscript{36} The Office, acting through its Director, refers all issues to a three-member panel consisting of an attorney, a health care provider, and a member of the general public.\textsuperscript{37} The panel conducts a hearing, determines the liability, if any,

\begin{itemize}
  \item \textsuperscript{31} \textit{Id.} at 216, 506 A.2d at 1220. Historically, a disproportionate number of beds and facilities had been located in Washington County. \textit{See id.} at 204, 506 A.2d at 1214. This unbalanced distribution pattern created a trend whereby Allegheny and Frederick County residents "migrated" to neighboring Washington County for nursing home care. \textit{Id.}
  \item \textsuperscript{32} \textit{See id.} at 215, 506 A.2d at 1220.
  \item \textsuperscript{33} \textit{See supra} text accompanying notes 14-22.
  \item \textsuperscript{34} The court was referring to Md. REGS. CODE tit. 10, § 24.01.07(B)(2)(c) (current version at § 24.01.07(H)(2)(c) (1984)) (COMAR), which requires that, after examining current demographic and utilization data, the Commission must consider the needs of the population that will be served or that is presently being served. \textit{See supra} note 6. The need for beds under the State health plan/regional health plan need not be identical to the need figure under COMAR. The COMAR need determination takes into consideration special needs that the State plan does not address, e.g., the needs of Medicaid patients, minority groups, and the disabled. Furthermore, COMAR permits a need analysis in cases in which the State health plan provides none. \textit{67 Md. App.} at 207, 506 A.2d at 1216; \textit{cf.} Princeton Comm. Hosp. v. State Health Planning and Dev. Agency, 328 S.E.2d 164, 170-71 (W. Va. 1985) (agency may issue certificate of need only after finding that proposed health service is consistent with state health plan and is "needed" under agency's own criteria).
  \item \textsuperscript{35} Md. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1984 & Supp. 1986).
  \item \textsuperscript{36} \textit{Id.} at § 3-2A-02(a). Before the 1986 amendment, the Act covered all claims seeking damages in excess of $5000. \textit{Id.} The Health Claims Arbitration Office is a public office, created as a unit in the Executive Department and headed by a Director appointed by the Governor with the advice and consent of the Senate. \textit{Id.} at § 3-2A-03(a).
  \item \textsuperscript{37} \textit{See id.} at §§ 3-2A-03(c), -04(e). Those arbitrators selected are not a part of the Arbitration Office's staff, and they are paid by the parties themselves, not by any government unit. Attorney General v. Johnson, 282 Md. 274, 286, 385 A.2d 57, \textit{appeal dismissed}, 439 U.S. 805 (1978).
\end{itemize}
of the health care provider, and assesses appropriate damages in the form of an award. The arbitration panel is further responsible for assessing the costs of the proceedings against one party or apportioning the costs among the parties. If no party rejects the award, it becomes final and binding when filed by the Director in the appropriate circuit court for confirmation. If a party seeks to reject the award, the party may obtain judicial review as outlined by statute.

I. Procedure.—In Tranen v. Aziz the Court of Appeals held that to obtain judicial review of an arbitration award, an aggrieved party must follow all necessary procedures set forth in the Act. The plaintiffs had filed a claim in the Health Claims Arbitration Office against a physician for failure to diagnose breast cancer. The panel made an award in favor of the physician. The plaintiffs responded by filing a declaration and election of jury trial in circuit court. Although the declaration alleged the same acts of negligence, it was silent as to the prior arbitration of the claim.

The Court of Appeals held that the procedures established by the Act were mandatory and created a condition precedent to the effective institution of a court action; therefore, failure to comply with those procedures necessitated dismissal of the action. The court explained that the statute required two separate undertakings: (1) the filing of a notice of rejection of the award with the Director and other parties within thirty days after service of the award on the rejecting party; and (2) the filing of an action in circuit court to nullify the award and the filing of a copy of the action with the Director during the same thirty-day period.

The court determined that the plaintiffs had not satisfied the second condition. Because the papers filed in circuit court made no mention of the arbitration decision, the court held that the plaintiffs

---

39. Id. at § 3-2A-05(f).
40. Id. at § 3-2A-05(i).
41. See id. at § 3-2A-06.
42. 304 Md. 605, 500 A.2d 636 (1985).
43. Id. at 611, 500 A.2d at 638-39. The court referred to the applicable provisions of the Act, namely § 3-2A-06(a)-(b).
44. Id. at 608, 500 A.2d at 637.
45. Id.
46. Id. at 608-09, 500 A.2d at 637.
47. See id. at 614, 500 A.2d at 640. The circuit court was not aware of the award itself or that plaintiffs were rejecting an award.
48. Id. at 612, 500 A.2d at 639.
49. Id. at 611, 500 A.2d at 638-39.
had failed to file an action to nullify the award.\(^{50}\) Because the plaintiffs neither notified the Director of their rejection of the award nor filed an action to nullify, the court also held that they had not substantially complied with the Act's provisions.\(^{51}\)

Judge McAuliffe concurred, expressly reserving for future consideration the principle of substantial compliance as applied to procedural requirements for instituting a court action following arbitration.\(^{52}\) He suggested that a notice of action might be drafted, filed, and served in a manner sufficient to satisfy the statutory requirements for the filing of a notice of rejection, or that a complaint might satisfy all notice and filing requirements for a notice of rejection and a notice of action.\(^{53}\)

*Tranen* appears to follow the series of cases indicating that a litigant's failure to follow strictly all prescribed steps required for review of an arbitration claim may result in the action's dismissal.\(^{54}\) The concurring opinion, however, seems to ally itself with another line of cases that leaves room for instances of substantial compliance.\(^{55}\)

---

50. *Id.* at 612-13, 500 A.2d at 639. The plaintiffs contended that § 3-2A-06 would not require the filing of a notice of rejection as a prerequisite to court action because, under § 3-2A-06, a party could commence an action to nullify in court before filing the notice of rejection. The court explained, however, that if the Director did not receive a notice of rejection at some point, the Director would file the arbitration award in circuit court and the court would have to confirm the award pursuant to § 3-2A-05(h). *Id.*, 500 A.2d at 639-40.

51. *Id.* at 613, 500 A.2d at 640. The court noted that an action to nullify in circuit court is in turn a two-step process, governed by the Maryland rules, specifically rules BY2 and BY4. First, rule BY2 provides that an action to nullify an arbitration award "shall be commenced by filing notice of the action with the clerk of the court .... The Notice shall identify the award and state that it is being rejected by the party filing notice." *Id.* Second, rule BY4 provides that within 30 days after filing notice of action, the plaintiff shall file and serve a declaration, setting forth the allegations entitling the aggrieved party to relief. *Id.* at 613-14, 500 A.2d at 640. By not apprising the court of the award or their rejection of the award, the plaintiffs did not properly file an action to nullify; they merely filed a new action, independent of the arbitration proceeding. *Id.* at 614, 500 A.2d at 640.

52. *Id.* at 614-15, 500 A.2d at 640-41 (McAuliffe, J., concurring). Judge Rodowsky joined Judge McAuliffe in the concurrence.

53. *Id.* at 615, 500 A.2d at 641.


55. *See* Osheroff v. Chestnut Lodge, 62 Md. App. 519, 490 A.2d 720, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985) (claimants substantially complied because they merely failed to affix technically correct caption on documents that otherwise met statutory re-
In Alfred Munzer, M.D., P.A. v. Ramsey the Court of Special Appeals further clarified the procedures essential to invoke judicial review of an arbitration proceeding. The plaintiffs filed a medical malpractice claim with the Health Claims Arbitration Office against Dr. Munzer and four other health care providers. After a hearing, a panel chairman granted summary judgment in favor of the physician, but did not determine or assess costs. The parties received copies of the order, but the panel chairman never sent the order to the Director of the Health Claims Arbitration Office. The plaintiffs then filed their notice of rejection and their declaration in the circuit court, seeking to nullify the summary judgment order. Dr. Munzer moved to dismiss on the ground that the trial court lacked subject matter jurisdiction, because the panel had never entered an award, and because the plaintiffs had not timely filed an action to nullify the panel chairman's order. The trial court agreed that it lacked jurisdiction.

The Court of Special Appeals affirmed, holding that the panel had never entered an arbitration award within the contemplation of the statute. According to the court, the Act made clear that the arbitration process was to end with an award that resolved the issues of liability and damages and assessed the costs of arbitration. Additionally, the panel chairman must then deliver this award to the Director, who in turn must serve it on each party. In the present case, the Director never received an award embodying the order granting summary judgment.

The court distinguished this failure to comply with statutory

requirements); Mitcherling v. Rosselli, 61 Md. App. 113, 484 A.2d 1060 (1984), aff'd, 304 Md. 363, 499 A.2d 476 (1985) (claimants substantially complied with Act provision because they filed timely notice of rejection with Director of Health Claims Arbitration Office and sent a copy to health care provider's counsel, notwithstanding that they did not send copies to members of the arbitration panel).

57. Id. at 353-54, 492 A.2d at 947.
58. Id. at 354, 492 A.2d at 947-48.
59. Id., 492 A.2d at 948.
60. Id.
61. Id. The panel chairman granted summary judgment in favor of Dr. Munzer on September 23, 1983. Presumably the notice was filed more than 30 days after this date.
62. Id. at 355, 492 A.2d at 948.
63. Id. at 357, 492 A.2d at 949.
65. 63 Md. App. at 356, 492 A.2d at 949.
66. Id.
provisions from other less significant omissions on the basis that this matter went to the very heart of the health claims arbitration system. First, without delivery to the Director, there could be no public record of the panel chairman's action, no triggering of the time required for other actions, and no ripening of the panel chairman's decision into a final judgment. Second, the award's failure to apportion costs among the parties was no small omission since apportionment is an important method of assuring that the parties defray at least a portion of the expense of the health claims arbitration scheme.

The court then discussed the relative positions of the parties. Since a condition precedent to circuit court action had not occurred, dismissal of the plaintiffs' court action was necessary. Unlike previous situations addressed by the courts, however, no valid award had ever been entered in this case. Thus, the court decided that the case should return to the panel for entry of an award to satisfy statutory requirements.

The court was less certain of the proper course for the arbitrators or panel chairman to follow when the case actually returned to arbitration. The court recalled its suggestion in Stifler v. Weiner: a claim should be adjudicated on a summary basis if it is susceptible to such treatment, but summary disposition must be made by the whole panel and not just by one member of it. A recent statutory amendment appears to endorse, at least in part, the Stifler analysis.

67. See id. at 357, 492 A.2d at 949.
68. Id.
69. Id. at 358, 492 A.2d at 950.
70. Id. at 360, 492 A.2d at 951.
74. The court dismissed the newly passed (1985) amendment of § 3-2A-05(a) of the Courts and Judicial Proceedings Article. 63 Md. App. at 362-63, 488 A.2d at 952. The section as amended states, in relevant part: "(1) Except as provided under paragraph
In *Wyndham v. Haines* the Court of Appeals limited the requirements for appeal to the circuit court from an adverse Health Claims Arbitration award. The plaintiffs filed a medical malpractice claim with the Health Claims Arbitration Office (the Office). At the conclusion of the hearing, the panel agreed unanimously to grant the health care provider's motion to dismiss on account of the plaintiff's failure to establish a prima facie case of liability. The plaintiffs promptly filed notice of rejection with the Office, and, in addition, filed an action to nullify, a declaration, and a prayer for jury trial in circuit court. They also filed a petition to vacate the award on the basis of the panel chairman's alleged partiality. The circuit court denied the petition to vacate, but it granted the health care provider's motion to dismiss on the ground that plaintiff's failure to establish a prima facie case of liability at the arbitration level was tantamount to a refusal to properly submit the claim to arbitration.

The Court of Appeals found no statutory basis for the trial court’s ruling on the motion to dismiss and thus reversed. In *Bailey v. Woels* the Court of Appeals had held that a plaintiff must present to the panel some evidence of liability; however, the *Wyndham* court refused to extend *Bailey* to require that the plaintiff present a prima facie case of liability. Indeed, the court suggested that this

---

(2) of this subsection, all issues of law shall be referred by the director to the panel chairman. All issues of fact shall be referred by the director to the arbitration panel.”

The court noted that in an appropriate case the new law does not explicitly bar either a panel or a chairman from making a summary award without an evidentiary hearing. The court speculated that the absence of such a bar might represent legislative approval of *Stifler*, and may authorize the chairman alone to rule on questions of law. As the amendment had not taken effect when this case was decided below, however, the court avoided any conclusions. 63 Md. App. at 362-63, 488 A.2d at 952.

75. 305 Md. 269, 503 A.2d 719 (1986).
76. *See id.* at 271, 503 A.2d at 721.
77. *See id.*
78. *Id.* at 272, 503 A.2d at 721.
79. *Id.* The claimants discovered that the panel chairman’s opposing counsel in two unrelated matters was also counsel to Dr. Haines in the present case. The claimants allegedly feared that the chairman’s desire to maintain a good rapport with defense counsel in the negotiation and settlement of his unrelated cases might subconsciously bias the chairman’s decisionmaking. *Id.* at 277-78, 503 A.2d at 724.
80. *Id.* at 273, 503 A.2d at 721.
81. *See id.* at 272-73, 503 A.2d at 721.
82. *See id.* at 275, 503 A.2d at 723.
84. *Id.* at 45, 485 A.2d at 268.
85. *See 305 Md.* at 275, 503 A.2d at 722-23.
extension would be contrary to provisions of the Act.86

The court added that by refusing to imply this additional condition precedent, it would not thwart the statutory objective of screening out unmeritorious health claims.87 The court cited Osheroff v. Chestnut Lodge,88 in which Judge Gilbert stated that the screening process was to occur at the arbitration level only; once a plaintiff had properly invoked judicial review, the case came to resemble any other suit and screening was no longer appropriate.89

Lastly, the court affirmed the denial of a petition to vacate,90 agreeing with the trial court that plaintiffs had failed to adduce the required proof of “evident partiality.”91 The court held that a party moving to vacate must offer more than speculation and bald allegations of bias, but rather must prove facts sufficient to permit an inference that the arbitrator was indeed partial.92

2. Joint Tortfeasor Releases.—In Ralkey v. Minnesota Mining and Manufacturing Co,93 the Court of Special Appeals held that the execution of a general release in settlement of a health claims arbitration case against a physician included a corporate manufacturer in its terms,94 even though that manufacturer was not and could not have

86. Id., 503 A.2d at 723.
87. See id. at 276, 503 A.2d at 723; cf. Quinn, The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis, 10 U. BALT. L. REV. 74, 95 (1980) (noting that statute was intended to discourage frivolous litigation).
89. 305 Md. at 276-77, 503 A.2d at 723 (citing Osheroff, 62 Md. App. at 525, 490 A.2d at 723).
90. Id. at 279, 503 A.2d at 724.
91. Id. The court referred to the governing Code provision, Md. Cts. & Jud. PROC. CODE ANN. § 3-224(b)(2) (1984), which allows a court to vacate an award if “[t]here was evident partiality by an arbitrator.” 305 Md. at 278, 503 A.2d at 724.
92. 305 Md. at 279, 503 A.2d at 724-25. The court expressly addressed Hartman v. Cooper, 59 Md. App. 154, 168, 474 A.2d 959, 967, cert. denied, 301 Md. 41, 481 A.2d 801 (1984), overruling the part of the opinion that stated that a mere appearance of possible bias was sufficient to vacate an arbitration award. 305 Md. at 279, 503 A.2d at 724-25. The court, however, did not insist on a standard so high as to require a showing of actual bias or proof of improper conduct.
94. Id. at 530, 492 A.2d at 1366. The actual language of the release is as follows:
I hereby release and discharge ROLAND CAVANAUGH, M.D., his or their successors and assigns, and all other persons, firms or corporations who are or might be liable, from all claims . . . resulting or to result from the incident which happened on or about March 28, 1980 and which is the subject matter of the lawsuit filed in the Health Claims Arbitration Office for Maryland, HCA No. 81-166 . . . .
Id. at 524, 492 A.2d at 1362-63.
been a party to the arbitration proceeding. The plaintiff had filed a claim in the Health Claims Arbitration Office against a physician, asserting negligence. Before arbitration, the parties agreed to a settlement of $4500 whereby the plaintiff executed a release. Later, the plaintiff filed an action against the manufacturer of casting tape used by the physician, alleging negligence, breach of warranty, and product liability. The manufacturer prevailed on a motion for summary judgment on the ground that the release barred the suit.

The plaintiff appealed on two grounds, the second of which was that the release could not apply to the manufacturer, but only to the physician. She maintained that the settlement agreement’s reference to the Health Claims Arbitration lawsuit necessarily restricted the scope of discharge to the doctor only, as the manufacturer was not a health care provider.

The court, however, determined that the language releasing “all other persons, firms and corporations” effectively discharged all joint tortfeasors, including the manufacturer. References in the release to the date of the accident and the “subject matter” of the arbitration proceeding could not distinguish between the suits against the physician and the manufacturer, because these items were the same in each case. The plain language of the agreement precluded any interpretation other than that it released all joint tortfeasors. The court noted that the plaintiff had the chance to

---


96. 63 Md. App. at 519, 492 A.2d at 1360.

97. Id.

98. Id.

99. Id. at 519-20, 492 A.2d at 1360.

100. Id. at 520, 492 A.2d at 1360. At an earlier stage in the proceedings, a different circuit court judge had denied the defendant’s motion for summary judgment. The plaintiff’s first ground of appeal was that the “law of the case” doctrine precluded the second judge from granting the motion for summary judgment that a court of coordinate jurisdiction previously denied. The Court of Special Appeals explained that denial of the motion did not preclude resubmission of it at a later point in the proceedings. Id. at 522, 492 A.2d at 1362 (citing Joy v. Anne Arundel County, 52 Md. App. 653, 660-61, 451 A.2d 1237, 1242 (1982), cert. denied, 295 Md. 440 (1983), and Placido v. Citizens Bank and Trust Co., 38 Md. App. 33, 44-46, 379 A.2d 773, 779-80 (1977)).

101. 63 Md. App. at 525, 492 A.2d at 1363. For the statutory definition of “health care provider,” see supra note 95.

102. Id. at 530-31, 492 A.2d at 1366.

103. Id. at 530, 492 A.2d at 1365-66.

104. Id. at 530, 492 A.2d at 1366.
remove the language or otherwise to limit the effect of the release, but had failed to do so. 105

C. Legislative Developments

1. Cost Containment.—Two bills passed by the General Assembly during the 1986 session establish exemptions from the lengthy and costly certificate of need process. 106 Chapter 827 107 eliminates the requirement of a certificate of need before nursing homes may expend capital for equipment, construction, or renovation, provided the expenditure is not for projects directly related to patient care or for projects that increase patient charges or other rates. 108 The exemption does not apply if the project would form part of a patient care or health care project for which a certificate of need would otherwise be required. 109

Chapter 864 110 closes a loophole in the health planning law that

105. Id. at 530-31, 492 A.2d at 1366.

Other Developments:

1. In McClurkin v. Maldonado, 304 Md. 225, 498 A.2d 626 (1985), the Court of Appeals held that a single arbitration panel chairman lacked the authority to dismiss an action brought under the Health Claims Arbitration Act. Id. at 234, 498 A.2d at 631.


106. The certificate of need application process often involves multiple applications for health care projects that are usually "batched" by the Commission and considered as a group. Before the Commission can render a decision as to which health care facility is most appropriate, multiple hearings must occur. Any party or interested person may request an evidentiary hearing pursuant to Md. Health-Gen. Code Ann. § 19-118(f) (Supp. 1986). The preparation for this hearing involves a great quantity of time and paperwork. In fact, competitors often use a hearing as a delay tactic. Also, the Commission may find that it requires more information to make a decision, which further delays the process. Telephone interview with Karl Aro, Joint Committee on Health Care Cost Containment (Sept. 25, 1986).


108. Md. Health-Gen. Code Ann. § 19-115(j)(5)(vi) (Supp. 1986). The General Assembly intended the statute to cover expenditures such as the construction of parking lots or other physical facilities unrelated to patient care. These expenditures do not raise the costs to patients, but rather enable nursing homes to operate more efficiently or to upgrade their physical plant. Consequently, the General Assembly believed it unnecessary to burden an already overworked Commission with these matters. Telephone interview with Karl Aro, Joint Committee on Health Care Cost Containment (Sept. 24, 1986).


permitted the construction and operation of "multispeciality ambulatory surgical facilities" without requiring a certificate of need.\textsuperscript{111} Specifically, the law alters the definition of "ambulatory surgical facility" to include these facilities, which are often extremely expensive to build and costly to the health care system,\textsuperscript{112} under certificate of need requirements.\textsuperscript{113} In addition, the legislation provides an exemption for physicians, podiatrists, or dentists who perform surgeries within a single medical or surgical subspecialty in their office.\textsuperscript{114} Lastly, the statute contains a grandfather clause for those entities that, before February 12, 1986, had either (1) received certification from Medicare to be reimbursed as an ambulatory surgical facility; or (2) received a letter of determination from the Commission that a certificate of need was not required, and had spent at least $100,000 in reliance on that determination.\textsuperscript{115}

The General Assembly enacted two other bills that amend the 1985 Health Care Cost Containment package.\textsuperscript{116} Chapter 803\textsuperscript{117} provides that future State health plans, developed after incorporation of the institution-specific plan\textsuperscript{118} into the State health plan, shall include the various requirements specified in the institution-specific plan.\textsuperscript{119} The Commission will then use the institution-spe-

\textsuperscript{111} Certain multiservice facilities, termed "hospitals without beds," which performed outpatient surgery and other services on a large scale, were technically exempt from certificate of need requirements. The Maryland Hospital Association wanted to close this loophole because these physician-operated facilities held a competitive advantage over ordinary hospitals. Telephone interview with Karl Aro, supra note 108.

\textsuperscript{112} These facilities were essentially "hospitals" in their construction and operation, and their operation caused a serious drain on state health resources. Telephone interview with Karl Aro, supra note 106.


\textsuperscript{114} Id. at § 19-101(e)(2)(v). This provision reflects a compromise between physicians and the Maryland Hospital Association, permitting a small group of practitioners, including podiatrists and ophthalmologists, to perform procedures for patients who leave after a few hours. The certificate of need exemption, however, covers facilities with no more than four surgical suites. Telephone interview with Karl Aro, supra note 108.


\textsuperscript{118} An institution-specific plan, also called a hospital capacity plan, identifies excess bed capacity and determines reduction for each hospital. Md. HEALTH-GEN. CODE ANN. §§ 19-114.1 (Supp. 1986).

\textsuperscript{119} Id. at § 19-114.1(d)(4). These requirements are set forth in Md. HEALTH-GEN. CODE ANN. § 19-114.1(b) (Supp. 1986), which provides:
specific plan, in conjunction with the State health plan, to review certificate of need applications for conversion, expansion, consolidation, or introduction of hospital services.120

The statute also directs the Joint Committee on Health Care Cost Containment121 to study the effects of the 1985 Health Care Cost Containment package on hospital capacity, access to health care, and quality of care.122 The Joint Committee is to report its findings and recommendations to the General Assembly on or before the first day of the 1990 Session.123

Finally, Chapter 809124 authorizes the Secretary of Health the Mental Hygiene to investigate complaints concerning the conformance of licenses for major medical equipment125 with statutory and regulatory licensing requirements.126 The Secretary may also inspect the operation of licensed major medical equipment to verify

(b) The institution-specific plan shall address:
1. Accurate bed count data for licensed beds and staffed and operated beds;
2. Cost data associated with all hospital beds and associated services on a hospital specific basis;
3. Migration patterns and current and future projected population data;
4. Accessibility and availability of beds;
5. Quality of care;
6. Current health care needs, as well as growth trends for such needs, for the area covered by each hospital;
7. Hospitals in high growth areas; and
8. Utilization.

The statute ensures that the above methodology will henceforth be incorporated in the State health plan, so that hospitals cannot avoid these requirements when a new State health plan comes into effect. Telephone interview with Karl Aro, supra note 106.

121. The Joint Committee comprises five Senators and five Delegates, appointed by the President of the Senate and the Speaker of the House of Delegates, respectively; it is staffed by the Department of Legislative Reference and Department of Fiscal Services. Health Care Cost Containment Act, ch. 109, § 4, 1985 Md. Laws 1532; ch. 111, § 3, 1985 Md. Laws 1541.
123. Id. The General Assembly added these provisions to enable an assessment concerning whether the methodology that it had created for health care costs would prove flexible enough to encourage reductions in bed capacity, yet remain sensitive to market growth. Telephone interview with Karl Aro, supra note 106.
125. MD. HEALTH-GEN. CODE ANN. § 19-1001(c) (Supp. 1986) defines “major medical equipment” as medical equipment used to provide health care services if the total cost of the equipment exceeds $600,000 after adjustment for inflation.
126. Id. at § 19-1005.1(a)(1).
that safety standards are being met.\textsuperscript{127} Furthermore, the Secretary may deny a license to individuals and corporate entities if they previously had a license revoked in their individual capacity or as a different corporate entity.\textsuperscript{128}

2. Medical Malpractice—Arbitration.—In a continuing response to the medical malpractice concern in the state,\textsuperscript{129} the General Assembly passed Chapter 642,\textsuperscript{130} providing for a stricter reporting and management program for claims against physicians. The Director of the Health Claims Arbitration Office must now forward copies of claims against a health care provider to the Commission on Medical Discipline and the Medical and Chirurgical Faculty of Maryland.\textsuperscript{131} The Commission will have two consumer members, one of whom should be knowledgeable in risk management or quality assurance.\textsuperscript{132} The Faculty must report complaints or malpractice claims against physicians to the Commission.\textsuperscript{133} Furthermore, every six months, hospitals must file with the Commission reports of certain complaints or claims against physicians.\textsuperscript{134} Under certain circumstances, the Commission must notify hospitals and other facilities of

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at § 19-1005.1(a)(2). These two powers, to investigate and to inspect, were explicitly granted to the Secretary to fill a gap in the previous legislation concerning major medical equipment. The Health Care Cost Containment Act, ch. 107, 1985 Md. Laws 1496 (codified at \textit{MD. HEALTH-GEN. CODE ANN.} §§ 19-1001 to -1008 (Supp. 1986)) had failed to address these issues. The Secretary now has the authority to enforce better compliance with the statute and thereby to promote safety.
\item \textsuperscript{128} Section 19-1006(a)(3) encompasses officers, owners, or directors of corporate entities. The purpose of the legislation was to prevent those who earlier had licenses revoked from obtaining licenses at a later time by merely reincorporating under another entity. Telephone interview with Karl Aro, \textit{supra} note 106.
\item \textsuperscript{129} See generally \textit{REPORT OF THE GOVERNOR'S TASK FORCE ON HEALTH CARE COST CONTAINMENT}, Recommendation 36 (Dec. 14, 1984).
\item \textsuperscript{130} Act of May 27, 1986, ch. 642, 1986 Md. Laws 2365 (codified at \textit{MD. CTS. & JUD. PROC. CODE ANN.} § 3-2A-04(a)(1) (Supp. 1986); \textit{MD. HEALTH OCC. CODE ANN.} §§ 14-402(a), (f), 14-501(c), -510.1(d), -512, -603 (Supp. 1986); and \textit{MD. HEALTH-GEN. CODE ANN.} § 19-319(e), (g) (Supp. 1986)).
\item \textsuperscript{131} \textit{MD. CTS. & JUD. PROC. CODE ANN.} § 3-2A-04(a)(1) (Supp. 1986).
\item \textsuperscript{132} \textit{MD. HEALTH OCC. CODE ANN.} § 14-402(a)(2)(ii)(4), (2)(iii) (Supp. 1986). Quality assurance, as the term suggests, embraces clinical issues of medical care delivery at an institution and whether that care meets certain standards. Recently, the field has become related to the area of risk management. For fuller discussion, see \textit{infra} note 137.
\item \textsuperscript{133} See \textit{MD. HEALTH OCC. CODE ANN.} § 14-501(c) (1986).
\item \textsuperscript{134} \textit{Id.} at § 14-512(a)(1). These reports would state whether, during the six months preceding the report, the hospital had taken any disciplinary action or placed restrictions on any licensed physicians in the hospital for reasons that might be grounds for disciplinary action under \textit{MD. HEALTH OCC. CODE ANN.} § 14-504 (1986 & Supp. 1986). Section 14-504 enumerates various grounds for reprimand, probation, suspension, or revocation of a physician's license, including incompetence, substance abuse, and falsification of records.
\end{itemize}
these complaints or reports. 135

Chapter 642 further prescribes that each hospital establish a process for providing credentials to physicians who have staff privileges at the hospital or who are employed by the hospital. 136 It also requires that hospitals maintain a risk management program. 137

135. Id. at § 14-510.1(d)(1) (Supp. 1986). Circumstances for notification would arise if the nature of the complaint signifies a reasonable possibility of an imminent threat to patient safety, or if the complaint or report resulted from a claim filed in the Health Claims Arbitration Office. Id.


   (2) The Secretary shall, by regulation and in consultation with hospitals, physicians, interested community and advocacy groups, and representatives of the Maryland Defense Bar and Plaintiffs' Bar, establish minimum standards for a credentialing process which shall include:

   (i) A formal written appointment process documenting the physician's education, clinical expertise, licensure history, insurance history, medical history, claims history, and professional experience.

   (ii) A requirement that an initial appointment to staff not be complete until the physician has successfully completed a probationary period.

   (iii) A formal, written reappointment process to be conducted at least every 2 years. The reappointment process shall document the physician's pattern of performance by analyzing claims filed against the physician, data dealing with utilization, quality, and risk, a review of clinical skills, adherence to hospital bylaws, policies and procedures, compliance with continuing education requirements, and mental and physical status.

137. Id. at § 19-319(g). Risk management entails the determination and analysis of the potential losses, i.e., risks, assumed by any business or institution, such as a hospital, in connection with its activity of production or service. Historically, the primary function of the risk manager was to assess the amount of insurance the hospital needed to cover adequately these potential losses. The risk manager's role was defensive; it largely required the tracking of occurrences or incidents that might later evolve into a claim.

Recent developments in the insurance market have altered that role. In part, due to the proliferation of malpractice suits and awards, the insurance market has decreased, limiting the number of sources from which hospitals and physicians can procure coverage. Furthermore, coverage is fairly standard and premiums tend to be uniformly elevated. Hence, this defensive aspect of the risk manager's position has become less significant.

Within the past few years, a greater focus on loss-prevention has led to a more active, affirmative role for risk managers. Hospitals had traditionally employed written "incident reports" to chronicle wayward occurrences such as medication errors or "slip and falls." This system, however, failed to account for more than half of actual incidents, and the more serious incidents tended to go unreported. Quality assurance personnel responded by creating a generic screening process whereby a list of criteria were applied against all patients in the hospital. Screening items might include death within 24 to 48 hours of admission, infection not present on admission, or neurodeficiency not present on admission. Consequently, hospitals could catch potential claims as well as detect important practice trends. Hospitals discovered that the outcome of these claims, i.e., whether the claims could result in lawsuits, often hinged on how hospital staff communicated to the patient and family the reasons for the turn of events. The number of lawsuits is not expected to drop, but to stabilize at its present high rate.

If quality assurance personnel detect a trend or practice pattern that needs to be
Failure to comply with either of these provisions may cause the hospital to lose its license or subject it to a monetary penalty.\textsuperscript{138}

3. Health Insurance—Policies—Nonduplication Provisions.—The General Assembly enacted Chapter 494,\textsuperscript{139} revising sections of the Insurance Code that regulate nonduplication provisions in health insurance policies.\textsuperscript{140} Previously, the Code expressly permitted health insurance policies to contain nonduplication provisions or provisions to coordinate coverage with other insurers, including nonprofit health service plans.\textsuperscript{141} The bill modified this provision only to the extent of prohibiting a nonprofit health insurance policy or plan from containing “nonduplication provisions or provisions to coordinate coverage . . . with any individually underwritten and issued, guaranteed renewable, specified disease policy . . . which does not provide benefits on an expense incurred basis.”\textsuperscript{142} As a result, a nonprofit health insurer can no longer restrict its coverage because an individual also maintains a separate disease policy.

addressed, they will usually offer this information to a risk management or quality assurance committee. The committee will then study the data and assess liability. If quality assurance personnel are concerned about a particular practitioner, then the committee may refer the person to peer review or limit his or her privileges.

Until very recently, hospitals did not have such an organized approach. Rather, they often designated an administrative official to handle risk management, among other duties, or asked a safety officer who dealt with occurrences like “slip and falls” to do so. The statute, however, mandates that all hospitals implement a formal risk management system. Telephone conversation with Department of Risk Management, Medical Mutual Liability Insurance Society of Maryland (Oct. 21, 1986).  

\textsuperscript{138} Md. Health-Gen. Code Ann. §§ 19-319(c)(4)(ii) & 319(g)(3)(ii) (Supp. 1986) each direct a $500 per day fine for every day the violation persists.  


\textsuperscript{140} Id.  

\textsuperscript{141} Md. Ann. Code art. 48A, §§ 361F(A), 470S(A), and 477Y(A) now provide:  

EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, THE Insurance Commissioner, in accordance with regulations issued by him, shall permit health insurance policies to contain nonduplication provisions or provisions to coordinate the coverage with other health insurance policies, including those of nonprofit health service plans, and those of commercial group, blanket, and individual policies, and with other established programs under which the insured may make a claim. (Capitals indicate language added by House Bill 791).  

\textsuperscript{142} Id. Sections 361F(B), 470S(B), and 477Y(B) of article 48A now provide:  

Notwithstanding the provisions of subsection (A) of this section or any other provision of this article, a nonprofit health insurance policy or nonprofit health service plan may not contain nonduplication provisions or provisions to coordinate coverage with any individually underwritten and issued, guaranteed renewable, specified disease policy, as defined in § 468H of this article, which does not provide benefits on an expense incurred basis.
4. Developmental Disabilities Administration.—Finally, the General Assembly enacted Chapter 637,\(^143\) to establish a Developmental Disabilities Administration.\(^144\) In general, this Act provides for State administered services to individuals with developmental and other disabilities.\(^145\) By expanding the definition of "disabled," the Act enables persons with physical as well as mental disabilities, and persons who are not institutionalized, to receive services. The Act calls for a State plan to identify the target population, assess their needs, and provide them with the necessary services.\(^146\)

JOHN J. KIM
KATHRYN A. TURNER


\(^{144}\) House Bill 711 repealed the Mental Retardation and Developmental Disabilities Law, Md. HEALTH-GEN. CODE ANN. § 7-101 to -1001 (1982), and the Family Support Services Program, id. at §§ 10-813, 15-201 to -204. The bill, however, added a new Title 7 as well as a new § 10-813 (codified in Supp. 1986); in addition, the bill repealed and reenacted, with amendments, Md. HEALTH-GEN. CODE ANN. §§ 2-103(c), 2-106(a), 12-105(b), 16-101(d)-(e), 16-401, 16-403, 16-406 (1985 & Supp. 1986); and Md. EDUC. CODE ANN. §§ 2-303(h)(1), 8-411(c), 22-201(b), 22-203(c) (1985 & Supp. 1986).

\(^{145}\) "Developmental disability" means:

- a severe chronic disability of an individual that:
  1. Is attributable to a physical or mental impairment, other than the sole diagnosis of mental illness, or to a combination of mental and physical impairments;
  2. Is manifested before the individual attains the age of 22;
  3. Is likely to continue indefinitely;
  4. Results in an inability to live independently without external support or continuing and regular assistance; and
  5. Reflects the need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are individually planned and coordinated for the individual.


\(^{146}\) Id. at § 7-301 to -306. Individuals with developmental disabilities are to be provided with the following:

- Day habilitation services;
- Family support services;
- Individual support services;
- Prevention and early detection of disabilities;
- Residential services in community-based settings;
- Services coordination;
- Services in State residential centers;
- Services to insure protection of the individual rights and liberties of individuals with developmental disability;
- Vocational services; and
- Any other services that may be necessary to permit delivery of the services under this subsection.

Id. at § 7-303.
IX. Property

A. Zoning and Planning

1. Zoning Board of Appeals.—In *Miller v. Pinto*\(^1\) the Court of Appeals held that the Kent County Board of Appeals possessed the requisite statutory authority to make an original determination as to whether an existing use of land violated the county zoning ordinance.\(^2\) In reaching this conclusion, the court explored the source of the Board of Appeal’s enforcement authority and the extent of its powers in light of Kent County’s status as a nonchartered, code home rule county.\(^3\)

The court determined that the Board’s immediate source of authority was the zoning ordinance enacted by the local legislative body of Kent County, the County Commissioners. In turn, the Commissioners’ authority derived from state enabling legislation.\(^4\)

The trial court had concluded that the Board of Appeals lacked statutory authority to make an original determination as to whether an existing zoning use violated the county zoning ordinance. The court determined that the local zoning ordinance exceeded the authority delegated to the Board by article 66B, section 4.07(d) of the Maryland Code,\(^5\) which the court termed “the sole source of Kent County’s authority to enact zoning ordinances.”\(^6\) Section 4.07(d) permits local legislative bodies to provide for a board of appeals whose powers are limited to hearing and deciding appeals of errors and special exceptions, and authorizing variances.\(^7\) The trial court thus reasoned that section 4.07(d) did not enable the Kent County Commissioners to authorize the Board of Appeals to make original

---

1. 305 Md. 396, 504 A.2d 1140 (1986).
2. Id. at 405-06, 504 A.2d at 1145.
3. Home rule legislation provides for a measure of self-government by local cities and counties. In Maryland, code home rule may be adopted pursuant to article XI-F of the Maryland Constitution and article 25B of the Maryland Annotated Code. See 305 Md. at 401 n.1, 504 A.2d at 1142 n.1. Alternatively, a unit of local government may adopt charter home rule pursuant to article XI-A of the Maryland Constitution. See generally Moser, County Home Rule—Sharing the State’s Legislative Power with Maryland Counties, 28 Md. L. Rev. 327 (1968).
4. In a chartered county, the authority of the local legislative body derives from the county charter, which is adopted by the citizens of the county. In a code home rule county, by contrast, the authority of the local legislative body derives directly from state statutes. 305 Md. at 404 n.5, 504 A.2d at 1144 n.5.
6. 305 Md. at 400, 504 A.2d at 1142.
determinations concerning zoning uses.\textsuperscript{8}

The Court of Appeals, however, found that another statute, article 25B, section 13,\textsuperscript{9} empowered the County Commissioners to vest authority in the Board of Appeals to make original determinations.\textsuperscript{10} Section 13 covers the general powers of nonchartered, code home rule counties; it also incorporates by reference article 25A, section 5(U),\textsuperscript{11} which delegates to local governments the authority to establish and empower boards of appeals.\textsuperscript{12} Thus, section 13 operates as enabling legislation for local zoning ordinances. The court believed it "manifest" that the General Assembly intended that both statutes afford boards of appeal the powers authorized by each of them.\textsuperscript{13} Consequently, the Kent County Zoning Ordinance, which authorizes the Board of Appeals "[t]o make a determination, in cases of uncertainty, of the district classification of any use not specifically named in these regulations," was within the boundaries set by the enabling legislation.\textsuperscript{14}

In \textit{Baltimore County v. Batza}\textsuperscript{15} the Court of Special Appeals held that the issuance of permits for the construction of private septic systems on private property was a governmental function;\textsuperscript{16} therefore, the County enjoyed immunity from tort liability for its failure to determine that seepage from the private septic systems would pollute the drinking supply.\textsuperscript{17} As a result, the County was not equitably estopped from imposing a special assessment upon owners of the private septic systems in order to finance the extension of public sewerage to their properties.\textsuperscript{18}

The court also held that the County could properly force the owners to pay fifty-two percent of the project's cost, notwithstanding the substantial public benefit—clean drinking water—that would
flow from the project's completion.\textsuperscript{19}

\textbf{2. Procedure—De Novo Hearings of Zoning Appeals.}—In \textit{Lohrmann v. Arundel Corp.}\textsuperscript{20} the Court of Special Appeals held that a board of zoning appeals' evenly-divided vote operated as an affirmance of a hearing officer's decision to grant a special exemption.\textsuperscript{21}

The court concluded that a \textit{de novo} hearing before a board of zoning appeals is analogous to a \textit{de novo} appeal to a circuit court from a district court.\textsuperscript{22} In the latter case, the circuit court proceeds as though the district court had never entered judgment.\textsuperscript{23} Thus, the court does not review the lower court's decision; instead, it proceeds "with the burdens of proof and persuasion allocated as an original proceeding, and with the entry of a new judgment at the conclusion of the trial."\textsuperscript{24}

Applying this analogy, the court observed that a decision by an evenly-divided board tended to show that the appellants had not met their burden.\textsuperscript{25} Thus, the effect of the board's action was to deny the request for a special exception.\textsuperscript{26}

\textbf{3. Master Plans.}—In \textit{People's Counsel for Baltimore County v. Webster}\textsuperscript{27} the Court of Special Appeals emphasized that courts should exercise flexibility in considering whether a county's zoning processes are consistent with its master plan.\textsuperscript{28} The controversy concerned the use of property for a new office building in an area of transition between commercial and residential districts.\textsuperscript{29} The local board of zoning appeals, the court held, did not err in granting a special exception for new office construction, even though the amended master plan recommended against that decision.\textsuperscript{30}

Section 523(b) of the Baltimore County Charter requires that the county zoning maps be consistent with the master plan.\textsuperscript{31} The \textit{Webster} court stressed the need for consistency, but reaffirmed the

\begin{itemize}
  \item \textsuperscript{19} \textit{Id.} at 305-06, 507 A.2d at 227-28.
  \item \textsuperscript{20} 65 Md. App. 309, 500 A.2d 344 (1985).
  \item \textsuperscript{21} \textit{Id.} at 319-20, 500 A.2d at 349.
  \item \textsuperscript{22} \textit{Id.} at 318-19, 500 A.2d at 348-49.
  \item \textsuperscript{23} \textit{Id.} at 318, 500 A.2d at 348-49.
  \item \textsuperscript{24} \textit{Id.}, 500 A.2d at 349.
  \item \textsuperscript{25} \textit{Id.} at 319, 500 A.2d at 349.
  \item \textsuperscript{26} \textit{Id.} at 319-20, 500 A.2d at 349.
  \item \textsuperscript{28} \textit{Id.} at 701-04, 501 A.2d at 1347-48.
  \item \textsuperscript{29} \textit{Id.} at 699-700, 501 A.2d at 1346.
  \item \textsuperscript{30} \textit{Id.} at 701-04, 501 A.2d at 1347-48.
  \item \textsuperscript{31} \textit{Baltimore Co., Md., Charter} § 523(b) (1978 & Supp. 1984).
\end{itemize}
well-settled principle that a master plan is to serve as a guide, not as a “straightjacket,” in the implementation of zoning regulations. The plain language of the County Charter, which provided for the master plan “to serve as a guide for the development of the county,” conformed with the generally accepted view under Maryland case law that a master plan is not mandatory. Therefore, the People’s Counsel’s allegation that the permitted use of the property did not exactly conform with the master plan was not in and of itself fatal.

In addition, giving full consideration to the historical context, the court found that the County Council’s subsequent revision of the comprehensive zoning map fully satisfied the concerns expressed in the plan. The revision reclassified part of the transition area of the district, including the appellee’s property, and permitted office buildings of certain height and area restrictions. Thus, the decision reflected the diminished importance of master plans as well as the court’s sensitivity to political and commercial developments.

B. Takings

1. Standard.—In Greenberg v. State the Court of Special Appeals reiterated the basic proposition that state-imposed restrictions on private property constitute a taking of land without just compensation only if the restrictions are so substantial as to render the property completely worthless and useless. Therefore, proof that the restriction merely deprived the property of its most reasonable or profitable use, even if the restriction caused a severe decline in

32. 65 Md. App. at 702-03, 501 A.2d at 1347.
33. Id. at 702, 501 A.2d at 1347 (quoting BALTIMORE Co., Md., CHARTER art. V, div. 2, subd. 6, § 523(a) (1978 & Supp. 1984)).
36. The area’s original designation, DR-16, permitted office buildings by special exception only. Consultants worried that because the provisions set no limits on height or area, the special exceptions might overwhelm the purpose of the classification as a transition area. The County Council, before amending the master plan to incorporate the consultants’ “working paper,” created a new classification (R-O) that allowed use of property for small office buildings by special exception, but set height and area restrictions and eliminated the special exception provision of the DR-16 classification. BALTIMORE Co., Md., COUNCIL BILLS 13-80 and 167-80 (codified at BALTIMORE Co., Md., ZONING REGULATIONS §§ 203 & 1B02.01 (1981)).
38. Id. at 30-31, 502 A.2d at 525.
the property's value, would not support a finding that a taking had occurred.\textsuperscript{39}

In \textit{Greenberg} the appellants owned an undeveloped piece of property\textsuperscript{40} located within the Baltimore-Washington International Airport noise zone.\textsuperscript{41} State noise zone regulations prohibited residential development in this area.\textsuperscript{42} The Anne Arundel County zoning ordinance imposed additional restrictions on the allowable uses of the land.\textsuperscript{43} The appellants alleged that the combined effect of the state noise zone regulation and the county zoning ordinance constituted a taking of their property without just compensation.\textsuperscript{44}

The court disagreed. \textit{Greenberg} did not allege that he had lost \textit{all} reasonable uses of his land, but only that the value of his property was severely diminished; therefore, he was not eligible for compensation.\textsuperscript{45}

The restrictions constituted a valid exercise of the police power, rather than a taking.\textsuperscript{46} Generally, a zoning ordinance cannot effect a taking so long as the ordinance substantially advances legitimate state interests and "do[es] not extinguish a fundamental attribute of ownership."\textsuperscript{47} As the state had a legitimate concern in regulating noise pollution, the court found that no taking had occurred.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{39} \textit{Id.} at 30, 502 A.2d at 525.
\item \textsuperscript{40} \textit{Id.} at 26, 502 A.2d at 523. The appellants were trying to sell property located near Crain Highway in Glen Burnie. They had entered into a contract with Harkins Associations contingent upon Harkins' ability to build apartments on the property. \textit{Id.} at 27, 502 A.2d at 523-24.
\item \textsuperscript{41} \textit{Id.} at 26, 502 A.2d at 523. The property was within a 65-70 Ldn noise zone. Ldn is the yearly day-night sound level in decibels and results from yearly average daily traffic and use of runways and flight paths. \textit{Id.} at 26 n.1, 502 A.2d at 523 n.1.
\item \textsuperscript{42} Md. REGS. Code tit. 11, § 03.03.03 (1977) prohibits residential development within a 65-70 Ldn noise zone. 66 Md. App. at 27, 502 A.2d at 523.
\item \textsuperscript{43} 66 Md. App. at 27, 502 A.2d at 523. The property was located in an R-22 Medium Density Multi-Family District.
\item \textsuperscript{44} \textit{Id.} at 29-30, 502 A.2d at 525.
\item \textsuperscript{45} \textit{Id.} at 36-37, 502 A.2d at 528.
\item \textsuperscript{46} There was a question whether the "'governmental action involved constituted a 'taking' in exercise of the power of eminent domain, or rather a regulation under the State's police power.' " \textit{Id.} at 32, 502 A.2d at 526. The police power involves regulation of the use and enjoyment of certain property, while exercise of the power of eminent domain involves its actual appropriation. The distinction is important since payment is the remedy for a taking for public use without compensation. On the other hand, any "'governmental action that violates due process requirements may be invalidated, without regard to whether compensation is provided.'" \textit{Id.} at 33, 502 A.2d at 526-27 (quoting Maryland-National Capital Park & Planning Comm'n v. Chadwick, 286 Md. 1, 8, 405 A.2d 241, 244-45 (1979)).
\item \textsuperscript{47} 66 Md. App. at 32, 502 A.2d at 526.
\item \textsuperscript{48} \textit{Id.} at 36-37, 502 A.2d at 528.
\end{itemize}
In *Ungar v. State* 49 the Court of Special Appeals held that a state-imposed sewer moratorium did not constitute a taking of private property without just compensation or a deprivation of property without due process of law. 50 Rather, the moratorium represented a reasonable exercise of the police power. 51

The police power's domain is large; it validates regulations enacted in furtherance of the public interest and regulations reasonably necessary to achieve a public goal. 52 Thus, courts will generally uphold a regulation enacted pursuant to the police power even against the charge that the regulation prohibits the beneficial use of property. In fact, the State need not pay compensation for diminution of property value resulting from the reasonable exercise of the police power. 53

Applying these principles, the *Ungar* court observed that the State imposed the sewer moratorium in order to prevent public harm. 54 Because the moratorium was, therefore, a reasonable exercise of the police power, Ungar was not entitled to compensation. 55

2. Landowner's Testimony.—In *Brannon v. State Roads Commission* 56 the Court of Appeals explained guidelines for the permissible scope of a landowner's testimony concerning damages in a condemnation proceeding. 57 The court held that a landowner is the most

---

50. Id. at 483, 492 A.2d at 1342.
51. See id.
52. Id. at 481-82, 492 A.2d at 1341.
53. Id.
54. Id. at 483, 492 A.2d at 1342.
55. See id.
56. 305 Md. 793, 506 A.2d 634 (1986).
57. Id. at 799-801, 506 A.2d at 637-38. The goal of awarding damages is to put the landowner in as good a pecuniary position as he or she would have occupied had the appropriation not occurred. Two different standards for measuring damages are available to a landowner who has lost a portion of property. Section 12-104(b) of the Real Property Article provides that the measure of damages for partial takings is "the actual value of the part taken plus any severance or resulting damages to the remaining land by reason of the taking and of future use by the plaintiff of the part taken." Md. Real Prop. Code Ann. § 12-104(b) (1981). Using this standard, once the actual value of the part taken is determined, the landowner is then responsible for proving severance and consequential damages. One way of doing this is to employ experts to measure the various elements of damage.

Maryland case law provides another option. Under this standard, the measure of damages is "the difference between the fair market value of the entire tract before the taking and the fair market value of what is left thereafter." Big Pool Holstein Farms, Inc. v. State Roads Comm'n, 245 Md. 108, 113, 225 A.2d 283, 285 (1967). Injured parties who choose this method take the risk of receiving lower damage awards if they do not provide direct proof of consequential damages. On the other hand, they save the ex-
logical person to testify as to the land's value, and is presumptively competent to express an opinion as to its worth. Thus, the dollar estimate as well as the reasons that form the basis of the valuation are admissible, although the jury is free to reject the owner's analysis.

C. Property Rights

1. Adverse Possession.—To acquire title by adverse possession, a claimant must prove that his or her occupation of land has been actual, hostile, notorious, exclusive, under claim of title, and continuous or uninterrupted for twenty years. When adverse possession is not claimed under color of title, the claimant can only acquire the land that he or she actually occupied. In determining exactly how much land the claimant occupied, courts look to the character of the land, its uses, and the purposes for which it is adapted.

In Peters v. Staubitz, the adverse possessor, who did not claim under color of title, asserted that a fence delineated the extent of his occupancy. The Court of Special Appeals held that while a visible line of demarcation may provide evidence as to the outer limits of the claimant's possible dominion and control, it could not conclusively establish the extent of the claim. The fence marked the greatest possible area that the claimant could acquire, but did not

pense of hiring expert witnesses and do not have to offer specific evidence categorizing each element of damage as a separate and distinct item of loss. The owner is free to testify as to the value of the property.

The Brannons chose this second method. Thus, the court's ruling is limited to the second method of measuring damages.

58. The landowner's estimate as to the property's value is admissible to the extent that the estimate is based on a unique familiarity with the land. 305 Md. at 802, 506 A.2d at 639.

59. *Id.* at 801, 506 A.2d at 638-39. The court also found that a value estimate, without any explanation of the reasons supporting it, is of little or no use to the trier of fact. "To permit a witness to express an opinion of value without allowing him to set forth the basis for his opinion is to deny the trier of fact a basis for weighing and evaluating [the] testimony." *Id.* at 803, 506 A.2d at 639 (quoting Denver Urban Renewal Auth. v. Berglund-Cherne Co., 193 Colo. 562, 569, 568 P.2d 478, 483 (1977)).

60. *Id.* at 802, 506 A.2d at 639.


62. *Id.* at 645, 498 A.2d at 664.

63. *Id.*

64. 64 Md. App. 639, 498 A.2d 661 (1985).

65. *Id.* at 641, 498 A.2d at 662. A prior landowner constructed a barbed wire fence to keep his cows from going into the neighbor's yard. In the related case of Costello v. Staubitz, 300 Md. 60, 475 A.2d 1185 (1984), the court found that the owner built the fence for his own purposes and that the fence was not evidence of the boundary of the claimant's adverse possession. *Id.* at 73-74, 475 A.2d at 1191-92.

66. 64 Md. App. at 644, 497 A.2d at 664.
prove that the adverse possessor had actually occupied the entire area. To acquire title, the adverse possessor must demonstrate occupation of the entire area claimed, which the claimant in this case was unable to do.67

2. Accretion.—Under Chapter 129 of the Acts of 1862,68 riparian owners were entitled to any accretions to their land, whether made by “natural causes or otherwise.”69 In 1970 the General Assembly repealed the 1862 Act and enacted Maryland’s Wetlands Act.70 Under the Wetlands Act riparian owners are entitled only to natural accretions to their land.71 To avoid the destruction of property rights that vested under the 1862 Act, the Wetlands Act contained a grandfather clause: “[A] riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership that he had prior to July 1, 1970.”72

In Rayne v. Coulbourne73 the Court of Special Appeals permitted riparian landowners to share in an equitable distribution of an artificial peninsula that was created by the Army Corps of Engineers in the water in front of their land.74 The peninsula had formed between 1951 and 1969.75

In support of its position, the court recognized that “[o]ne of the greatest assets of being riparian is the right of access to navigable water.”76 The right of access to navigable water involves not only a practical ability to reach the water, but also “the legal right to use, improve and build out from the land that borders on the water.”77 As these riparian owners possessed the statutory right to

67. Id. at 647, 498 A.2d at 665. The court found that while use of part of the disputed land for a fire pit and a boathouse satisfied a finding of occupation, the mere demarcation with a fence did not establish a claim for the entire area.
69. 1862 Md. Laws ch. 129, § 1.
71. Id. at § 9-201(a) (1983).
72. Id. at § 9-103 (1983).
74. Id. at 371-72, 500 A.2d at 676. Riparian owners find themselves in a unique situation. They are at the mercy of nature since large quantities of their property may be lost to erosion. By the same token, however, the owner of “fast land” has the common law right to any accretion to the land. Id. at 358, 500 A.2d at 669.
75. Id. at 371-72, 500 A.2d at 676. The deposit of spoils from dredging of the river created an eight-acre peninsula that lay between the original fast land and the river. The appellants filed suit seeking a proportionate share of the artificial tract of land that cut off their former frontage on the Wicomico River. Id. at 353-54, 500 A.2d at 666.
76. Id. at 365, 500 A.2d at 672.
77. Id. at 366, 500 A.2d at 673. The peninsula lay between the water and the
build out into the water in front of their property, any accretion that formed in the water in front of their land would deprive the owners of this right.\textsuperscript{78}

The right of access to the Wicomico River was severely impaired by the artificial peninsula directly in front of the riparian owner's property. The peninsula's very existence hindered the owner's ability to build out from the land. The court found that the riparian owner enjoys a "quasi-property right to extend his property, whether by accretion—as he could do at common law, or by making improvements into the water—an enhanced right under the Act of 1862."\textsuperscript{79} Consequently, the court held that the landowner was entitled to a proportionate share of the tract of land.\textsuperscript{80}

3. Antenuptial Contracts.—In Watson v. Watson\textsuperscript{81} the Court of Appeals held that an antenuptial contract to convey an interest in land upon marriage to an intended spouse passes an equitable interest in the realty; therefore, a post-marriage judgment against the vendor will not encumber the property.\textsuperscript{82} The court applied the doctrine of equitable conversion\textsuperscript{83} to reach this conclusion.\textsuperscript{84} The doctrine is applicable only if the promise is subject to specific performance;\textsuperscript{85} however, in Maryland, a promise to convey real estate in consideration of marriage is specifically performable.\textsuperscript{86} Generally, then, equitable conversion will apply to antenuptial covenants unless the promise to convey the realty is made for the purpose of defrauding creditors.\textsuperscript{87}

\textsuperscript{78} Id. at 353, 500 A.2d at 666.
\textsuperscript{79} Id. at 368, 500 A.2d at 674.
\textsuperscript{80} Id. at 369-70, 500 A.2d at 674-75.
\textsuperscript{81} 304 Md. 48, 497 A.2d 794 (1985).
\textsuperscript{82} Id. at 65, 497 A.2d at 802.
\textsuperscript{83} The doctrine of equitable conversion provides that before execution of a deed, one who has contracted to purchase realty becomes equitable owner of the realty; the vendor retains bare legal title. Id. at 60, 497 A.2d at 800. The doctrine is based on the maxim that equity considers as done that which ought to be done. Equitable conversion by contract is still viable in Maryland. Himmighoefer v. Medallion Indus., Inc., 302 Md. 270, 497 A.2d 282 (1985).
\textsuperscript{84} 304 Md. at 59-62, 497 A.2d at 800.
\textsuperscript{85} Id. at 61, 497 A.2d at 800.
\textsuperscript{86} Id. at 62, 497 A.2d at 801. The court rejected a per se rule voiding all conveyances between spouses or conveyances made in consideration of marriage since marriage is valuable consideration under Maryland law. Id. at 63-66, 497 A.2d at 801-03.
\textsuperscript{87} Id. at 66, 497 A.2d at 803.
D. Landlord-Tenant

1. Security Deposits—Treble Damages.—Section 8-203(f)(4) of the Real Property Article provides that "[i]f the landlord, without a reasonable basis, fails to return any part of the security deposit, plus accrued interest, within 45 days after termination of the tenancy, the tenant has an action of up to threefold of the withheld amount, plus reasonable attorney's fees." In *Rohrbaugh v. Estate of Stern* the Court of Appeals held that the statute provides for treble damages based not on the entire amount withheld, but rather only on the amount of the security deposit withheld without a reasonable basis.

In *Rohrbaugh* the landlord withheld the tenant's $675 security deposit more than forty-five days after the lease's termination. The trial court found that a small portion of the security deposit had been withheld without a reasonable basis, but it awarded the tenant's estate damages of $2097.50. The court calculated this figure by tripling the security deposit, adding attorney's fees, and subtracting the amount the landlord legally withheld. In contrast, the Court of Appeals determined the proper damages to be $702.50.

In reaching its decision, the Court of Appeals acknowledged the ambiguous language of section 8-203(f)(4). While the district court interpreted the phrase "withheld amount" to mean the entire amount withheld, the appellate court noted that the language may also be read as the amount "withheld without a reasonable basis." Thus, the issue became one of statutory construction.

Noted commentators support the court's holding that section 8-
203(f)(4) authorizes treble damages only on the amount wrongfully withheld. Professor Steven Davison, the Reporter for the committee that drafted section 8-203(f)(4), stated that the statute "authorizes punitive damages up to threefold the amount withheld 'without a reasonable basis' after 45 days from termination of the lease, plus reasonable attorney's fees." A Maryland treatise on landlord-tenant law also confirms this interpretation.

The court noted that the ambiguity arose during the recodification of prior statutes into the new Real Property Article. The previous provision clearly provided for treble damages on the amount wrongfully withheld. Recodification did not change the statute's meaning. The revisor's note to section 8-203(f)(4) indicates that the language change is simply stylistic.

The Court of Appeals also established guidelines for applying section 8-203(f)(4). Two distinct determinations are required. First, the trier of fact must decide "whether the landlord withheld more of the secured deposit than that to which he was entitled." Second, if the first question is answered in the affirmative, it must be further determined "whether any part of this excess was withheld without a reasonable basis." An excess withheld "incorrectly," but not unreasonably, does not warrant a treble damages award.

---

99. Id., 505 A.2d at 116.
101. 305 Md. at 447, 505 A.2d at 116; D. BREGMAN & G. EVERNGAM, MARYLAND LANDLORD-TENANT LAW, PRACTICE AND PROCEDURE 51 (1983).
102. 305 Md. at 448, 505 A.2d at 116.
103. Before 1974, § 8-203(f)(4) was codified at Md. ANN. CODE art. 21, § 8-213(f)(iv) (1973) and read as follows: "If the landlord shall, without a reasonable basis, fail to return all or any part of the security deposit, plus accrued interest, within 45 days after termination of the tenancy, the tenant has an action of up to threefold of the amount so withheld, plus reasonable attorney's fees." 305 Md. at 449, 505 A.2d at 116 (emphasis added).
104. 305 Md. at 449, 505 A.2d at 116. The court, quoting from previous decisions, emphasized that "'[r]ecodification of statutes is presumed to be for the purpose of clarity rather than change of meaning. Thus, even a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so material that the intention of the General Assembly to modify the law appears unmistakably from the language of the Code.'" Id. (quoting Consumer Protection Div. v. Consumer Publishing Co., 304 Md. 731, 768, 501 A.2d 48, 67 (1985), which quoted In re Special Investigation No. 236, 295 Md. 573, 576-77, 458 A.2d 75, 76 (1985)).
105. 305 Md. at 450, 505 A.2d at 116.
106. Id. at 451, 505 A.2d at 117.
107. Id.
108. Id. The amount incorrectly withheld, however, is certainly recoverable.
Additionally, assessment of treble damages requires "egregious" behavior on the landlord's part in withholding the excessive amount.\textsuperscript{109}

2. Smoke Detectors.—In Salvatore \textit{v.} Cunningham\textsuperscript{110} the Court of Appeals held that "the common law duty to maintain safe premises for a tenant does not encompass the installation of fire protection devices."\textsuperscript{111} If any such duty ever existed, it became void upon the enactment of article 38A, section 12A.\textsuperscript{112}

The \textit{Salvatore} complaint alleged that the owners of a ski chalet\textsuperscript{113} had breached both their statutory\textsuperscript{114} and common law\textsuperscript{115} duties by failing to equip the chalet with a fire detection system.\textsuperscript{116} The trial court dismissed the causes of action for failure to state a claim upon which relief could be granted.\textsuperscript{117}

Despite the tenants' contrary contention, the Court of Appeals found the chalet to be a single family dwelling within the meaning of article 38A, section 12A.\textsuperscript{118} Therefore, under the statute, if the chalet had been constructed before July 1, 1975,\textsuperscript{119} the owners had until July 1, 1982, six months after the date of the fire, to install and maintain a smoke detector.\textsuperscript{120}

\f109. \textit{Id.}
\f110. 305 Md. 421, 505 A.2d 102 (1986).
\f111. \textit{Id.} at 430, 505 A.2d at 106. The case is a consolidation of two suits arising out of the same incident and tried separately by the Circuit Court for Howard County. The Court of Appeals issued a writ of certiorari prior to a decision by the Court of Special Appeals. \textit{Id.} at 423, 505 A.2d at 103.
\f112. \textit{Id.} at 430, 505 A.2d at 106. Article 38A, § 12A provides for smoke detection systems in hotels and multifamily buildings (§ 12A(a)), and in one, two, or three family dwellings constructed prior to July 1, 1975 (§ 12A(b)). \textit{Md. Ann. Code art.} 38A, § 12A (1986).
\f113. The chalet contained three bedrooms, a loft, a common kitchen, a bathroom, and living facilities; it could sleep twelve persons. The owners rented the chalet by weekend and weekly rates. 305 Md. at 425, 505 A.2d at 104.
\f115. The complaint further alleged that the owners breached a common-law duty to make rental property reasonably safe for tenants. 305 Md. at 425, 505 A.2d at 104.
\f116. \textit{Id.} Two persons, among a group renting the chalet, died in a fire that destroyed the dwelling on January 1, 1982.
\f117. \textit{Id.} at 423, 505 A.2d at 103.
\f118. \textit{Id.} at 429-30, 505 A.2d at 106.
\f119. The plaintiffs failed to allege the chalet's construction date in their complaint. In their brief submitted to the Court of Appeals, the plaintiffs did "not contend the chalet was constructed subsequent to July 1, 1975." \textit{Id.} at 427 n.2, 505 A.2d at 105 n.2.
\f120. Article 38A, § 12A(b) provides that: "An occupant of a one, two or three family residential dwelling constructed prior to July 1, 1975 shall by July 1, 1982: (1) Equip each occupant's living unit with a minimum of one approved battery or AC primary
The tenants had contended that because the owners intended the chalet to be used as a temporary accommodation for renters and not as a residential dwelling, the owners had a duty pursuant to article 38A, section 12A(a) to install a smoke detector. The court rejected this argument, holding that the "construction and configuration of the premises" and not the owner's intended use of the premises determines its classification as a residential dwelling or as a hotel and multifamily building.

E. Estates

1. Wills.—In Casson v. Swogell the Court of Appeals held that "publication" is not essential to the valid execution and attestation of a will. The court used this case to clarify any confusion that may have resulted from its earlier opinions.

Katherine Korbien died leaving two wills. The first designated her attorney, Benjamin Swogell, as personal representative and principal beneficiary. Some months after the first will was admitted to probate, Ms. Korbien's cousin, Bernice Casson, introduced a second will. This second will named Ms. Casson as


121. 305 Md. at 424-25, 505 A.2d at 103-04. Article 38A, § 12A(a), as codified at the time of the fire, provided in pertinent part: "Smoke detector required in sleeping area; light signal for deaf or hearing impaired occupants; compliance by hotels and multifamily buildings. (1) Each sleeping area within all occupancies classified residential... shall be provided with a minimum of one approved smoke detector..."

122. Id. at 429, 505 A.2d at 106. The classification of the building determines whether § 12A(a) or § 12A(b) is applicable.

123. 304 Md. 641, 500 A.2d 1031 (1985).

124. When used in the context of the law of wills, "publication" means a declaration or other manifestation by the testator to the witness that conveys the knowledge that the instrument is a will. Id. at 643, 500 A.2d at 1032. If the testator signs the will outside the presence of witnesses, publication may provide an alternative method of proving execution of a will. Id. In this case the will was signed in the presence of both Casson, the personal representative, and Cooney, the witness. Id. at 646, 500 A.2d at 1033. Therefore, publication was not required.

125. Id. at 643, 500 A.2d at 1032.

126. Id.

127. Id. The second will was actually captioned "Power of Attorney." But it also contained testamentary language and the signature of witnesses, id. at 643, 500 A.2d at 1032, although the witnesses did not sign the document at the same place, id. at 657, 500 A.2d at 1039. Furthermore, the testamentary language was added at a later date and the additions did not conform to the margins of the paper, nor were they typed on the same typewriter. Id. at 645, 500 A.2d at 1033. The court found that the discrepancies might bear on the jury question of whether the will was actually a fraud, but would not "constitute a fatal variance from the required procedure for lawful execution." Id. at 657, 500 A.2d at 1039.
personal representative and principal beneficiary of the estate. Swogell contested the validity of the second will primarily because Mr. Cooney, a witness, said that at the time Ms. Korbien signed the instrument, he did not know that the document was a will.\footnote{128} Swogell alleged that prior Maryland case law implied that publication was required for valid attestation,\footnote{129} which in turn was essential to the valid execution of a will.\footnote{130}

A majority of states do not require publication; and, generally, the states that require publication do so because of an express statutory mandate.\footnote{131} The laws of Maryland, however, have never contained a specific requirement of publication.\footnote{132} Currently, for example, section 4-102 of the Estates and Trusts Article requires only that a will 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.\footnote{133}

Nonetheless, Swogell contended that under Maryland case law publication had become an element of attestation.\footnote{134} In rejecting this contention, the court thoroughly recounted the history of the attestation requirement, beginning with the Statute of Wills of 1540.\footnote{135} Maryland’s statutory requirement of attestation, the court observed, derives from the Statute of Frauds of 1677; however, the Statute of Frauds has never been understood to contain a require-
ment of publication. Thus, despite two Maryland cases that seemed to suggest otherwise, the court held that publication is not an element of attestation.

Accordingly, the court expressly held that compliance with the attestation requirement does not necessitate any knowledge on the part of the witness as to the document’s contents. Nor does a valid attestation rest on any particular knowledge as to the character of the instrument. An individual could validly attest to the signing of a document, therefore, without actually knowing that the instrument was a will.

2. Appeal by Personal Representative.—In Alston v. Gray the Maryland Court of Appeals held that a personal representative may not appeal from an order of the Orphans’ Court; instead, as the Court of Appeals had previously held, a personal representative must distribute the estate in accordance with the determination of the Orphans’ Court.

136. See id. at 649, 500 A.2d at 1036.
137. The two cases were Woodstock College v. Hankey, 129 Md. 675, 99 A. 962 (1917), and Conrades v. Heller, 119 Md. 448, 87 A. 28 (1913), on which the Woodstock College court relied. The court stated: “To the extent Conrades implies that a testator must declare the instrument a will, or by word, act, sign or conduct convey that knowledge to the witness, it is disapproved.” 304 Md. at 654, 500 A.2d at 1038.
138. 304 Md. at 654, 500 A.2d at 1038. If, however, the testator signs the will out of a witness’ presence, the testator must “acknowledge” the will before the absent witness may sign. Acknowledgement does not necessarily consist of a verbal declaration by the testator to the witness that the document to be signed is the testator’s will. The testator’s conduct or the paper itself might suffice to apprise the witness of that fact. Id. at 656, 500 A.2d at 1039.
139. Id. at 654-56, 500 A.2d at 1038-39.
140. Id.
141. Id.
142. 303 Md. 163, 492 A.2d 900 (1985).
143. Id. at 166, 492 A.2d at 902. Prior to distribution of the estate, Alston, the personal representative, received a letter informing her that Harrison, the intestate, may have fathered an as-yet-unborn child who would have a claim on the estate. Alston filed a Petition for Instructions in the Orphans’ Court to resolve the legitimacy question and to discharge her responsibilities as personal representative.

The Orphans’ Court conducted the legitimacy hearing and found that Harrison had openly and notoriously recognized one Gray as his child. The court told Alston to list this child as an interested party in any further proceedings and ordered her to furnish Gray with a distributive share. Gray, as only surviving issue, could receive the corpus of the estate.

Alston appealed this decision to the Court of Special Appeals, specifically noting the appeal in her capacity as personal representative. Id. at 166-67, 492 A.2d at 902 and authorities cited therein.
144. See id. at 166-67, 492 A.2d at 902 and authorities cited therein.
145. Id. at 167, 492 A.2d at 902. Generally, the same order that binds the representative to distribute the estate in a certain manner also protects the representative from any liability; however, this is not always so. See Goldsborough v. DeWitt, 171 Md. 225, 257,
The Alston court reasoned that a personal representative is not an aggrieved party and thus has no right to appeal an order.\textsuperscript{146} Additionally, if a personal representative or an executor possessed an unlimited right of appeal, continuous litigation could seriously deplete the assets of a small estate and indefinitely delay the distribution of assets to deserving heirs.\textsuperscript{147} Finally, the court noted, absent this restriction on the right to appeal, the courthouse doors would be open to appeals "‘presenting issues which might well be moot, or seeking opinions on abstract propositions.’"\textsuperscript{148}

\section*{F. Security Interests}

\subsection*{1. Foreclosure Sale Price}

In \textit{Walker v. Ward}\textsuperscript{149} the Court of Special Appeals held that after ratifying a foreclosure sale price, a court cannot change the price to reflect the amount paid by substituted purchasers.\textsuperscript{150} In \textit{Walker} the circuit court ratified a foreclosure sale price of $57,000 and referred the case to the Auditor to state the account.\textsuperscript{151} Before ratification of the Auditor’s Report, the circuit court granted a petition to convey the property to substituted purchasers.\textsuperscript{152} The substituted purchasers paid $86,500 for the prop-

\begin{footnotesize}
\begin{enumerate}
\item\footnotesize 189 A.2d 226, 241 (1937) (personal representative held liable for imprudent investments even though Orphans’ Court had authorized those investments).
\item\footnotesize 146. 303 Md. at 166, 492 A.2d at 902. The court dismissed Alston’s appeal for want of a proper party-appellant. Clearly, had she brought the appeal in her individual capacity as sister of the deceased, instead of her representative one, the court would have allowed it. \textit{Id.} at 166-67, 492 A.2d at 902.
\item\footnotesize In a dissenting opinion, Judge Eldridge contended that the record showed that because Alston was the decedent’s sister, she was an heir at law and an aggrieved party. Since probate court proceedings are generally informal and since substance should override form, Judge Eldridge argued that justice should prevail over technicalities and that the appeal should thus be allowed. \textit{Id.} at 170-72, 492 A.2d at 904-05 (Eldridge, J., dissenting).
\item\footnotesize 147. \textit{Id.} at 167, 492 A.2d at 902.
\item\footnotesize 148. \textit{Id.} (quoting Webster v. Larmore, 270 Md. 351, 353, 311 A.2d 405, 406 (1983)).
\item\footnotesize 149. 65 Md. App. 443, 501 A.2d 83 (1985).
\item\footnotesize 150. \textit{Id.} at 450, 501 A.2d at 87. To hold otherwise would change the amount originally credited to the mortgagors. \textit{Id.} at 448-49, 501 A.2d at 86. The court further held it error for the trial court to question sua sponte the validity of a sale to substituted purchasers, absent fraud or illegality. \textit{Id.} at 450, 501 A.2d at 87.
\item\footnotesize 151. \textit{Id.} at 445, 501 A.2d at 84. The Court of Special Appeals noted that: “The function of an auditor is that of a calculator and accountant for the court.” \textit{Id.} at 448, 501 A.2d at 85 (citing Green v. Green, 182 Md. 571, 35 A.2d 298 (1944)). Md. R. 2-543 authorizes the appointment of auditors and sets forth their powers.
\item\footnotesize 152. 65 Md. App. at 446, 501 A.2d at 85. Md. R. W74(g)(3) provides that: “The court may, at any time after sale, upon \textit{ex parte} petition and consent of the purchaser and person making the sale, authorize the conveyance to be made after final ratification to a substituted purchaser.”
\end{enumerate}
\end{footnotesize}
The court then ratified the Auditor’s Report, which reflected the price paid by the substituted purchasers, rather than the previously ratified foreclosure price. Hence, a surplus payable to the original mortgagors resulted. The Court of Special Appeals held that it was error to state an account based on the substituted purchaser’s price once the foreclosure sale price had been ratified.

2. Mechanics’ Liens.—In 5500 Coastal Highway Limited Partnership v. Electrical Equipment Co., the Court of Appeals held that suppliers of materials to an out-of-state modular home builder are entitled to mechanics’ liens under section 9-102 of the Real Property Article if the modules are constructed for use within Maryland. The court rejected the contention that section 9-102 did not apply because modular units are completed buildings prior to their placement on the building site. In the court’s view, “A module is not in and of itself a building.”

That the materials were originally supplied to an out-of-state contractor is irrelevant. The relevant determination is whether the materials are incorporated into a building constructed to order in Maryland. A mechanic’s lien, however, would not be available

153. 65 Md. App. at 446, 501 A.2d at 85.
154. Id.
155. Id. at 448-49, 501 A.2d at 86. Md. R. W74(g)(3) does not address the consideration paid by substituted purchasers; therefore, according to the court, an auditor’s report should not reflect that consideration. 65 Md. App. at 449, 501 A.2d at 86. Moreover, the court reasoned that it would be unfair to both the mortgagor and the mortgagee to include in the foreclosure sale audit the price paid by the substituted purchasers. Id.
156. 305 Md. 532, 505 A.2d 533 (1986).
Every building erected and every building repaired, rebuilt, or improved to the extent of 25 percent of its value is subject to establishment of a lien in accordance with this subtitle for the payment of all debts, without regard to the amount, contracted for work done for or about the building and for materials furnished for or about the building . . . .
158. 305 Md. at 533, 540, 505 A.2d at 533, 537.
159. Id. at 540, 505 A.2d at 537. An undelivered module is not a completed building. Certain work, including the installation of wiring and plumbing connections, can only be finished after the module arrives at the building site. Id.
160. Id.
161. Id. The court also cited Maryland case law permitting the establishment of liens for necessary work done away from the building site. Id. at 538, 505 A.2d at 536 (citing Morris J. Liebergott & Assocs. v. Investment Bldg. Corp., 249 Md. 584, 241 A.2d 138 (1968); Evans Co. v. International Trust Co., 101 Md. 210, 60 A. 667 (1905)).
162. Id. In 5500 Coastal Highway this was evidenced by an agreement between the modular home manufacturer and the supplier for the materials to be used specifically in
for materials supplied for modules produced for stock purposes and subsequently sold under contracts after construction.\textsuperscript{163}

G. Power of Attorney

In \textit{King v. Bankerd}\textsuperscript{164} the Maryland Court of Appeals held that, as a matter of law, a power of attorney authorizing an agent to "convey, grant, bargain and/or sell" property did not permit the agent gratuitously to transfer that property.\textsuperscript{165}

Maryland statutes\textsuperscript{166} and prior Maryland cases\textsuperscript{167} provide little, if any, guidance concerning the proper construction of powers of attorney. Thus, after reviewing the rules of interpretation pertaining to powers of attorney, the principles of agency, and decisions from other jurisdictions, the court established a definition of these instruments. A power of attorney, the court declared, is "a written document by which one party, as principal, appoints another as agent (attorney in fact) and confers upon the latter the authority to perform certain specified acts or kinds of acts on behalf of the

---

\textsuperscript{163} Id. at 534-35, 505 A.2d at 534.

\textsuperscript{164} 303 Md. 98, 492 A.2d 608 (1985).

\textsuperscript{165} Id. at 110-12, 492 A.2d at 614-15. The court affirmed the lower court's grant of summary judgment to a landowner/principal who had sued his attorney/agent for breach of trust and fiduciary duty in the transfer of property. See \textit{King v. Bankerd}, 55 Md. App. 619, 465 A.2d 1181 (1983). The landowner had executed a power of attorney before he went west in 1968 and then in 1975 had executed a new power of attorney authorizing his attorney to "convey, grant, bargain and/or sell" the property. The attorney later attempted to locate the landowner, but was unsuccessful. He ultimately conveyed the property, without consideration, to the landowner's wife. 303 Md. at 102-03, 492 A.2d at 610.

The agent believed the principal had either abandoned the property, did not care about the property, or had died. The court found, however, that this argument did not support an inference that the principal intended to authorize the gift, but only that the agent could justify the gift. Also, the only evidence before the court relevant to the issue of intent indicated that the principal did not authorize the agent to give the property away. \textit{Id.} at 112-13, 492 A.2d at 615.

\textsuperscript{166} See, e.g., \textit{MD. REAL PROP. CODE ANN.} § 4-107 (1981) (requiring that an agent's authority to grant property be executed in the same manner as a deed); \textit{Id}. at § 14-112 (generally authorizing trustee or trustee's personal representative to convey property if settlor did not designate beneficiary).

\textsuperscript{167} Only a handful of Maryland cases directly deal with the construction of powers of attorney. In \textit{Posner v. Bayless}, 59 Md. 56 (1882), the Court of Appeals recognized the rule of strict construction, with the proviso that the intention of the parties should prevail. In \textit{American Bonding Co. v. Ensey}, 105 Md. 211, 65 A. 921 (1907), and \textit{Kaminski v. Wladerek}, 149 Md. 548, 131 A. 810 (1926), the court reiterated these principles. Finally, in \textit{Klein v. Weiss}, 284 Md. 36, 395 A.2d 126 (1978), the court observed that if a limited partner vests a general partner with power of attorney, the court must narrowly construe the general partner's authority. \textit{Id}. at 61, 395 A.2d at 140.
principal.

The court then reviewed the various rules that govern the interpretation of powers of attorney. In Maryland, as a general rule, powers of attorney are to be strictly construed and grant only those powers clearly delineated in the document. Nonetheless, the rule of strict construction cannot override the cardinal rule that the court must determine the intention of the parties in light of the surrounding circumstances. Furthermore, in accordance with principles of contract law, the court should resolve ambiguities in the document against the maker. Because powers of attorney usually are carefully crafted documents, courts should give these documents' terms their technical, rather than their popular, meaning. Also, general words are to be restricted by the context in which they are used. Finally, the all-embracing expressions found in powers of attorney should be disregarded as "meaningless verbiage."

The court then applied the fundamental principle that a general power of attorney authorizing the sale of property implies a sale for the principal's benefit. Thus, that power does not authorize the agent to make a gift of the property or otherwise transfer it without a present consideration. This finding formed the basis for the court's conclusion that

an agent holding a broad power of attorney lacks the power to make a gift of the principal's property, unless that power (1) is expressly conferred, (2) arises as a necessary implication from the conferred powers, or (3) is clearly intended by the parties, as evidenced by the surrounding facts and circumstances.

The court cited several reasons for reaching its conclusions. First, the court observed, the power to make a gift of the principal's property is potentially hazardous to the principal's interests and thus will not be lightly inferred from a general power of attorney.

168. 303 Md. at 105, 492 A.2d at 611.
169. Id. (citing Klein, 284 Md. 36, 395 A.2d 126).
170. Id.
171. Id. at 106, 492 A.2d at 612.
172. Id.
173. Id.
174. Id. The court cited the RESTATEMENT (SECOND) OF AGENCY § 34 comment h (1958) and persuasive authority from other jurisdictions to support this proposition.
175. 303 Md. at 106-07, 492 A.2d at 612.
176. Id. at 107, 492 A.2d at 612.
177. Id., 492 A.2d at 612-13.
178. Id. at 108, 492 A.2d at 613.
Second, the agent's first loyalty must necessarily be to the principal.\textsuperscript{179} It is difficult to imagine that a gift would benefit the principal, however, if neither the power of attorney nor the principal intended the agent to have this power.\textsuperscript{180} Third, it would be most unusual for a property owner to authorize an agent to give property away.\textsuperscript{181}

H. The Washington Suburban Sanitary Commission

The Court of Appeals in \textit{Washington Suburban Sanitary Commission v. C.I. Mitchell & Best Co.}\textsuperscript{182} held that the Washington Suburban Sanitary Commission (WSSC) did not have statutory authority to levy a one-time, up-front, special connection charge on new WSSC customers.\textsuperscript{183} The WSSC had adopted the special charge exclusively to offset the general annual costs of long-term debt service on certain capital costs.\textsuperscript{184}

The court determined that the WSSC's power to levy charges is limited by the WSSC's enabling statute, article 29 of the Maryland Code.\textsuperscript{185} Various sections of article 29 permit the WSSC to assess service connection charges, front foot connection charges, user charges, and \textit{ad valorem} taxes to pay for identified costs,\textsuperscript{186} but none authorize the WSSC to levy a \textit{special} connection charge for the costs.\textsuperscript{187} Thus, the court concluded that an act of the General As-

\textsuperscript{179} Id.
\textsuperscript{180} Id. at 109, 492 A.2d at 613.
\textsuperscript{181} Id.
\textsuperscript{182} 303 Md. 544, 495 A.2d 30 (1985).
\textsuperscript{183} Id. at 571, 495 A.2d at 44. The General Assembly created the WSSC to provide for the construction, operation, and maintenance of water supply, sewerage, and storm drainage facilities in the Washington Suburban Sanitary District, which encompasses over 950 square miles in Montgomery and Prince George's Counties. The county executives and county councils of the two counties have the power to review and approve the WSSC's capital and operating budgets. Id. at 550, 495 A.2d at 33.

Among other matters, the court held that Md. \textit{Ann. Code} art. 29, § 6-110 (1983), which authorized the Public Service Commission (PSC) to determine the reasonableness of WSSC service charges, did not create a special statutory remedy before the PSC to challenge the WSSC's power to levy the special connection charge. Thus, the developers had exhausted all administrative remedies and could seek judicial review of WSSC's power to levy the charge. 303 Md. at 560, 495 A.2d at 38. The court also held that the developer's payments to WSSC for the special connection charge were voluntary and thus not recoverable. Id. at 577-78, 495 A.2d at 47.

\textsuperscript{184} 303 Md. at 550-51, 495 A.2d at 33.
\textsuperscript{185} Id. at 565, 495 A.2d at 40.
\textsuperscript{186} Md. \textit{Ann. Code} art. 29, §§ 4-105, 4-106, 4-110, 5-101, 6-101, 6-104 (1986).
\textsuperscript{187} 303 Md. at 571, 495 A.2d at 44. Section 4-105 authorizes the two county councils to levy an \textit{ad valorem} tax to retire the WSSC notes and bonds; section 4-106 authorizes the WSSC to assess a water service charge to pay for bond costs; section 4-110(d)
assembly is necessary to enable the WSSC to levy such a charge.\textsuperscript{188}

\textbf{I. In Rem Actions}

Under Maryland Rule 1028\textsuperscript{189} a civil litigant must submit a printed record extract to the Court of Special Appeals to preserve the right of appeal.\textsuperscript{190} In \textit{Allied Bail Bonds v. State}\textsuperscript{191} the Maryland Court of Special Appeals held that a challenge to the forfeiture of a bail bond was a civil in rem proceeding, an action against a thing—the bail bond.\textsuperscript{192} Thus, even though the dispute arose in a criminal proceeding, the party challenging the forfeiture was a civil litigant.\textsuperscript{193} Because that party had neglected to abide by rule 1028, the court refused to review the trial court's decision on the merits.\textsuperscript{194}

\textbf{J. Legislation—Chesapeake Bay Critical Area}

In the spring of 1986 the Maryland General Assembly enacted Chapters 602, 603, and 604 of the Laws of Maryland:\textsuperscript{195} the Chesapeake Bay Critical Areas Act. This landmark Act promulgates new regulations and augments prior regulations governing development in "critical" or "resource conservation" areas\textsuperscript{196} near the Bay.

Echoing regulations previously adopted by the Chesapeake Bay Critical Areas Commission (the Commission),\textsuperscript{197} the 1986 Act establishes guidelines that localities must follow when prescribing locations for new areas of intense and limited development.\textsuperscript{198} The

\begin{enumerate}
\item \textsuperscript{188} 303 Md. at 571, 495 A.2d at 44.
\item \textsuperscript{189} MD. R. 1028.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} 66 Md. App. 754, 505 A.2d 918 (1986).
\item \textsuperscript{192} Id. at 756, 505 A.2d at 919. The court relied heavily on its decision in One 1983 Toyota v. State, 63 Md. App. 208, 492 A.2d 643 (1985), in which it had held that an action to recover an impounded automobile was a civil action. 66 Md. App. at 755, 492 A.2d at 918.
\item \textsuperscript{193} Id. at 756, 492 A.2d at 919.
\item \textsuperscript{194} Id. at 756-57, 492 A.2d at 919.
\item \textsuperscript{195} MD. NAT. RES. CODE ANN. §§ 8-1808.1, -1808.2, -1808.3 (Supp. 1986).
\item \textsuperscript{196} The General Assembly appears to have used these terms interchangeably. Section 8-1807 of the Natural Resources Article, which took effect in 1984, delineates the perimeters of the Chesapeake Bay Critical Area.
\item \textsuperscript{197} In 1984 the General Assembly established the Chesapeake Bay Critical Areas Commission. Act approved May 29, 1984, ch. 794, 1984 Md. LAWS 3744. The Commission's powers and the scope of its mission are set forth in MD. NAT. RES. CODE ANN. §§ 8-1801, -1807 (Supp. 1986).
\item \textsuperscript{198} MD. NAT. RES. CODE ANN. §§ 8-1808.1(b) (Supp. 1986).
\end{enumerate}
Act advocates "clustering": further development should be limited to areas that have experienced prior development. Hence, localities should place new areas of intense development either in areas in which limited development has occurred or adjacent to areas in which intense development has occurred.\textsuperscript{199} Similarly, localities should place new areas of limited development adjacent to existing areas of limited or intense development.\textsuperscript{200}

The Commission will devise criteria for the allocation of future expansion; however, no more than half the expansion thus allocated may occur in resource conservation areas.\textsuperscript{201} Any new area of intense or limited development located in a resource conservation area must conform to all criteria that the Commission may promulgate; the area must also be designated on a comprehensive zoning map.\textsuperscript{202}

Subject to certain conditions,\textsuperscript{203} the Act drastically restricts the density of development on parcels located in the critical area: apparently,\textsuperscript{204} local jurisdictions may permit only one "dwelling unit" per twenty acres.\textsuperscript{205}

Notwithstanding density limitations previously established by the Commission, Chapter 603 allows "bona fide intrafamily transfers" for the purpose of establishing a new residence for a family member on land within a resource conservation area.\textsuperscript{206} A local jurisdiction may permit intrafamily transfers only if the land conveyed was of record on March 1, 1986, and the land consists of between seven and sixty acres.\textsuperscript{207} Before approving an intrafamily transfer, however, a local jurisdiction must require that the relevant deed contain a covenant stating that the lot is created subject to the provisions of the Act.\textsuperscript{208} No person who receives land through an intrafamily transfer may subsequently convey that land to anyone

\begin{itemize}
\item \textsuperscript{199} Id. at § 8-1808.1(b)(1).
\item \textsuperscript{200} Id. at § 8-1808.1(b)(2).
\item \textsuperscript{201} Id. at § 8-1808.1(b)(3).
\item \textsuperscript{202} Id. at § 8-1808.1(b)(4).
\item \textsuperscript{203} Id. at § 8-1808.1(c)(1),(2).
\item \textsuperscript{204} It is unclear whether the Act authorizes one acre of any sort of development per 20 acres, or simply one acre of residential development per 20 acres.
\item \textsuperscript{206} Id. at § 8-1802.2(b). The Act defines "bona fide intrafamily transfers" as follows: "[A] transfer to a member of the owner's immediate family of a portion of the owners' property for the purpose of establishing a residence for that family member." Id. at § 8-1802.2(a)(2). "Immediate family" means "a father, mother, son, daughter, grandfather, grandmother, grandson, or granddaughter." Id. at § 8-1802.2(a)(3).
\item \textsuperscript{207} Id. at § 8-1808.2(c).
\item \textsuperscript{208} Id. at § 8-1808.2(f)(i).
\end{itemize}
other than a member of his or her immediate family.\textsuperscript{209}

Finally, the General Assembly enacted Chapter 604\textsuperscript{210} to limit the Commission's power to establish certain "impervious surfaces limitations."\textsuperscript{211} This section, which supersedes all prior regulations of impervious surfaces in the critical area,\textsuperscript{212} provides the following limitations: for storm water runoff, human-caused impervious areas may not exceed fifteen percent of a parcel to be developed; however, impervious surfaces may cover up to twenty-five percent of lots larger than one acre in subdivisions approved after June 1, 1986.\textsuperscript{213}

The Act took effect on June 1, 1986.

\textbf{JUDITH C. ENSOR}
\textbf{AWILDA R. MARQUEZ}
\textbf{KATHRYN A. TURNER}

\begin{flushright}
\textsuperscript{209} Id. at § 8-1808.2(f)(ii).
\textsuperscript{210} Id. at § 8-1808.3.
\textsuperscript{211} Id. at § 8-1808.3(c).
\textsuperscript{212} Id. at § 8-1808.3(a)(2),(3).
\textsuperscript{213} Id. at § 8-1808.3(c).
\end{flushright}
X. TAXATION

A. Income Tax

1. Domestic International Sales Corporations.—In *Ward Europa, Inc. v. Comptroller of the Treasury*¹ the Maryland Court of Special Appeals held that the Comptroller can alter the three-factor formula of property, payroll, and sales² to determine the taxes of a domestic international sales corporation (DISC).³

Ward Europa, a DISC, bought goods from its parent company and resold those goods to foreign buyers.⁴ For the tax years in question, 1979 to 1982, Ward Europa and its parent were a unitary business;⁵ therefore, Ward Europa had to apportion its income based on the three-factor formula.⁶ In calculating its taxes, using

---

² Md. Ann. Code art. 81, § 316(c) (1980) stated:
The portion of the business income derived from or reasonably attributable to 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, in which each factor shall be given equal weight and in which the property factor shall include rented as well as owned property and tangible personal property having a permanent situs within this State and used in the trade or business shall be included as well as real property. The Comptroller of the Treasury shall have the right, in those cases where circumstances warrant, to alter any of the above rules as to the use of the separate accounting method or the formula method, the weight to be given the various factors in the formula, the manner of valuation of rented property included in the property factor and the determination of the extent to which tangible personal property is permanently located within the State.

The statute has been amended, but the relevant portion of the statute remains unchanged save that “net income” replaced “business income.” Md. Ann. Code art. 81, § 316 (Supp. 1985).
³ 66 Md. App. at 347-48, 503 A.2d at 1379. DISCs were shell corporations that allowed domestic exporting companies to isolate and defer tax liability on some of their profits. See 26 U.S.C. §§ 991-997 (1982). They were abolished by the Tax Reform Act of 1984, Pub. L. No. 98-369, § 805, 98 Stat. 1001 (1984). Foreign sales corporations (FSCs) replaced the defunct DISCs. The Court of Special Appeals prefaced its decision with the following caveat: “[T]his opinion focuses only on DISCs, entities formed under the then-existing sections of the IRC, and may not be applicable to foreign sales corporations.” 66 Md. App. at 334, 503 A.2d at 1372.
⁴ 66 Md. App. at 337, 503 A.2d at 1374.
⁵ Id. at 339, 503 A.2d at 1374. In a prior case the Maryland Tax Court had ruled that a DISC and its parent company constituted a unitary business. *Id.* at n.4. For a review of factors determining whether a business is unitary, see Ramsay, Scarlett & Co. v. Comptroller of the Treasury, 302 Md. 825, 490 A.2d 1296 (1985).
⁶ 66 Md. App. at 339, 503 A.2d at 1374-75.
the Comptroller's regulations, Ward Europa determined that it owed no tax at all since it owned no property anywhere, had no payroll, and made all its sales outside of Maryland.

The Comptroller disagreed and assessed deficiencies against Ward Europa. Confronted with the unique circumstances surrounding DISCs, the Comptroller decided to alter the three-factor formula. The payroll and property factors used by the parent company in apportioning its taxes were included in the formula used by Ward Europa.

Ward Europa argued that the Comptroller could only modify those variables specifically mentioned in the statute concerning the allocation of corporate income. The court disagreed, reasoning that the legislature did not intend for creatures such as DISCs to escape all tax liability. Instead, the legislature granted the Comptroller the power to revise the three-factor formula to contend with unusual circumstances. Revision of the formula, therefore, was proper.

2. Valuation of Mineral Leases.—In Comptroller of the Treasury v. Shell Oil Co. the Court of Special Appeals held that royalties paid for minerals extracted under lease agreements constituted "gross rents" for the purpose of valuing a multistate corporation's assets; therefore, the property to be valued was not the gas and oil

---

8. 66 Md. App. at 342, 503 A.2d at 1376.
9. Id. at 343, 503 A.2d at 1377.
10. Id., 503 A.2d at 1376.
11. Id. at 344, 503 A.2d at 1377.
12. Id.
13. Id. at 345, 503 A.2d at 1377.
15. The consideration for the leases in question included a bonus lump sum payment upon execution of the lease, and royalty payments made at designated intervals based on a percentage of the gas or oil extracted from the land. Id. at 255, 500 A.2d at 316.
16. The Code of Maryland Regulations (COMAR) defines "gross rent" as follows: The term "Gross Rent" shall include payments made by a tenant for the privilege of occupying or using the property, including such items as fixed rent, percentage rent, real estate taxes, insurance and maintenance expense borne by the tenant. The term does not include utilities such as gas, electricity, oil, water or items normally consumed by the tenant. Md. Regs. Code tit. 3, § 04.01.03(4)(a) (1986).
17. The relevant portion of the statute for the years in question, 1976, 1977, and 1978, stated:

[T]he portion of the business income of the corporation allowable to this State shall be determined in accordance with a three-factor formula of property, pay-
extracted, but rather the leasehold interest in the land.\textsuperscript{18}

Shell calculated its taxes by treating as gross rent the royalties it paid\textsuperscript{19} and by capitalizing the royalties to determine the value of its leased property.\textsuperscript{20} The Comptroller disapproved of this method and assessed additional taxes.\textsuperscript{21} The Comptroller refused to capitalize Shell’s royalty payments on the theory that the transaction between Shell and its lessors was the sale of minerals instead of the conveyance of a leasehold.\textsuperscript{22} Alternatively, the Comptroller argued that if the transaction did convey a leasehold interest, its total value should be measured by the royalty payments.\textsuperscript{23} The Tax Court agreed, but both the circuit court and the Court of Special Appeals rejected the Comptroller’s position.\textsuperscript{24} The appellate court found the royalty payments to be in the nature of a percentage rent for the land and held that, as a matter of law, the property to be valued was the leasehold interest.\textsuperscript{25}

\textsuperscript{18} Roll and sales, in which each factor shall be given equal weight and in which the property factor shall include rented as well as owned property....

\textsuperscript{19} Md. Ann. Code art. 81, § 316(c) (1980).

\textsuperscript{20} The General Assembly has amended this statute; however, the portion considered in this case remains unchanged save for the substitution of “net income” for “business income.” Id. at § 316 (Supp. 1985).

\textsuperscript{21} Explaining the operation of the three-factor formula, the court stated: “[T]he percentage of Shell’s total business income allocable to Maryland is determined by averaging three fractions: (1) Shell’s property in Maryland/Shell’s total property; (2) Shell’s payroll in Maryland/Shell’s total payroll; and (3) Shell’s sales in Maryland/Shell’s total sales.” 65 Md. App. at 254, 500 A.2d at 316.

\textsuperscript{22} 18. 65 Md. App. at 262, 500 A.2d at 320.

\textsuperscript{19} Id. at 253, 500 A.2d at 315.

\textsuperscript{23} 20. Md. Regs. Code tit. 3, § 04.01.03(4) (1986) provides in relevant part:

(a) In determining the capitalized value of rented or leased property includible in the property factor... the term “leased or rented property” shall include property held by the taxpayer where the legal relation between the parties is that of “Landlord and Tenant”, whether that property be held under a gross lease, net lease, percentage lease, or a lease of similar purport...

(b) The term “Capitalized Value”, for the purpose of these regulations, shall mean a value determined by multiplying the “Gross Rent”, as defined in these regulations by eight...

\textsuperscript{24} 21. 65 Md. App. at 253, 500 A.2d at 315.

\textsuperscript{25} 22. Id. at 257, 500 A.2d at 317.

\textsuperscript{23} 23. Id. at 262, 500 A.2d at 320.

\textsuperscript{24} 24. Id. at 258, 500 A.2d at 318.

\textsuperscript{25} 25. Id. at 262, 500 A.2d at 320. Although no direct precedential authority dictated the decision, the court reviewed several analogous cases for guidance. Thus, for example, in Kiser v. Eberly, 200 Md. 242, 246, 88 A.2d 570, 572 (1952), the Court of Appeals found that a tract of land included in an oil and gas lease conveyed an interest in the land rather than a sale of the minerals. In Ammendale Normal Inst., Inc. v. Schrom Constr. Co., 264 Md. 617, 626-27, 288 A.2d 140, 145 (1972), the Court of Appeals construed an agreement allowing the mining of sand and gravel at a certain amount per ton to be neither a sale of goods nor a lease, but rather a license to extract certain
B. Interest on Refunds

In Comptroller of the Treasury v. Fairchild Industries the Maryland Court of Appeals held that the income tax refund statute requires payment of interest to a corporate taxpayer on a refund arising from a carryback of net operating loss unless the taxpayer's mistake that caused the overpayment is not attributable to the State. Additionally, the court found that interest accrues from the date that the taxpayer files a claim for a refund.

Fairchild incurred a net operating loss for tax year 1978. A corporation can use such a loss as a deduction for the three preceding tax years. Therefore, Fairchild recalculated its taxes for 1975, 1976, and 1977 to reflect the loss, and it filed amended returns on September 27, 1979. The Comptroller granted the refunds, but refused to pay interest thereon.

The Comptroller unsuccessfully argued that the State should not pay interest on a refund if the tax was originally paid due to taxpayer error or if the error was not attributable to the State. That is, the Comptroller contended that the two conditions barring interest payment provided in the income tax refund statute should be disjunctively construed, despite the statutory mandate that in-
interest be paid unless the original tax was paid due to "a mistake or error on the part of the taxpayer and not attributable to the State . . . ." In the Comptroller's view, the substitution of "or" for "and" was a reasonable and logical means of effectuating the legislature's intention that the State must be at fault before interest is paid on a tax return.

In rejecting the Comptroller's position, the Court of Appeals construed the word "and" to have its ordinary conjunctive meaning. Although acknowledging that "and" can be construed to mean "or" to effectuate obvious legislative intent, the court found that since the legislature's intention was clear, the refund statute did not require such construction. The plain and ordinary meaning of the income tax refund statute is that the State must pay interest on a tax refund unless overpayment results solely from taxpayer error. The court found support for this interpretation in Comptroller of the Treasury v. Davidson, in which the Court of Appeals had construed identical language in an earlier statute to require a taxpayer mistake before forfeiture of refund interest. Since Fairchild made no mistake in filing its returns, the corporation was entitled to a refund.

As to the time from which interest on a refund accrues, Fairchild argued that interest should be calculated from October 15 of 1975, 1976, and 1977, the dates on which it properly filed the original returns. The Court of Appeals, however, agreed with the Comptroller that interest should instead be computed from September 27, 1979, the date on which Fairchild filed the amended returns. Since the State was fully entitled to Fairchild's tax payments until the amended returns were filed, the court reasoned that it would be illogical for interest to accrue during the period prior to the filing of those amended returns.

38. 303 Md. at 285, 493 A.2d at 343.
39. Id. at 285-87, 493 A.2d at 343.
40. See Little Store, 295 Md. at 162, 453 A.2d at 1217-18.
41. 303 Md. at 286, 493 A.2d at 344.
42. 234 Md. 269, 199 A.2d 360 (1964).
43. "In order to have a forfeiture under sec. 218, there must have been a mistake or error by the taxpayer, not attributable to the State or a State agency." Id. at 273, 199 A.2d at 361.
44. 303 Md. at 287-88, 493 A.2d at 345.
45. Id. at 289, 493 A.2d at 345.
46. Id.
C. Maryland Tax Court

1. Statute of Limitations.—In Comptroller of the Treasury v. World Book Childcraft International, Inc.47 the Court of Special Appeals, in a case of first impression, ruled that in tax cases the party relying on an exception to the statute of limitations48 bears the burden of demonstrating the applicability of that exception.49

The Comptroller assessed World Book in 1979 for taxes allegedly due from 1939 to 1977.50 The Maryland Tax Court, however, found that the three-year statute of limitation barred the assessments prior to 1976.51 A net operating loss in 1976, which was carried forward in 1977, negated the taxes due for the years not affected by the statute.52

The Comptroller unsuccessfully argued that because World Book had failed to file returns, the statute of limitations was inapplicable.53 Applying a narrow scope of review,54 the court upheld the Tax Court's finding that the Comptroller had not proved that World Book had a duty to file returns.55 Additionally, the court held that

48. MD. ANN. CODE art. 81, § 309(b) (1980) states: "Except as otherwise provided in this section, the amount of any tax imposed by this subtitle shall be assessed within 3 years after the return was filed or within 3 years after the due date for such return, whichever date is later."
49. 67 Md. App. at 445, 508 A.2d at 159.
50. Id. at 429, 508 A.2d at 151.
51. Id.
52. Id. at 430, 508 A.2d at 151.
53. MD. ANN. CODE art. 81, § 309(c)(2) (1980) provides an exception to the three-year statute of limitations: "In the case of a failure to file a return or in the case of the filing of an incomplete return, the tax may be assessed at any time."
54. MD. ANN. CODE art. 81, § 229(o) (Supp. 1985) provides in pertinent part that reviewing courts "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." A reviewing court can reverse a Tax Court order based solely on an erroneous conclusion of law. Ramsay, Scarlett & Co. v. Comptroller of the Treasury, 302 Md. 825, 834, 490 A.2d 1296, 1301 (1985). If the Tax Court has not erred on a question of law, a reviewing court must defer to the Tax Court's factual finding if the finding is supported by substantial evidence appearing in the record. Id. In reviewing the Tax Court's application of law to facts, a court must defer to the agency's decision if a reasoning mind could reach the same conclusion. Id. at 839, 490 A.2d at 1303. In this case, the Court of Special Appeals found that the Tax Court did not err on a question of law and thus deferred to the Tax Court's finding of fact. 67 Md. App. at 439, 508 A.2d at 156.
55. 67 Md. App. at 441, 508 A.2d at 157.
the Tax Court had properly placed on the Comptroller the burden of proving the correctness of the assessment.\textsuperscript{56} The court reasoned that the taxpayer would be forced to prove a negative—that it had no duty to file—if it were to avoid an assessment brought under an exception to the limitation.\textsuperscript{57} Requiring taxpayers to preserve, beyond the statutory period, records that prove they owe no taxes would be inconsistent with the policy underlying the statute of limitations.\textsuperscript{58}

In \textit{Osborne v. Comptroller of the Treasury}\textsuperscript{59} the Court of Special Appeals held that an assessment\textsuperscript{60} of retail sales tax does not constitute an “action” for the purpose of tolling the statute of limitations.\textsuperscript{61} An “action” can be an assumpsit claim\textsuperscript{62} or the filing of a lien.\textsuperscript{63} Since the Comptroller failed to bring such an “action” against Osborne within the statutory four-year period,\textsuperscript{64} the Comptroller

\textsuperscript{56} Id. at 445, 508 A.2d at 159. Normally, the taxpayer bears the burden of proving an assessment incorrect. \textit{Id.} at 442 n.7, 508 A.2d at 158 n.7 (citing Md. Ann. Code art. 81, § 309(d) (Supp. 1985)).

\textsuperscript{57} Id. at 443, 508 A.2d at 158.

\textsuperscript{58} See id.


\textsuperscript{60} Md. Ann. Code art. 81, § 345(a) (1980) provides in relevant part:

If the Comptroller finds from an examination of the returns or records of any taxpayer or otherwise that the taxpayer has filed an incorrect return and paid less than the amount of the tax due under this subtitle, he shall levy a deficiency assessment against the taxpayer, which shall be prima facie correct.

\textsuperscript{61} 67 Md. App. at 564, 508 A.2d at 543. Md. Ann. Code art. 81, § 342(a) (1980) provides in relevant part:

An action may be brought at any time within four (4) years from the time the tax shall be due and payable by the Comptroller in the name of the State to recover the amount of any taxes, penalties and interest due under this subtitle, but if there is proof of fraud or gross negligence, there shall be no limitation of the period in which the action may be brought.

\textsuperscript{62} Md. Ann. Code art. 81, § 206(a) (1980) states:

Any tax may be collected from the person liable under this article to pay the same by action of assumpsit instituted at any time after said tax shall become due and payable, within the period of limitations prescribed by this article, and such suit may be maintained notwithstanding the existence of other remedies by way of sale of real estate, or otherwise.

\textsuperscript{63} Md. Ann. Code art. 81, § 342(b) (1980) provides in pertinent part:

The tax, and all increases, interests and penalties thereon shall be a lien upon all the property, real and/or personal, of any person liable to pay the same to the State from and after the time when notice has been given that such tax has become due and payable as provided herein. Notice of such lien shall be filed by the Comptroller with the clerk of the circuit court . . . . The lien provided for in this section shall have the full force and effect of a lien of judgment.

\textsuperscript{64} In 1978 the Comptroller levied an assessment against Harford Excavating, Inc. (Harford, Inc.) for taxes owed from 1975 to 1977 by Harford Excavating Co. (Harford Co.), a company of which Osborne was sole proprietor. 67 Md. App. at 559, 508 A.2d at
could not collect the assessment.\textsuperscript{65}

2. Exhaustion of Remedies.—In \textit{Comptroller of the Treasury v. Brand Iron, Inc.}\textsuperscript{66} the Court of Special Appeals ruled that by failing to appear at an informal conference and a formal hearing for revision of an assessment,\textsuperscript{67} the taxpayer had not exhausted its remedies before the taxing authority.\textsuperscript{68} Therefore, the Maryland Tax Court lacked jurisdiction over the taxpayer's appeal,\textsuperscript{69} and a dismissal was mandated.

\textbf{D. Personal Property Tax}

In \textit{Phillips Harborplace, Inc. v. State Department of Assessments and Taxation}\textsuperscript{70} the Court of Special Appeals held that a restaurant's kitchen equipment did not qualify for a manufacturing equipment exemption\textsuperscript{71} from personal property tax.\textsuperscript{72} Because the food prepared with kitchen equipment did not undergo what the average person would consider a substantial transformation from its natural state, the court found that the State Department of Assessments and Taxation had properly assessed the kitchen equipment as personal

\begin{thebibliography}{12}
\item \textsuperscript{65} Id. at 567, 508 A.2d at 545.
\item \textsuperscript{66} Id. at 567, 508 A.2d at 542.
\item \textsuperscript{67} Id. at 209-10, 499 A.2d at 1326.
\item \textsuperscript{68} "No appeal to the Maryland Tax Court shall be allowed until the party seeking to appeal has exhausted his remedies before the appropriate assessing or taxing authority ...." \textit{Md. Ann. Code} art. 81, § 230 (1980).
\item \textsuperscript{69} Id. at 212, 499 A.2d at 1327. The Tax Court dismissed the appeal in which Brand Iron protested the finality and correctness of the assessment, but the court remanded the case for an informal conference before the Comptroller. \textit{Id.} at 210, 499 A.2d at 1326. The Court of Special Appeals stated, however, that the Tax Court had authority only to dismiss the taxpayer's appeal. \textit{Id.} at 212, 499 A.2d at 1327.
\item \textsuperscript{70} 65 Md. App. 461, 501 A.2d 92 (1985).
\item \textsuperscript{71} \textit{Md. Ann. Code} art. 81, § 9A(c)(1) (1980) provided an exemption from state assessment for the following property used in manufacturing: "tools (including mechanical tools); implements, however operated; machinery; manufacturing apparatus or engines, whether or not in use; except where the property is declared to be taxable by this subsection." In \textit{Phillips} the tax year in question was 1981. Section 9A was repealed by the Act of April 9, 1985, ch. 8, 1985 Md. Laws 45. The present codification of the manufacturing equipment exemption is found in \textit{Md. Tax-Prop. Code Ann.} § 7-225(a) (1986): "Except as provided in subsection (b) of this section, if used in manufacturing, the following personal property, however operated and whether or not in use, is not subject to property tax: (1) tools; (2) implements; (3) machinery; or (4) manufacturing apparatus or engines."
\item \textsuperscript{72} 65 Md. App. at 468, 501 A.2d at 96.
\end{thebibliography}
In determining what constitutes "manufacturing," Maryland courts have looked to what "manufacturing" means to the average person. For guidance, the court looked to the statement of the United States Supreme Court in *Anheuser-Busch Brewing Association v. United States*:

Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary.... There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."

Applying this rationale, the court rejected Phillips' contention that anything that changes food is manufacturing equipment. A new product is not manufactured by preparing and cooking food.

Phillips further contended that the average person who manages a large restaurant would consider cooking to be manufacturing. The court rejected this argument, stating that it would employ an objective rather than subjective standard to determine the meaning of "manufacture." The average person does not manage Phillips Harborplace. Lastly, the court rejected Phillips' position that since kitchen equipment is subject to retail sales tax as manufacturing equipment, kitchen equipment must be considered manufacturing equipment for purposes of the property tax. Phillips, the court observed, did not sell kitchen equipment; therefore, the Retail Sales Act was irrelevant to personal property taxation. Inconsistent treatment of the same item in different tax statutes re-

---

73. *Id.* at 467-68, 501 A.2d at 95-96.
74. *See, e.g., Macke Co. v. State Dep't of Assessments and Taxation, 264 Md. 121, 285 A.2d 593 (1972)* (vending machine that makes cold drinks and ice is not used in manufacturing).
75. *207 U.S. 556 (1908).*
76. *Id.* at 562 (quoting Hartranft v. Wiegmann, 121 U.S. 609, 615 (1887)).
77. The Maryland Tax Court found the kitchen equipment was properly assessed as personal property. 65 Md. App. at 464, 501 A.2d at 94. That decision was upheld by the Circuit Court for Baltimore City. *Id.* Therefore, the Court of Special Appeals was limited to reviewing whether substantial evidence supported the judgment. *Md. Ann. Code* art. 81, § 229(o) (Supp. 1985).
78. 65 Md. App. at 467, 501 A.2d at 95.
79. *Id.*, 501 A.2d at 95-96.
80. *Id.* at 468, 501 A.2d at 96.
82. 65 Md. App. at 469, 501 A.2d at 96.
83. *Id.*
fects the varying legislative purposes underlying the statutes. The definitional provisions of a tax statute are limited to that statute and do not apply to other statutes. Thus, the court upheld the assessment in every aspect.

E. Real Estate Taxes

1. Property Tax Exemption.—In Supervisor of Assessments of Baltimore City v. Friends School the Court of Special Appeals held that property owned by an educational institution qualified for a property tax exemption if the property is: “1) owned by an educational institution or organization; 2) actually used and necessary for the educational purposes of that institution or organization; and 3) used in the promotion of the general public welfare of the citizens.”

Addressing the second prong of the test, the court looked to several factors in deciding whether property is “actually used” for educational purposes. The use must be “actual and present.” The court also considered the type, frequency, and regularity of activities taking place on the property. Whether a property is “necessary for educational purposes” depends on:

85. 65 Md. App. at 469, 501 A.2d at 96. The court stated:
To grant an exemption in order to induce a manufacturer to operate in Maryland—a manufacturer who might conduct its business anywhere—serves the policy underlying § 9A(c)(1). To grant that exemption to a restaurant that must in any case operate where its patrons are to be found—here, in Baltimore—does not serve that purpose.

86. Id.


88. Md. Ann. Code art. 81, § 9(e)(2) (1980), the relevant statute, provided an exemption from state property tax for: “[P]roperty owned by . . . educational . . . organizations . . . when any of such property described above is actually used exclusively for and necessary for . . . educational purposes (including athletic programs and activities of an educational institution) in the promotion of the general public welfare of the people of the State.” This statute was repealed by the Act of April 9, 1985, ch. 8, 1985 Md. Laws 45 and as rewritten is now codified at Md. Tax-Prop. Code Ann. § 7-202 (1986). The new statute provides an exemption if the property:

(i) is necessary for and actually used exclusively for a charitable or educational purpose to promote the general welfare of the people of the State, including an activity or an athletic program of an educational institution; and

(ii) is owned by:
1. a nonprofit hospital;
2. a nonprofit charitable, fraternal, educational, or literary organization.

89. 67 Md. App. at 518-19, 508 A.2d at 520.

90. Id. at 519, 508 A.2d at 520 (citing Supervisor of Assessments of Baltimore County v. Trustees of Bosly Methodist Church Graveyard, 293 Md. 208, 443 A.2d 91 (1982)).

91. 67 Md. App. at 519-20, 508 A.2d at 520.
the particular type of institution, *i.e.*, day or boarding school; the needs of the student body, taking into account their age, educational level, social development, and other special requirements; the location of the school, *i.e.*, rural, suburban or city; the proximity of the subject property to the students or campus buildings; and whether the services performed in or on the property can be contracted out or are shared by other school employees.\(^9\)

Applying this test, the court concluded that a caretaker's residence at the Friends School did not qualify for a property tax exemption.\(^9\) Because the caretaker's residence was not necessary for educational purposes, the taxpayer did not satisfy the second prong of the test; furthermore, because the property was used only as a personal residence, the taxpayer did not satisfy the third prong of the test.\(^9\)

2. **Transfer Tax.**—In Montgomery County *v.* Fulks,\(^9\) the Court of Special Appeals held that the state agricultural transfer tax statute\(^9\) imposed a ceiling on the total tax a locality could levy on a transfer

---

92. *Id.* at 520, 508 A.2d at 520-21.
93. *Id.*, 508 A.2d at 521.
94. *Id.* at 521, 508 A.2d at 521.
96. The relevant part of the statute read:
   Furthermore, in any county that has imposed a transfer tax at a rate in excess of the rate of transfer tax levied on improved residential property, the combination of the state and local transfer tax rates may not exceed 5 percent plus the rate applicable to improved residential property. If the combined rates exceed the maximum allowable rate, the tax imposed by this section shall be collected in full, and the local tax shall be reduced as required.

*Id.* at 232, 500 A.2d at 305 (quoting Md. Ann. Code art. 81, § 278F(j) (Supp. 1981) (footnote omitted)).

The transfer in question occurred in 1981; however, § 278F(j) was repealed by the Act of April 9, 1985, ch. 8, 1985 Md. Laws 45. The subsection is now codified at Md. Tax-Prop. Code Ann. § 13-407 (1986), which reads in pertinent part:

(2) If a county has imposed a county transfer tax at a rate that exceeds the rate applicable to the transfer of improved residential property, the total rate of tax that applies to a transfer subject to the agricultural land transfer tax may not exceed 5% plus the rate that applies to improved residential property under the county transfer tax.

(3) If the total rate of tax that applies to a transfer subject to the agricultural land transfer tax exceeds the minimum rate allowed under paragraph (2) of this subsection, the tax that applies to the transfer:

(i) is payable at the rate specified for the agricultural land transfer tax; and

(ii) the rate of the county transfer tax shall be reduced as necessary to comply with the 5% limit.
of property subject to the agricultural transfer tax.97 By the terms of the statute, the total tax on transfers of agricultural property could not exceed six percent.98 The taxpayers had already paid a six percent rezoning transfer tax;99 however, the county argued that the statutory ceiling applied only to the agricultural land portion of local taxes.100 Rejecting this argument, the court found that the statutory language clearly expressed the General Assembly's intent to limit the total tax a locality could impose.101

In *Hampton Associates Limited Partnership v. Baltimore County*102 the Court of Special Appeals ruled that Baltimore County could impose its local transfer tax103 on a real estate transfer effected by filing articles of transfer104 with the State Department of Assessments and Taxation.105

Hampton Apartments, Inc., a Maryland corporation, sold real estate located in Baltimore County to Hampton Associates.106 The parties effected the conveyance by the filing of articles of transfer with the State Department of Assessments and Taxation in Baltimore City.107 Hampton Associates argued that by imposing the tax the county had exceeded its statutory authority.108 For, Hampton maintained, Baltimore County can only tax events that occur within the county,109 but the filing of the articles of transfer had occurred within the city.110 The court found, however, that the tax went to

97. 65 Md. App. at 236, 500 A.2d at 307.
98. *Id.* at 232, 500 A.2d at 305.
99. *Id.* at 228, 500 A.2d at 303.
100. *Id.* at 232, 500 A.2d at 305.
101. *Id.* at 236, 500 A.2d at 307.
103. BALTIMORE COUNTY, MD., CODE § 11-74 (1978) placed a 1.6% tax on the value of any estate of inheritance or freehold or any estate longer than seven years. Although the court acknowledged that § 11-74 did not meet the notice requirement mandated by BALTIMORE COUNTY, MD., CODE § 11-15(c) (1978), the legislation was valid because it did not conflict with any charter or constitutional provision. 66 Md. App. at 566, 505 A.2d at 545.
104. Filing articles of transfer with the State Department of Assessments and Taxation effects a realty transfer under MD. CORP. & ASS'NS CODE ANN. § 3-113 (1985).
105. 66 Md. App. at 566, 505 A.2d at 545.
106. *Id.* at 553, 505 A.2d at 538.
107. *Id.*
108. *Id.* at 558, 505 A.2d at 541.
109. BALTIMORE COUNTY, MD., CODE § 11-15(a) (1978) provides:
The county is hereby authorized to have and exercise, within the limits of the county, in addition to any and all taxing powers heretofore granted by the General Assembly, the power to tax to the same extent as the state has or could exercise such power within the limits of the county as part of its general taxing power.
110. 66 Md. App. at 558, 505 A.2d at 541.
the underlying transfer of property and not to the act of filing.\footnote{111}

Additionally, the court rejected the position that the statute\footnote{112} authorizing the State Department of Assessments and Taxation to collect transfer taxes for any county except Baltimore County\footnote{113} precluded Baltimore County from collecting the tax itself.\footnote{114} The statute was not a grant of taxing power, but rather a collection and distribution device for taxes imposed under the counties' authority.\footnote{115} Therefore, Baltimore County could impose and collect transfer taxes on property in the county conveyed by filing articles of transfer with the State Department of Assessments and Taxation.

\section*{F. Use and Retail Sales Tax}

In \textit{Comptroller of the Treasury v. Washington National Arena Limited Partnership} \footnote{116} the Court of Special Appeals held that tickets for arena admissions were intangible personal property.\footnote{117} Hence, the equip-

\footnote{111} Id. at 559, 505 A.2d at 541. Because Hampton Associates confused filing the articles of transfer with the event of transfer, it had contended that the subject matter of Md. Corps. & Ass'ns Code Ann. §§ 1-203, -204 (1985) (original version at Md. Ann. Code art. 23, §§ 129, 130 (1957)) extended to the transfer itself. 66 Md. App. at 560, 505 A.2d at 542. Sections 1-203 and 1-204 set out a schedule of filing and recording fees and procedures to be followed when depositing corporate documents with the State Department of Assessments and Taxation. If these statutes extended to the transfer itself, then the county's transfer tax would have been invalid under BALTIMORE COUNTY, MD., CODE § 11-15(b) (1978), which denies the county the power to impose taxes on the subject matter of former §§ 129 and 130. The court, however, read § 1-203 as a mere recording fee schedule and § 1-204 as a list of the in-house procedures for completing files kept on each registered corporation. 66 Md. App. at 560, 505 A.2d at 542. Therefore, the subject matter of §§ 1-203 and 1-204 did not extend to real property transfer taxes.

\footnote{112} MD. ANN. CODE art. 91, § 277A (1980), the relevant statute, provided:

The Department of Assessments and Taxation is hereby authorized and directed to collect the transfer tax of any of the counties or Baltimore City, at the rate locally imposed on the sale or transfer of real property, upon the filing of articles of sale, lease, exchange, or other transfer of all or substantially all the property and assets of a corporation with respect to the property subject to the certificate required under § 3-112 of the Corporations and Associations Article . . . . The provisions of this section do not apply to Baltimore County.

Section 277A was repealed by the Act of April 9, 1985, ch. 8, 1985 Md. Laws 45. The section as rewritten is now codified in Md. Tax-Prop. Code Ann. § 13-404 (1986), which states, "[T]he Department shall collect county transfer tax at the rate set by each county for articles of transfer filed with the Department as required by § 3-107 of the Corporations and Associations Article."

\footnote{113} Act of May 21, 1985, ch. 157, 1985 Md. Laws 1769 removed the Baltimore County exception from § 277A and § 13-404.

\footnote{114} 66 Md. App. at 561, 505 A.2d at 542.

\footnote{115} Id.


\footnote{117} Id. at 428, 504 A.2d at 672. In the court's view, the tickets' value was wholly
ment and ticket stock needed in printing the tickets were not used in the sale or resale of "tangible personal property." Therefore, neither the equipment nor the ticket stock were exempt from taxation under the Use and Retail Sales Tax Acts.

Timothy P. Branigan
XI. Torts

A. Abuse of Process

In Palmer Ford, Inc. v. Wood\(^1\) the Court of Special Appeals held that a trier of fact may award compensatory damages for abuse of process even if the defendant had probable cause for initiating the lawsuit;\(^2\) however, the trier of fact may not award punitive damages under such circumstances absent evidence of malice.\(^3\)

In Palmer the court laid to rest a case that had been to court on seven previous occasions.\(^4\) As a result of a repair bill dispute, Palmer Ford had retained possession of Wood’s car.\(^5\) Nevertheless, Wood obtained the car from an anonymous Palmer Ford employee for a reduced payment.\(^6\) When Wood returned the car for another repair job, the defendant retained the automobile once again, insisted on full payment of Wood’s original bill, and then notified the police, who charged Wood with embezzlement.\(^7\) Palmer Ford threatened to send Mrs. Wood’s son to jail unless she paid the bill, though her son was already in police custody.\(^8\) Consequently, Wood sued for abuse of process and won compensatory and punitive damages.\(^9\)

In affirming the compensatory award, the Court of Special Appeals reasoned that the evidence confirmed that the plaintiff’s injuries resulted from the defendant’s abuse of criminal prosecution as a means of threat and debt collection.\(^10\) In such a situation, a court may award compensatory damages for “humiliation, disgrace or in-

---

2. Id. at 397, 500 A.2d at 1059.
3. Id. at 400-01, 500 A.2d at 1060-61.
4. The plaintiff first sued in 1979 for abuse of process. The trial court granted summary judgment for the defendant, but this decision was reversed and remanded on appeal. A jury then found for the plaintiff on the grounds of malicious prosecution and abuse of process, and it awarded both compensatory and punitive damages. On appeal, the Court of Special Appeals affirmed; but the Court of Appeals reversed as to malicious prosecution and remanded the case for damage redetermination. Following a mistrial, the third trial court awarded the plaintiff both compensatory and punitive damages. The present case addressed the defendant’s appeal. Id. at 392-93, 500 A.2d at 1056.
5. Id. at 393, 500 A.2d at 1057.
6. Id.
7. Id. at 394, 500 A.2d at 1057. The charge was later changed to false pretenses and finally to grand larceny and unauthorized use of an automobile. Eventually the charges were dropped. Id.
8. Id.
10. 65 Md. App. at 399-400, 500 A.2d at 1060.
dignity suffered as well as monetary losses incurred..."\(^{11}\) Despite
the defendant's argument to the contrary, the court found that the
existence of probable cause for arrest did not negate Wood's claim
for compensatory damages.\(^{12}\)

The court, however, reversed the punitive damage award for
lack of evidence of actual or implied malice.\(^{13}\) While malice is not
an element of abuse of process, it is a prerequisite for punitive dam-
ages.\(^{14}\) Thus, merely establishing abuse of process is insufficient in
itself to merit punitive damages.

**B. Damages**

1. *Cap.—Recent legislation—*Chapter 639 of the 1986 Mary-
land laws\(^{15}\)—attempts to control damage awards in personal injury
cases through dollar limitations and procedural restrictions.\(^{16}\)
Though originally designed for medical malpractice litigation, the
legislation as adopted covers all personal injury actions.\(^{17}\)

Chapter 639 places a $350,000 limit on awards for
noneconomic damages in cases in which the cause of action for per-
sonal injury arises on or after July 1, 1986.\(^ {18}\) Noneconomic dam-
ages include, for example, pain, suffering, and physical
disfigurement,\(^ {19}\) but not punitive damages.\(^ {20}\) Awards under this
provision include those made by the Health Claims Arbitration
Panel.\(^ {21}\)

Chapter 639 makes no distinction between types of personal in-

---

11. *Id.* at 400, 500 A.2d at 1060. 
12. The court stated: "Once it has been established that legal process has been per-
verted by misapplication to an end for which that process was never intended, the
abuser is liable for all the consequences that reasonably result from the process." *Id.* at
397-98, 500 A.2d at 1059. 
13. *Id.* at 401-02, 500 A.2d at 1061. 
14. *Id.* at 400-01, 500 A.2d at 1060 (citing Montgomery Ward & Co. v. Keulemans,
275 Md. 441, 448, 340 A.2d 705, 709 (1975); American Laundry Mach. Indus. v. Horan,
45 Md. App. 97, 115, 412 A.2d 407, 419 (1980)). 
16. *Id.* at 2347 (describing the purpose of the act). 
17. *Id.* at 2347-51 (evidencing editorial transition). The final provision of the act
emphasizes the acquisition of information concerning the act's impact on medical mal-
practice claims and insurance premiums. *Id.* at 2352. 
1986)). 
Other noneconomic losses include inconvenience and loss of consortium. *Id.* 
jury and thus presents no equal protection question.\textsuperscript{22} Furthermore, the United States Supreme Court has previously upheld the constitutionality of statutory limits on dollar recovery.\textsuperscript{23} Thus, the act may well withstand a test of its constitutionality.

Maryland’s personal injury Act requires the trier of fact to itemize damage awards.\textsuperscript{24} The court or the Health Claims Arbitration Panel may order payment of future economic damage\textsuperscript{25} awards in a lump sum or in periodic payments,\textsuperscript{26} if the defendants or their insurers provide security.\textsuperscript{27} The court may also appoint a conservator to resolve interparty disputes over the need for or cost of the plaintiff’s care or treatment.\textsuperscript{28} In the event of the plaintiff’s death, the unpaid balance of plaintiff’s future loss of earnings reverts to his or her estate. In contrast, the unpaid balance of the award for future medical expenses reverts to the entity that originally provided the funds for the award.\textsuperscript{29}

Concerning punitive damages, evidence of defendant’s financial means is now admissible only after a finding of liability and only if the plaintiff presents facts supporting punitive damages.\textsuperscript{30} This provision applies both to court actions and claims filed with the Health Care Arbitration office.\textsuperscript{31}

The legislation, which took effect July 1, 1986,\textsuperscript{32} requires all insurers who provide professional health care liability insurance to

\textsuperscript{22} Cf. Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (upholding California’s medical malpractice damage cap despite plaintiff’s claim that the statute denied him equal protection).

\textsuperscript{23} Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (upholding an act limiting the amount of damages recoverable from the defendant in the event of a nuclear accident).


\textsuperscript{26} \textit{Id.} (codified at Md. Cts. & Jud. Proc Code Ann. § 11-109(a)(1)-(2) (Supp. 1986)).

\textsuperscript{27} \textit{Id.} at 2352 (codified at Md. Cts. & Jud. Proc Code Ann. § 11-109(a)(1)-(2) (Supp. 1986)).

\textsuperscript{28} \textit{Id.} (codified at Md. Cts. & Jud. Proc Code Ann. § 11-109(c)(3) (Supp. 1986)).

\textsuperscript{29} \textit{Id.} (codified at Md. Cts. & Jud. Proc Code Ann. § 11-109(d) (Supp. 1986)).

\textsuperscript{30} \textit{Id.} at 2349 (codified at Md. Cts. & Jud. Proc Code Ann. § 10-913(a) (Supp. 1986)).

\textsuperscript{31} \textit{Id.} (codified at Md. Cts. & Jud. Proc Code Ann. § 10-913(b) (Supp. 1986)).

\textsuperscript{32} \textit{Id.} at 2353.
submit yearly reports on their claims and insurance rates. The Insurance Commissioner may also require similar information from other insurers. The Commissioner will then report to the General Assembly on the Act's effectiveness in combatting rising insurance premiums.

2. Punitive Damages.—In Miller Building Supply, Inc. v. Rosen the Court of Appeals held that a plaintiff must show actual malice to recover punitive damages for fraud arising from a contractual relationship. In so doing, the court strongly reaffirmed the Tes- ternman rule: that in tort actions arising out of a contract, actual malice is a necessary predicate of punitive damages.

In Miller the employer sued its employees, disloyal salesmen who had diverted profits to themselves. Urging the court to adopt a standard of "implied malice," the employer argued that fraudulent conduct should warrant the imposition of punitive damages, regardless of whether the conduct occurs in connection with a contract or rises to the level of actual malice.

The Court of Appeals correctly refused to make an exception to

33. Id. at 2352.
34. Id.
35. Id.
38. 305 Md. at 343, 503 A.2d at 1345.
40. Testerman, 275 Md. at 44, 338 A.2d at 53. The issue in Testerman was whether to allow the recovery of punitive damages for "contorts"—torts arising out of a contractual relationship. The law permits punitive damages for certain pure torts upon the finding of implied malice; on the other end of the spectrum, the law completely denies punitive damages for pure breaches of contract. The Court of Appeals in Testerman decided to adopt an actual malice standard that would lie between the above two extremes. 275 Md. at 43-44, 338 A.2d at 53. This common sense approach allows recovery if the conduct warrants the imposition of punitive damages; however, to avoid unnecessary punitive damage awards, it imposes a more stringent standard than that imposed in pure tort cases. 275 Md. at 47, 338 A.2d at 54.
41. 305 Md. at 343-46, 503 A.2d at 1345-46.
42. 305 Md. at 348, 503 A.2d at 1347. Implied malice does not require finding that conduct has been motivated by hatred or spite. Id.
43. Id. at 352-53, 503 A.2d at 1350. The plaintiff cited Wedeman v. City Chevrolet Co., 278 Md. 524, 366 A.2d 7 (1976), in support of its argument. The court correctly
the Testerman rule and advanced persuasive practical considerations for imposing the actual malice standard.\textsuperscript{44} An implied malice standard is unlikely to deter a greater amount of potential fraud than does the actual malice standard.\textsuperscript{45} Moreover, criminal sanctions already provide ample deterrence against fraud.\textsuperscript{46} Finally, the court explained, since fraud is a broad concept, the potential for abusive punitive damage claims would be too great without a stringent standard.\textsuperscript{47} Hence, the court retained the actual malice standard for fraud actions that arise out of a contract.

C. Infliction of Emotional Distress

1. Intentional.—The tort of intentional infliction of emotional distress remains difficult to establish in Maryland. But for the first time since Maryland recognized the tort, the Court of Appeals acknowledged that a plaintiff had successfully pleaded a cause of action.

In Young v. Hartford Accident & Indemnity Co.\textsuperscript{48} the plaintiff sought to hold her employer’s workers’ compensation insurer liable for intentionally aggravating a disabling emotional injury.\textsuperscript{49} Ignoring medical advice to refrain from further psychiatric evaluation of the plaintiff, the insurers insisted on repeated evaluations.\textsuperscript{50} The plaintiff alleged that this caused her to attempt suicide.\textsuperscript{51}

First, the court addressed the issue of whether the insurer’s actions were privileged. Citing comment g to section 46 of the Restatement (Second) of Torts,\textsuperscript{52} the court acknowledged that the insurer

\textsuperscript{44} 305 Md. at 353-54, 503 A.2d at 1350. The court cited several cases in which the Maryland courts previously analyzed punitive damages claims under the Testerman rule. See id. and authorities cited therein.
\textsuperscript{45} Id. at 354, 503 A.2d at 1350. The court also mentioned that prejudgment interest is a deterrent against fraud. Id.
\textsuperscript{46} Id., 503 A.2d at 1351.
\textsuperscript{47} Id. at 354-55, 503 A.2d at 1350-51. “Fraud” has been widely recognized as a vague and ambiguous concept. See generally W. KEETON, PROSSER AND KEETON ON TORTS § 105, at 727-28 (5th ed. 1984).
\textsuperscript{48} 303 Md. 182, 492 A.2d 1270 (1985).
\textsuperscript{49} Id. at 188-89, 492 A.2d at 1273.
\textsuperscript{50} Id. at 187-88, 492 A.2d at 1272.
\textsuperscript{51} Id., 492 A.2d at 1273.
\textsuperscript{52} The Restatement (Second) of Torts § 46 comment g (1965) states in part: The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.
could not be liable for insisting upon its right to evaluate a claimant's health in a "permissible" way. The court found, however, that the plaintiff's allegations depicted the insurer's motive in insisting upon further evaluation as pure harassment. In such a case, the insurer would not be entitled to the section 46 privilege. Therefore, the plaintiff had stated a cause of action.

In two other cases allegations of intentional infliction of emotional distress were found insufficient.

In Dick v. Mercantile-Safe Deposit & Trust Co. the Court of Special Appeals held that the plaintiff failed to state a cause of action. In this case a debtor sought recovery from his creditor because the creditor's agent had threatened to attach his home and wages, yelled at him over the telephone, and accused him of lying. The court held that this conduct was not sufficiently "extreme and outrageous" to sustain the cause of action. A plaintiff can prove extreme and outrageous conduct only if "the average member of the community must regard the defendant's conduct... as being a complete denial of the plaintiff's dignity as a person."

The court explained that although the bank official's conduct may have been uncivil, he had a right to threaten to resort to proper legal procedures to enforce debt obligations. The court also emphasized that in previous cases plaintiffs had failed to recover even though they had suffered greater abuse than the plaintiff in this case.

---

53. 303 Md. at 197-98, 492 A.2d at 1277-78.
54. Id. at 198-99, 492 A.2d at 1278. The court called this an "escalated level" of intentional conduct. Id. at 199, 492 A.2d at 1278.
55. Id.
56. Id.
58. To establish a claim for intentional infliction of emotional distress, the plaintiff must show that: (1) the defendant's conduct was intentional and reckless; (2) the defendant's conduct was extreme and outrageous; (3) there was a causal connection between the defendant's wrongful conduct and the plaintiff's emotional distress; and (4) the plaintiff's resulting emotional distress was severe. Harris v. Jones, 281 Md. 560, 566, 380 A.2d 611, 614, aff'd Jones v. Harris, 35 Md. App. 556, 371 A.2d 1104 (1977).
59. 63 Md. App. at 274-75, 492 A.2d at 676.
60. Id. at 277, 492 A.2d at 678.
62. 63 Md. App. at 277, 492 A.2d at 678.
63. Id. at 276, 492 A.2d at 677.
64. The court cited Household Finance Corp. v. Bridge, 252 Md. 531, 520 A.2d 878 (1969) (five or six phone calls that included objectionable language did not constitute
In *Gallagher v. Bituminous Fire & Marine Insurance Co.* the Court of Appeals held that an insurer’s failure to pay workers’ compensation benefits in a timely manner did not yield a claim for intentional infliction of emotional distress. By alleging only the defendant’s failure to pay, the plaintiff failed to plead that the conduct complained of was extreme or outrageous, or that the emotional distress was severe. Thus, the plaintiff had neglected to allege specific facts that demonstrated intentional conduct and depicted a causal relationship with the injuries.

2. *Negligent.*—In *Hamilton v. Ford Motor Credit Co.* the Court of Special Appeals refused to recognize the tort of negligent infliction of emotional distress. In *Hamilton* a buyer and co-buyer of a truck brought suit against their financing company in connection with the repossession of the truck. The buyers alleged that the defendant’s rude conduct caused them emotional distress. Unable to satisfy the rigid standard for intentional infliction of emotional distress, the plaintiffs settled on a negligence theory.

Language in a prior case and in the Maryland Pattern Jury Instructions suggested that Maryland allows recovery for negli-
gent infliction of emotional distress. The court, however, considered that language inapposite: "Recovery may be had in a tort action for emotional distress arising out of negligent conduct. In such case, the emotional distress is an element of damage, not an independent tort." Thus, although at least two jurisdictions have recognized a cause of action for negligent infliction of emotional distress, the court was unwilling to extend liability that far; accordingly, it refused to recognize the new tort.

3. Damages.—In *Exxon Corp. USA v. Schoene* the Court of Special Appeals held, in a case of first impression, that a spouse may predicate an action for loss of consortium on mental or emotional injury unaccompanied by physical harm. The court found it unnecessary to distinguish between physical harm and emotional harm if the resultant damage in either situation is identical. Thus, Maryland joins the small number of jurisdictions that hold that physical injury is not a prerequisite for damages for loss of consortium.

D. Invasion of Privacy

In *Pemberton v. Bethlehem Steel Corp.* the Court of Special Appeals set forth the elements for two types of invasion of privacy. These two types are: unreasonable intrusion upon the seclusion of another, and unreasonable publicity given to another’s private life.

gent infliction of emotional harm; the plaintiffs suggested that Maryland thus recognized the latter as a distinct tort. 66 Md. App. at 62, 502 A.2d at 1065.

76. 66 Md. App. at 63, 502 A.2d at 1066.
79. Id. at 423, 508 A.2d at 148.
80. Id. at 423-24, 508 A.2d at 148. Cf. Deems v. Western Md. Ry., 247 Md. 95, 231 A.2d 514 (1967) (physical injury can form basis for loss of consortium if injury causes significant change to spouse's personality or ability to participate in married life).
83. Id. at 161, 502 A.2d at 1115. Maryland has looked primarily to the Restatement (Second) of Torts and to Prosser's *Law of Torts* in defining the conduct that is actionable for invasion of privacy. See 66 Md. App. at 161, 502 A.2d at 1115 and authorities cited therein. The Restatement defines the tort of invasion of privacy as follows:

(2) The right of privacy is invaded by
(a) unreasonable intrusion upon the seclusion of another . . . or
(b) appropriation of the other's name or likeness . . . or
(c) unreasonable publicity given to the other's private life . . . or
(d) publicity that unreasonably places the other in a false light before the public . . . .

A labor union's business agent brought an action against a steel corporation, alleging invasion of privacy. Specifically, the plaintiff asserted that the steel corporation: sent his employer documents, including a mug shot, that revealed his prior criminal conviction; sent his wife documents concerning his marital infidelity; and placed him under surveillance, using a "detection device." The corporation admitted that it had conducted surveillance, but denied that it had publicized any of the information thus collected.

Citing with approval the Restatement (Second) of Torts, the court defined an actionable intrusion upon the seclusion of another. The court described the tort as:

[T]he intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person . . . . [T]he gist of the offense is the intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs. There is no liability for observing him in public places, "since he is not then in seclusion."

Depending on the manner in which it is conducted, surveillance may constitute an actionable intrusion. In Pemberton the plaintiff was unaware of the surveillance. This would normally render the surveillance unactionable. Listening devices, however, inflict an extensive intrusion. The court thus remanded because, in some circumstances, the use of a listening device might constitute an actionable intrusion.

The court adopted a two-part test to determine liability for the tort of unreasonable publicity of another's private life: (1) whether the matter disclosed became public by communication to more than

84. 66 Md. App. at 141, 502 A.2d at 1105. The plaintiff also brought an action for intentional infliction of emotional harm; however, the court found the defendant's conduct insufficiently "outrageous" to satisfy the high standard of Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977). 66 Md. App. at 160-61, 502 A.2d at 1115.
85. 66 Md. App. at 141, 502 A.2d at 1105.
86. Id.
87. Id.
88. Id. at 162, 502 A.2d at 1116.
89. Id. at 163, 502 A.2d at 1116-17 (quoting Restatement (Second) of Torts § 652B comment c (1977)).
90. See id. at 164, 502 A.2d at 1117 and authorities cited therein.
91. Id.
92. Id. The court advanced no authority for this proposition.
93. See id. at 164-65, 502 A.2d at 1117 and authorities cited therein.
94. Id. at 165, 502 A.2d at 1117.
a small group of persons; and (2) whether the matter disclosed is open to public inspection and is, therefore, not a private fact. The plaintiff, the court determined, could satisfy neither prong of this test.

The application of the first prong, which the court borrowed from the *Restatement*, clearly indicated that the disclosure of the extramarital affairs was not a "publication." The defendant had disclosed this information only to the plaintiff's wife, not to a large group of persons. Therefore, this disclosure could not form the basis for an invasion of privacy claim.

The second prong derived from the United States Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*. In that case the Court held that the first and fourteenth amendments prohibit imposition of sanctions against the publication of truthful information contained in official court records open to the public. Following *Cox Broadcasting*, the Court of Special Appeals observed that the publication of the plaintiff's criminal record was constitutionally protected and thus could not form the basis for tort liability.

### E. Malpractice

1. Attorney.—In *Flaherty v. Weinberg* the Court of Appeals held that an attorney may be liable to someone other than a client for professional malpractice if the direct purpose of the attorney-client relationship was to benefit that third party. In so holding, the court expanded the third party beneficiary exception to the strict privity rule to include actions of tort in addition to contract.

In *Flaherty* the plaintiffs purchased a home relying on the advice of their lender's attorney, who assured them of the property's specific boundaries. The plaintiffs were not the attorney's clients; rather, the lender was the attorney's client. After building a pool and making other improvements, the plaintiffs discovered that the

---

95. *Id.* at 166-68, 502 A.2d at 1118-19.
97. 66 Md. App. at 141, 502 A.2d at 1105.
98. *Id.* at 166-67, 502 A.2d at 1118.
100. *Id.* at 494-95.
101. 66 Md. App. at 168, 502 A.2d at 1119. The court also held that, on the facts of this case, the plaintiff's mug shot was an official public record. *Id.*
103. *Id.* at 130, 492 A.2d at 625.
104. *Id.*
105. *Id.* at 132, 492 A.2d at 626.
106. *Id.*
improvements encroached on their neighbor’s property. The plaintiffs sued the attorney, alleging negligence, breach of warranty, and negligent misrepresentation. When the trial court granted the defendant’s demurrer, the plaintiffs appealed.

The Court of Appeals reversed, indicating that the plaintiffs had stated a cause of action in negligent misrepresentation by claiming that the attorney, Weinberg, had a duty of care to them as third party beneficiaries of his contract with the lender. The court concluded that if the plaintiffs could prove that the lender actually intended to benefit them through the relationship, the plaintiffs would be entitled to a remedy. The court reasoned that this was a logical application of the third party beneficiary concept in contract to the duty concept in tort, the tort in this case being attorney malpractice.

In expanding the third party beneficiary rule to actions in tort,

107. Id. at 132-33, 492 A.2d at 626.
108. Id. at 133-34, 492 A.2d at 626-27.
109. Id. at 139, 492 A.2d at 629-30. The elements of negligent misrepresentation include the following:
   (1) The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
   (2) The defendant intends that his statement will be acted upon by the plaintiff;
   (3) The defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
   (4) The plaintiff, justifiably, takes action in reliance on the statement; and
   (5) The plaintiff suffers damage proximately caused by the defendant’s negligence.
   Id. at 135, 492 A.2d at 627-28 (citing Martens Chevrolet, Inc. v. Seney, 292 Md. 328, 337, 439 A.2d 534, 539 (1982)).

   The court found it proper to enter a demurrer in the negligence action because of the absence of allegations of an express or implied employment relationship between plaintiff and defendant. Id. at 134, 492 A.2d at 627 (citing Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943), which held that an essential element of establishing attorney negligence is an employment relationship between the attorney and the plaintiff). The court found that the claim of breach of express or implied warranty was demurrable because the plaintiffs had not alleged employment by contract or extension of duty by statute. Id. at 135, 492 A.2d at 627.

110. The court pointed out that even though (1) the plaintiffs had elected to go to settlement without separate counsel, (2) the plaintiffs ultimately paid the attorney’s fee, and (3) the bank and the plaintiffs had concentric interests, this did not prove the allegation that the bank intended to confer a benefit on the plaintiffs. Id. at 137-38, 492 A.2d at 628-29. In fact, the court noted that the plaintiffs would have difficulty establishing that intent: they had received a letter stating that the defendant would represent the bank as well as a statement of charges indicating that the defendant performed his services for the bank, not its borrowers. Id. at 139 n.9, 492 A.2d at 630 n.9. If, however, the plaintiffs could prove intent, the attorney would be liable.
111. Id. at 139, 492 A.2d at 629-30.
112. Id. at 130, 492 A.2d at 625.
the court noted that this exception to the strict privity rule is still a narrow one.\textsuperscript{113} Two factors restrict the scope of the exception: the difficulty in proving the client's actual intent; and the limits of an attorney's responsibility in adversarial situations to persons other than the client.\textsuperscript{114} The exceptions, however, increasingly reflect a national trend toward greater liability.\textsuperscript{115}

2. Medical.—a. Statute of Limitations.—In Hill v. Fitzgerald\textsuperscript{116} the Maryland Court of Appeals explained the intricacies of section 5-109 of the Courts and Judicial Proceedings Article,\textsuperscript{117} which

\begin{itemize}
  \item \textsuperscript{113} Id. at 131, 492 A.2d at 625-26.
  \item \textsuperscript{114} Id. (citing MD. CODE OF PROF. RESPONSIBILITY Canons 5 & 7 (1980)).
  \item \textsuperscript{115} A majority of jurisdictions have held that absent fraud, collusion, or privity of contract, an attorney is not liable to a third party for professional malpractice. \textit{Cf.} Savings Bank v. Ward, 100 U.S. 195 (1879) (stating above rule). In the context of decreased emphasis on privity, however, see Ultraneres Corp. v. Touche, Niven & Co., 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), many jurisdictions have now relaxed privity requirements through (1) the balancing of factors theory or (2) the third party beneficiary theory. 303 Md. at 123, 492 A.2d at 621 (1985). In Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), the Supreme Court of California balanced such policy considerations as:
    \begin{itemize}
      \item (1) the extent to which the transaction was intended to affect the plaintiff;
      \item (2) the foreseeability of harm to the plaintiff;
      \item (3) the degree of certainty that the plaintiff suffered injury;
      \item (4) the closeness of the connection between the defendant's conduct and the injury;
      \item (5) the moral blame attached to the defendant's conduct; and
      \item (6) the policy of preventing future harm.
    \end{itemize}
  \end{itemize}

303 Md. at 124, 492 A.2d at 622.

Under another theory, a third party beneficiary contract arises if two parties enter an agreement with the intent to confer a benefit on a third party. 303 Md. at 125, 492 A.2d at 622.

Like the rest of the nation, Maryland originally adhered to the strict privity rule. \textit{See} Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943) (holding that a land purchaser's attorney was not liable to the vendor for erroneously informing the purchaser of an obligation to correct a defective covenant of special warranty); Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774 (1940) (holding that, as a general rule, an attorney is not liable to a third party for certifying a defective title as good and merchantable). In Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972), however, the Court of Appeals held that the third party beneficiary theory acts as a limited exception to strict privity in an attorney-client relationship. \textit{See also} Kirgan v. Parks, 60 Md. App. 1, 478 A.2d 713 (1984) (applying Prescott's third party beneficiary theory); Clagget v. Dacy, 47 Md. App. 23, 420 A.2d 1285 (1980) (same). In Prescott the plaintiff, a deposit insurance company with priority over the funds of a savings and loan association, sued the counsel for the association's receiver. The plaintiff claimed that the attorney caused the association to pay sums to lower priority creditors instead of to the plaintiff. 266 Md. at 565, 296 A.2d at 151. The Flaherty case, then, carries Maryland still further along the path chosen in Prescott.

\textsuperscript{116} 304 Md. 689, 501 A.2d 27 (1985).

\textsuperscript{117} MD.CTS. & JUD. PROC. CODE ANN. § 5-109 (1984). The statute provides that:

\begin{itemize}
  \item An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in \textsection{3-2A-01} of this article shall be filed (1) within five years of the time the injury was com-
shortens the effective period of limitations for medical malpractice actions arising after July 1, 1975.\textsuperscript{118} Previously, under section 5-101,\textsuperscript{119} the general statute of limitations, a person could file a malpractice suit up to three years after the "accrual of action."\textsuperscript{120} An action accrues after completion of treatment\textsuperscript{121} and discovery of harm.\textsuperscript{122} In contrast, under section 5-109 a person can file suit up to three years after the discovery of "injury," but no later than five years after the "injury" took place.\textsuperscript{123} In \textit{Hill} the Court of Appeals concluded that "injury" occurs upon first harm—the point at which the defendant's negligent act is coupled with some harm to the plaintiff.\textsuperscript{124}

In \textit{Hill} Dr. Fitzgerald first treated the plaintiff on January 27, 1975,\textsuperscript{125} misdiagnosed him no later than February 1975,\textsuperscript{126} and ended treatment on November 2, 1975.\textsuperscript{127} Having allegedly discovered the misdiagnosis on December 5, 1980, the plaintiff filed suit in federal district court on December 2, 1983.\textsuperscript{128}

The defendant\textsuperscript{129} moved for summary judgment on the ground that section 5-109 barred the suit.\textsuperscript{130} Invoking the common law

\begin{quote}
mitted or (2) within three years of the date when the injury was discovered, whichever is shorter.
\end{quote}

118. \textit{Id.}

\begin{quote}
A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.
\end{quote}

120. \textit{See} \textsc{304 Md.} at 693, \textsc{501 A.2d} at 29.

121. The court stated: "[I]f the facts show continuing medical . . . treatment for . . . which there is malpractice producing or aggravating harm, the cause of action of the patient accrues at the end of the treatment . . . unless the patient sooner knew or reasonably should have known of the injury. . . ." \textit{Id.} at 698, \textsc{501 A.2d} at 32 (citing \textsc{Waldman v. Rohrbaugh}, 241 \textsc{Md.} 137, 142, \textsc{215 A.2d} 825, 828 (1965)).

According to the \textsc{Waldman} court, this "continuous treatment rule" serves to avoid the harsh result that would follow if the statute ran from the date of the physician's negligence and the patient lacked the knowledge to recognize the negligence before the period of limitations had run. \textsc{241 Md.} at 139-40, \textsc{215 A.2d} at 827.

122. Under Maryland's common-law discovery rule, a cause of action cannot accrue until the claimant first knows or reasonably should have known of the alleged wrong. \textsc{304 Md.} at 693, \textsc{501 A.2d} at 29 (citing \textsc{Poffenberger v. Risser}, \textsc{290 Md.} 631, \textsc{431 A.2d} 677 (1981)).


124. \textsc{304 Md.} at 699-700, \textsc{501 A.2d} at 32.

125. \textit{Id.} at 692, \textsc{501 A.2d} at 28.

126. Both parties agreed on this fact. \textit{Id.} at 694, \textsc{501 A.2d} at 29.

127. \textit{Id.} at 692, \textsc{501 A.2d} at 28.

128. \textit{Id.} at 693, \textsc{501 A.2d} at 29.

129. The defendant was Katherine R. Fitzgerald, personal representative of the deceased Dr. Fitzgerald. \textit{Id.} at 693, \textsc{501 A.2d} at 28.

130. \textit{Id.}, \textsc{501 A.2d} at 28-29.
continuous treatment rule, the defendant contended that "injury" occurred upon the completion of treatment in November of 1975, five months after section 5-109 took effect. Filed seven years after the injury occurred, the claim had thus exceeded section 5-109's five-year limit.

According to the plaintiff, however, the "injury" occurred upon the initial misdiagnosis, rather than upon completion of treatment. Because the misdiagnosis occurred several months before section 5-109 took effect, section 5-101 applied instead. Under section 5-101, the statute did not begin to run until the completion of treatment and discovery of the harm in 1980; therefore, the plaintiff concluded that he had filed within the appropriate three-year limit.

In its uncertainty over the statutory meaning of "injury" and the constitutionality of a special statute of limitations for malpractice cases, the federal district court certified three questions to the Court of Appeals: 1) when did section 5-109 apply; 2) when did section 5-109 begin to run; and 3) did section 5-109 violate article 19 of the Maryland Declaration of Rights.

In resolving the first question, the court relied on Oxtoby v. McGowan in which the Court of Appeals had interpreted the effective date of the Health Care Malpractice Claims Act (HCMCA). In Oxtoby the court held that if a patient were harmed through malpractice before the HCMCA's effective date, but died thereafter, the patient's "medical injuries" occurred upon the first harm. The

131. For a discussion of the continuous treatment rule, see supra note 121 and infra text accompanying notes 142-143.
132. 304 Md. at 693, 501 A.2d at 29.
133. Id.
134. Id.
135. Id.
136. Id.
137. Id. at 692, 501 A.2d at 28. Article 19 of the Maryland Declaration of Rights provides:
That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.
139. Id. at 85, 447 A.2d at 862. The HCMCA requires that certain medical malpractice claims be heard by an arbitration panel prior to a court of law; effective July 1, 1976, the Act applies to "medical injuries" that take place on or after that date. 304 Md. at 694, 501 A.2d at 29.
140. 304 Md. at 696, 501 A.2d at 30. Based on the broad meaning given "injury" in State ex rel. McManus v. Board of Trustees of Policeman's Pension Fund, 138 Wis. 133, 135-36, 119 N.W. 806, 807 (1909), the Oxtoby court found that the occurrence of a
Hill court thus held it to be a question of fact "[w]hether the original allegedly negligent misdiagnosis of Hill's condition caused some harm and therefore 'injury' prior to" section 5-109's effective date. If, but only if, the plaintiff prevailed on this issue, section 5-101 would govern instead and the suit could proceed.

Under the continuous treatment rule, however, if the patient's treatment involves a continuous course of conduct, and if the patient's disease imposes on the physician a duty of continuing care, then the statute of limitations does not begin to run until the termination of treatment. The defendant thus maintained that the plaintiff's cause of action did not accrue until the termination of treatment in November 1975, five months after section 5-109 took effect. The court disagreed: although the rule may delay the date on which a cause of action accrues, it has no bearing on when "injury" occurred.

In response to the second certified question, the court assumed the applicability of section 5-109 and attempted to determine when its three- and five-year limitation periods would begin to run. It was evident that the legislature designed section 5-109 to prevent excessive delays under the discovery rule. Thus, the period of limitations would run five years after first harm, regardless of whether three years had passed since the discovery of injury or whether the injury was even reasonably discoverable. Furthermore, the court held that by requiring the statute to run upon the occurrence or discovery of first harm, the legislature effectively abrogated the continuous treatment rule.

"medical injury," within the meaning of the HCMCA, requires only that the physician's negligence be coupled with some harm. A "medical injury" can occur even if the victim suffers the greater part of his or her injury at a later date. Id.

141. 304 Md. at 697, 501 A.2d at 31.
142. Id. at 698, 501 A.2d at 31.
143. Id. at 697, 501 A.2d at 31.
144. Id. at 698-99, 501 A.2d at 31-32.
145. Id. at 699, 501 A.2d at 32.
146. Id. at 700, 501 A.2d at 32-33. The court concluded that the statute's creation of an absolute five-year limit from time of injury was designed to restrict "the amount of time that could lapse between the allegedly negligent treatment of a patient and the filing of a malpractice claim related to that treatment." Id., 501 A.2d at 32.
147. Id., 501 A.2d at 32-33.
148. Id., 501 A.2d at 32. The court explained that: "Section 5-109 is couched in terms of when the injury was committed and not when the entire course of treatment is finally concluded. The provisions of § 5-109, and the intent underlying the enactment of that statute, are plainly inconsistent with the survival of the continuing treatment rule." Id.
Finally, the court reasoned that section 5-109 did not violate article 19 of the Maryland Declaration of Rights by denying access to the courts.\textsuperscript{149} Because it did not significantly interfere with a fundamental right, the statute was not subject to strict scrutiny.\textsuperscript{150} Instead, the court found that section 5-109 struck a "fair balance": it furthered the State's interest in barring stale claims while affording reasonable protection to victims of medical malpractice.\textsuperscript{151}

\textbf{b. Burden of Proof.---In Hetrick v. Weimer}\textsuperscript{152} the Court of Special Appeals adhered to a relaxed burden of proof in medical malpractice cases that involve victims who have died before trial.\textsuperscript{153} The court found that plaintiffs do not have to prove with certainty that but for the doctor's negligence the patient definitely would have lived; rather, they must prove only that the doctor's negligence substantially reduced the patient's chances of survival.\textsuperscript{154}

On May 23, 1987, however, the Court of Appeals reversed and strongly disapproved of any relaxed burden of proof.\textsuperscript{155} The court distinguished the cases that endorsed the relaxed burden,\textsuperscript{156} pointing out that in those cases the evidence of the defendant's negligence either amply supported a jury verdict for the plaintiff or was uncontradicted.\textsuperscript{157} By contrast, in Hetrick the defendant had presented evidence that he was not negligent, and the jury had clearly relied on that evidence in entering a verdict for the defendant.\textsuperscript{158}

\begin{thebibliography}{157}
\bibitem{149} Id. at 703, 501 A.2d at 34.
\bibitem{150} Id. at 702-03, 501 A.2d at 33-34. The court emphasized that a statute of limitations merely affects the remedy without destroying or impairing a vested right; therefore, the statute does not violate the fourteenth amendment, upon which article 19 analysis is based. Id. at 702, 501 A.2d at 33 (quoting Allen v. Dovell, 193 Md. 359, 363-64 66 A.2d 795, 797 (1949)).
\bibitem{151} 304 Md. at 703, 501 A.2d at 34. The court remarked that this statute of limitations was still longer than the statute of limitations in effect when article 19 was adopted. Id. at 705, 501 A.2d at 35.
\bibitem{152} Judge Eldridge did not join this portion of the opinion of the court. Id. (Eldridge, J., concurring).
\bibitem{153} Id. at 702-03, 501 A.2d at 33-34. The court emphasized that a statute of limitations merely affects the remedy without destroying or impairing a vested right; therefore, the statute does not violate the fourteenth amendment, upon which article 19 analysis is based. Id. at 702, 501 A.2d at 33 (quoting Allen v. Dovell, 193 Md. 359, 363-64 66 A.2d 795, 797 (1949)).
\bibitem{154} 304 Md. at 703, 501 A.2d at 34. The court remarked that this statute of limitations was still longer than the statute of limitations in effect when article 19 was adopted. Id. at 705, 501 A.2d at 35.
\bibitem{155} 309 Md. 536, 525 A.2d 643 (1987).
\bibitem{156} See supra note 154.
\bibitem{157} 309 Md. at 551, 525 A.2d at 651.
\bibitem{158} Id. at 552, 525 A.2d at 651.
\end{thebibliography}
F. Negligence

1. Duty.—In Rowley v. City of Baltimore\textsuperscript{159} the Court of Appeals held that one who employs an independent contractor is not liable for injuries to the contractor's employees resulting from the contractor's negligence in the scope of its contractual duties.\textsuperscript{160}

The City of Baltimore engaged an independent contractor to manage and operate the Baltimore Convention Center.\textsuperscript{161} Pursuant to the agreement, the contractor assumed responsibility for maintenance and routine repairs.\textsuperscript{162} The contractor hired Rowley as a security guard.\textsuperscript{163} While performing her duties, Rowley was robbed, beaten, and raped by an unknown assailant, who had gained access to the Center through a defective door.\textsuperscript{164} This defect had existed for at least eleven months before the incident and had been reported numerous times.\textsuperscript{165} Rowley brought a negligence action against the City alleging that, as owner of the Convention Center, the City had a nondelegable duty to provide a safe work place.\textsuperscript{166}

The court agreed that the City has a nondelegable duty to licensees to maintain the premises in a reasonably safe condition.\textsuperscript{167} The court held, however, that the duty did not extend to the independent contractor or its employees when the defects arose from the contractor's failure to accomplish the very repairs it had undertaken to perform.\textsuperscript{168}

\textsuperscript{159} 305 Md. 456, 505 A.2d 494 (1986).
\textsuperscript{160} Id. at 475, 505 A.2d at 503.
\textsuperscript{161} Id. at 459-60, 505 A.2d at 495-96.
\textsuperscript{162} Id. at 460, 505 A.2d at 496.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 461, 505 A.2d at 496. The plaintiff conceded that the City's legal relationship with the contractor was that of employer and independent contractor, and therefore liability could not be imposed on the City under the doctrine of respondeat superior. Id.
\textsuperscript{167} The general rule is that one who employs an independent contractor is not liable for the negligence of the contractor or its employees. See Restatement (Second) of Torts § 409 (1965); W. Keeton, Prosser and Keeton on Torts § 71 (5th ed. 1984). This general rule today has numerous exceptions; one major exception is that the employer cannot delegate some duties if the employer has a particular relationship with the public or an individual. See Restatement (Second) of Torts § 409 comment b (1965).
\textsuperscript{168} Rowley suggested that the City's duties arose from three distinct sources: (1) its status as owner and occupier of premises, see Restatement (Second) of Torts § 343 (1965); (2) its status as municipal government maintaining a building for public use, see Restatement (Second) of Torts § 418 (1965); or (3) its status as employer of independent contractor, see Bauman v. Woodfield, 244 Md. 207, 223 A.2d 364 (1966). 305 Md. at 463, 505 A.2d at 497. The court did not specify the exact grounds upon which it would impose this nondelegable duty. Id.
\textsuperscript{168} 305 Md. at 474, 505 A.2d at 503.
The availability of workers' compensation strongly affected the court's decision.\textsuperscript{169} The expense of workers' compensation insurance is a factor in the determination of the contract price between an independent contractor and its employer. Thus, the independent contractor's employee should not be placed in a better position than an ordinary employee by being able to bring suit against a contractor's employer as well as being able to collect workers' compensation.\textsuperscript{170} Conversely, an employer should not be subjected to greater liability because it engaged the services of an independent contractor rather than hiring its own employees.\textsuperscript{171}

In \textit{Lamb v. Hopkins}\textsuperscript{172} the Court of Appeals held that even if a probation officer fails to carry out the duty to notify a sentencing court of a probationer's violations, the officer is not liable to third parties whom the probationer has injured.\textsuperscript{173} In so holding, the court adopted section 319 of the \textit{Restatement (Second) of Torts},\textsuperscript{174} under which the officer could not be liable to third parties unless the injuries occurred while the probationer was in the officer's custody.\textsuperscript{175}

The probationer in this case was a convicted armed robber whose probation had been continued despite three subsequent alcohol-related driving offenses and his failure to participate in a mandatory alcohol treatment program.\textsuperscript{176} In continuing his probation, the circuit court emphasized that another violation would probably lead to imprisonment.\textsuperscript{177} The probationer was then convicted in the district court of three other driving offenses as well as the discharge of a firearm.\textsuperscript{178} Contrary to court order and state law, however, his probation officers did not inform the original sentencing court of these violations.\textsuperscript{179} Subsequently, while driving under the influence of alcohol, the probationer collided with a vehicle driven by the plaintiff, Cynthia Lou Lamb, and rendered her infant daughter Laura a quadriplegic.\textsuperscript{180}

\begin{thebibliography}{99}
\bibitem{169} 305 Md. at 468-69, 505 A.2d at 500-01 (quoting King v. Shelby Rural Elec. Corp., 502 S.W.2d 659, 663 (Ky. 1973), cert. denied, 417 U.S. 932 (1974)).
\bibitem{170} 305 Md. at 468-69, 505 A.2d at 500-01 (quoting \textit{King}, 502 S.W.2d at 663).
\bibitem{171} \textit{Id.}
\bibitem{172} 303 Md. 236, 492 A.2d 1297 (1985).
\bibitem{173} \textit{Id.} at 248-49, 492 A.2d at 1304.
\bibitem{174} \textit{RESTATEMENT (SECOND) OF TORTS} § 319 (1965).
\bibitem{175} 303 Md. at 245, 492 A.2d at 1302.
\bibitem{176} \textit{Id.} at 239, 492 A.2d at 1299.
\bibitem{177} \textit{Id.}
\bibitem{178} \textit{Id.} at 240, 492 A.2d at 1299.
\bibitem{179} \textit{Id.} at 239, 492 A.2d at 1299.
\bibitem{180} \textit{Id.} at 240, 492 A.2d at 1299.
\end{thebibliography}
The Lambs\textsuperscript{181} sued the probation officers,\textsuperscript{182} alleging that they had proximately caused the collision by failing to report the probationer's violations or to seek his incarceration.\textsuperscript{183} The defendants successfully demurred on the grounds that they owed no duty to the plaintiffs.\textsuperscript{184}

On certiorari to the Court of Special Appeals, the Court of Appeals considered whether the defendants had a duty to control the probationer.\textsuperscript{185} The Lambs argued that because the probation officers had a special relationship with the driver, whom they knew to be dangerous, the officers owed the public such a duty. In failing to fulfill their duty to report the violations, the officers became liable for the actions of the probationer, namely the injury of Laura Lamb.\textsuperscript{186} The defendants contended, however, that they had no special relationship with the probationer; therefore, they concluded, they owed no duty to third parties whom he may have harmed.\textsuperscript{187} Both parties relied on sections 315 and 319 of the \textit{Restatement (Second) of Torts}.\textsuperscript{188}

The Court of Appeals indicated that previously it had implicitly adopted section 315,\textsuperscript{189} which states that, absent a special relationship, one has no duty to control the actions of another person and thus has no liability to third parties for the other person's conduct.\textsuperscript{190} The court then expressly adopted section 319, which states that:

\begin{quote}
one who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such
\end{quote}

\begin{itemize}
\item \textsuperscript{181} Alan C. Lamb and Cynthia Lou Lamb sued on behalf of their daughter. \textit{id.}
\item \textsuperscript{182} The plaintiffs also sued the director and employees of the State's Division of Parole and Probation. \textit{id.} The plaintiffs settled their claim against the probationer two months before trial. \textit{id.} at 240 n.3, 492 A.2d at 1299 n.3.
\item \textsuperscript{183} \textit{id.} at 240, 492 A.2d at 1299.
\item \textsuperscript{184} \textit{id.} at 240-41, 492 A.2d at 1299-1300.
\item \textsuperscript{185} \textit{id.} at 241, 492 A.2d at 1300.
\item \textsuperscript{186} \textit{id.}
\item \textsuperscript{187} \textit{id.}
\item \textsuperscript{188} \textit{id.} at 242, 492 A.2d at 1300-01; \textit{Restatement (Second) of Torts} §§ 315, 319 (1965).
\item \textsuperscript{189} 303 Md. at 245, 492 A.2d at 1302 (citing Scott v. Watson, 278 Md. 160, 166, 359 A.2d 548, 552 (1976)).
\item \textsuperscript{190} 303 Md. at 242, 492 A.2d at 1300. Special relationships include those between, for example, parent and minor child, master and servant, and the possessor of land or chattels and the possessor's licensee. \textit{id.} at 243, 492 A.2d at 1301 (quoting \textit{Restatement (Second) of Torts} §§ 316-317 (1965)).
\end{itemize}
harm.\textsuperscript{191}

The court noted that "taking charge" usually applies to custodial situations.\textsuperscript{192} While acknowledging that a minority of jurisdictions permit third party liability in noncustodial situations,\textsuperscript{193} the court adhered to the majority view that custody is a prerequisite of third party liability.\textsuperscript{194}

In characterizing the instant relationship as noncustodial, the court observed that the probationer was free to carry on his daily activities as long as he periodically reported to the officers.\textsuperscript{195} The court drew an analogy to other noncustodial relationships in which courts had refused to impose liability.\textsuperscript{196} In so doing, the court rejected psychotherapist-patient analogies as inapposite to the officer-probationer relationship.\textsuperscript{197} Absent custody, the officers had no duty to control the probationer.

The Lambs also contends that the Maryland Code\textsuperscript{198} and the probation order, which required the officers to report violations to the sentencing court, established a duty of care that ran to the public.\textsuperscript{199} Rejecting this contention, the Court of Appeals held that this
duty ran only to the sentencing court. Despite its harshness under the specific facts of the case, this decision is consistent with Maryland case law, which evidences judicial reluctance to establish third party liability.

2. Contributory Negligence.—In *Liscombe v. Potomac Edison Co.* the Court of Appeals held that one who knows of the presence of an electrical line and is then injured upon approaching or touching it is contributorily negligent as a matter of law. In so holding, the court noted that subjective criteria concerning whether the plaintiff appreciated the degree of danger involved was relevant only in establishing assumption of risk.

In *Liscombe* the plaintiff elevated the bed of his dump truck as though he were aware of the presence of power lines directly overhead. He subsequently suffered electric shock when his truck came into contact with the lines. The plaintiff sued both the company that maintained the lines and the company on whose facilities the lines were located. The trial court granted summary judgment for the defendants based on the plaintiff's contributory negligence. The plaintiff appealed, contending that the issue of contributory negligence should have gone to the jury.

The Court of Appeals affirmed the defendants' verdict: factual disputes concerning the magnetism of the power lines, the effect of

---

200. *Id.* at 252-53, 492 A.2d at 1305-06.
201. *Id.* at 245 n.7, 492 A.2d at 1302 n.7 (citing *Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981), and *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951), in both of which the court refused to establish third party liability for alcohol vendors absent a statute to the contrary).
203. *Id.* at 633, 495 A.2d 845.
204. *Id.* The elements of assumption of the risk are (1) knowledge of the risk of danger, (2) appreciation of that risk, and (3) voluntary exposure. *Id.* at 630, 495 A.2d 843 (quoting *Stancill v. Potomac Elec. Power Co.*, 744 F.2d 861, 866 (D.C. Cir. 1984)).
205. 303 Md. at 623, 495 A.2d at 840. In fact, injury flags were attached to the power lines to improve visibility from the ground. *Id.* at 622, 495 A.2d at 839.
206. *Id.* at 623, 495 A.2d at 840.
207. *Id.* at 620-21, 495 A.2d at 838-39.
208. *Id.* at 621, 495 A.2d at 839.
209. *Id.* The plaintiff argued in the alternative that contributory negligence was not a defense to the defendants' gross negligence. The court, however, rejected this argument, holding that the plaintiff had not put forth sufficient evidence of gross negligence. *Id.* at 637, 495 A.2d at 847. The plaintiff also argued that the defendants were liable under the doctrine of last clear chance. The court responded that the doctrine did not apply when, as in this case, the plaintiff's negligence is concurrent with any negligence on the part of the defendants. *Id.* at 637-38, 495 A.2d at 847 (citing *Sanner v. Guard*, 236 Md. 271, 276, 203 A.2d 885, 888 (1964)).
the sun's glare on the plaintiff's vision, and the plaintiff's knowledge of similar accidents were all immaterial in determining the plaintiff's negligence. The relevant facts—that the plaintiff knew of the power lines but continued to approach them—were not in dispute. These facts have consistently been sufficient to establish contributory negligence as a matter of Maryland law; therefore, the court affirmed the lower court's decision.

G. Negligent Hiring

Two Maryland cases provide new insight into the requirements of negligent hiring claims. The first addresses whether an employer has a duty to conduct research into a potential employee's background. The second concerns the negligent assignment of duties to a known convict.

In Cramer v. Housing Opportunities Commission of Montgomery County the Court of Appeals held that, in a suit for negligent hiring, evidence concerning the employer's access to the employee's criminal record is relevant to the determination of the employer's liability. Therefore, it was prejudicial error for the trial court not to admit this evidence.

The plaintiff was raped in the townhouse she rented from the Housing Opportunities Commission of Montgomery County (HOC). Her assailant was a housing inspector employed by the HOC. The inspector's job required him to come into close con-

210. 303 Md. at 626-27, 495 A.2d at 841-42. As long as the plaintiff had sole control of the truck's movement, the magnetism of the power lines was immaterial to his negligence. Id. at 626, 495 A.2d at 841. The effect of the sun's glare on his vision was merely a consideration in evaluating whether he discharged his duty to act with reasonable care; the glare could not absolve him of negligence. Id. at 627, 494 A.2d at 841-42. As long as the plaintiff was aware of the power lines, his lack of knowledge of past electric shock incidents was immaterial to his negligence. Id. at 626, 495 A.2d at 841.

211. Id. at 622-24, 495 A.2d at 839-40.


214. Id. at 717, 501 A.2d at 41.

215. Id.

216. Id. at 707, 501 A.2d at 36.

217. Id.
tact with tenants; under some circumstances, for example, they would provide him with the keys to their homes. At trial, the plaintiff alleged that the HOC was negligent in hiring the inspector because it failed to undertake a reasonable inquiry as to whether he was trustworthy or fit for the job.

Under Maryland law an employer has a nondelegable duty to make a reasonable inquiry into an employee's fitness before hiring the employee for a position that puts him or her into close contact with the public; however, the employer need not make this inquiry if it has some other basis for believing that the employee is trustworthy and suitable.

After establishing that the employer failed to make an adequate inquiry into the employee's background, the plaintiff must prove that this failure resulted in the employee's hiring. If a reasonable search would have yielded no information that would lead a reasonable employer to refuse employment, then the failure to conduct a search is not a proximate cause of the harm.

The availability of the information concerning the employee's criminal record was extremely pertinent in determining whether the employer's inquiry was "reasonable." As a result, the court held that the trial court should have allowed the trier of fact to consider evidence concerning the availability of this information. The court also held that the same evidence was relevant to the issue of causation. A jury could reasonably have found that but for his

---

218. Id. at 711, 501 A.2d at 38. Depending on the circumstances, what constitutes a reasonable inquiry will vary. If the hiring of an unfit employee poses a serious danger to society, "as in the hiring of a police officer," the employer may well have a duty to conduct a criminal investigation. Id. at 716, 501 A.2d at 40.

219. Id. at 711, 501 A.2d at 38. The employee had a lengthy criminal record: he had been convicted of assault and battery, burglary, and robbery, and had served time in prison from 1969 until 1973. Id. at 707, 501 A.2d at 36.

220. See id. at 712, 501 A.2d at 38 and authorities cited therein. The employer may not rely on information provided by someone else, however reasonable the reliance was under the circumstances. Id., 501 A.2d at 39.

221. Id. (citing Scott v. Watson, 278 Md. 160, 359 A.2d 548 (1976)). For example, suppose an employer negligently hires an employee. If this employee assaults the plaintiff while the employee is not on duty, there is no causal relationship between the negligent hiring and the assault upon the plaintiff; hence, the employer is not liable to the plaintiff. Id. at 713, 501 A.2d at 39.

222. Id. At trial, the plaintiff offered to prove that the employee's criminal record was easily available. The HOC could have obtained the record either by calling the Montgomery County Police Department or requesting a record from the employee himself. The trial judge refused to allow the jury to consider this. Id. at 714, 501 A.2d at 39-40.

223. Id. at 717, 501 A.2d at 41.

224. Id. at 720-21, 501 A.2d at 43.

225. Id. at 717, 501 A.2d at 41.
employment, the assailant could not have gained access to information about the layout of the victim's apartment. Therefore, it was again prejudicial error for the trial judge not to admit this evidence.

In Cramer the court recognized that an employee has not only a right of privacy, but also an interest in securing employment. Society, however, has an equally legitimate interest in protecting its citizens from the consequences of negligent hiring. The attempts of Congress and the Maryland General Assembly to balance these interests are reflected in the laws that regulate when and how an employer can obtain access to a potential employee's criminal record. Because the legislature has decided to make information concerning a person's criminal record available to the public, the factfinder may decide whether the employer acted negligently by not failing to consider the information.

In Henley v. Prince George's County the Court of Appeals held that the trial court erred in entering summary judgment on the issue of whether an employer negligently assigned security duties to its employee, a former convict. Before remanding, however, the court made several observations on the tort of negligent hiring and retention.

An employer must use reasonable care to ensure that its employees will not pose a danger to any persons that foreseeable will come into contact with the employee. Even if the employer cannot identify that class of persons in advance, the employer may still be liable if, in retrospect, it appears that the plaintiff falls within the class. Finally, the trier of fact must ascertain whether the employer's negligence proximately resulted in the plaintiff's injuries: the trier of fact can find proximate cause if the plaintiff produces proof of an "appropriate nexus" between the employee's duties to the employer and the victim's injuries.
H. Negligent Misrepresentation

To prevail on any claim for misrepresentation, a plaintiff must show that he or she justifiably relied on a representation of material fact.\(^{237}\) In *Ward Development Co. v. Ingrao*\(^{238}\) the Court of Special Appeals adopted the definition of a "material fact" found in section 538 of the *Restatement (Second) of Torts*.\(^{239}\) A fact is material if:

(a) a reasonable man would attach importance to its existence or non-existence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.\(^{240}\)

In so holding, the court rejected the narrower definition adopted by the Court of Appeals in *Babb v. Bolyard*:\(^{241}\) "‘[T]he fraud must be material, by which is meant, without it, that the transaction would not have been made.’"\(^{242}\) The *Babb* definition emphasizes the recipient's subjective belief. In contrast, the *Restatement* permits the court to premise a finding of materiality on either the recipient's objective belief or the maker's subjective or objective belief. Thus, under the *Restatement*'s definition, materiality is possible in a greater variety of circumstances. This effectively eases a plaintiff's burden of proof.\(^{243}\)

---


\(^{238}\) Id. at 645, 493 A.2d at 421.

\(^{239}\) Id. at 655, 493 A.2d at 426; *Restatement (Second) of Torts* § 538 (1977). The court also held that damages for negligent misrepresentation should be calculated in the same manner as damages for fraudulent misrepresentation. 63 Md. App. at 659, 493 A.2d at 426.

\(^{240}\) Id. at 655, 493 A.2d at 426 (quoting *Restatement (Second) of Torts* § 538 (1977)).

\(^{241}\) Id. (citing Babb v. Bolyard, 194 Md. 603, 72 A.2d 13 (1950)).

\(^{242}\) Babb, 194 Md. at 609, 72 A.2d at 16 (quoting Boulden v. Stilwell, 100 Md. 543, 552, 60 A. 609, 610 (1905)).

\(^{243}\) The authority for this new definition is questionable. If viewed as contradicting the Court of Appeals' definition, the new definition is barren of authority; however, if the new definition merely supplements or expands that of the Court of Appeals, then the definition has some weight, though it is still subject to approval by the court above.
I. Privilege and Immunity

1. Immunity.—In *Frye v. Frye* the Maryland Court of Appeals refused to abrogate parent-child immunity despite its recent abrogation of interspousal immunity in *Boblitz v. Boblitz*. Relying on the doctrine of stare decisis, the court distinguished *Boblitz* and reasoned that the parent-child relationship had not changed significantly enough to justify abrogation.

On behalf of their minor son, the plaintiff sued her husband for his negligent operation of an automobile, which had led to the injury of their minor son. Upon entry of judgment for the defendant, the plaintiff appealed, contending that the court should abrogate parent-child immunity for the same reasons it had abolished interspousal immunity in *Boblitz*.

The Court of Appeals considered the continuing viability of parent-child immunity. The court determined that *Boblitz* did not control. In that case, the court asserted, it abrogated interspousal immunity because of the change in the status of women, as evidenced by Maryland’s adoption of the Equal Rights Amendment. In contrast, the General Assembly has reaffirmed the traditional ba-
ses of the parent-child relationship. While acknowledging the modern trend opposing parent-child immunity, the court noted that few jurisdictions have relied on the abrogation of interspousal immunity to eliminate the rule.

The growing majority of states that have judicially abrogated the doctrine have done so because of the its inability to achieve its original purpose of promoting family harmony. The doctrine’s rationale is that suits between parents and their unemancipated children violate the public interest by eroding parental discipline and the tranquility of the home. But this rationale does not extend to all actions between parent and child. For example, as many states have found, the operation of an automobile falls outside the boundaries of parental authority; furthermore, insurance buffers any potential disharmony that might result from litigation. Hence, in those states the immunity would not apply in cases such as Frye, cases that involve automobile torts. In fact, some courts note that the child’s inability to recover may lead to financial strain on the family and thus to disharmony. Accordingly, most courts, the Restatement (Second) of Torts, and leading legal scholars advocate either partial or total abrogation of the doctrine.

Yet the Frye court rejected this reasoning and concluded that parent-child immunity still achieves its original purpose of promoting family harmony. The court found the existence of insurance irrelevant to the determination of liability.

254. Md. Fam. Law Code Ann. § 5-203 (1984) (describing the establishment of guardianship and the responsibility of a parent for a minor child’s “support, care, nurture, welfare, and education”); see also id. at § 5-204 (child’s domicile is that of custodial parent).

255. 305 Md. at 561, 505 A.2d at 836-37 (indicating that 40 states and the District of Columbia have abrogated parent-child immunity at least in part).

256. Id. at 562, 505 A.2d at 836 (citing New Mexico and South Carolina as states that have abrogated parent-child immunity because they had previously abrogated interspousal immunity).


259. See 305 Md. at 562, 505 A.2d at 837.


263. 305 Md. at 548, 505 A. at 829 (quoting Schneider v. Schneider, 160 Md. 18, 21-22, 152 A. 498, 499 (1930)).

264. 305 Md. at 564-65, 505 A.2d at 837-38. The court recognized, however, that
members, the court discerned no explicit legislative intent to allow recovery between parent and child.

Without legislative direction to abrogate the doctrine or evidence of change in parent-child relationships, the court held that it must adhere to its precedents upholding the immunity. Thus, the General Assembly must balance the injured child's right to recovery against the impact recovery would have on the legislated insurance scheme in terms of both increased costs and family collusion.

The court's reasoning is flawed. While a court should not create liability based on the presence of insurance, a court may eliminate an exception to liability if insurance removes the justification for liability. Therefore, in automobile torts insurance removes the justification for parent-child immunity. In addition, it is true that the court might in effect rewrite part of the Insurance Code by creating an exception to parent-child immunity. Still, this prospect clearly has not deterred the court from, for example, abrogating interspousal immunity. The solution, however, now lies with the

when it previously concluded in Schneider that insurance was irrelevant to parent-child immunity, the mandatory automobile insurance statute did not yet exist.

265. Md. Ann. Code art. 48A, § 539(a) (1986). This provision requires motor vehicle liability insurance benefits to "cover the named insured and members of his family residing in his household . . . injured in any motor vehicle accident . . . ."

266. 305 Md. at 565-67, 505 A.2d at 838-39. Stare decisis requires the court not to overturn prior cases, but rather to defer doctrinal change to the legislature unless a change in circumstances is so significant as to render the prior cases unsound. If policy and the modern trend recommend a change in the common law, the court typically looks to expression of legislative intent to determine whether a significant change of circumstances has taken place. Recognizing the great effect doctrinal change has on public policy, the court has stated that the legislature is best equipped to express the will of the State for initiating such change. See Jones v. Malinowski, 299 Md. 257, 473 A.2d 429 (1984) (allowing recovery for wrongful birth based on the absence of a legislative barrier and in accord with traditional negligence principles of damage); Boblitz v. Boblitz, 296 Md. 242, 462 A.2d 506 (1983) (abrogating interspousal immunity on the basis that it was contrary to the theory of Maryland's Equal Rights Amendment, the enactment of which reflected a dramatic change in the husband-wife relationship); Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456 A.2d 894 (1983) (refusing to abrogate contributory negligence in favor of comparative negligence, reasoning from the absence of changed circumstances and from the legislature's rejection of 21 bills proposing abrogation); Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981) (refusing to establish a "dram shop" rule on the basis that the legislature had made unreasonable sale of alcohol a misdemeanor and had not established civil liability); Kline v. Ansell, 287 Md. 585, 414 A.2d 829 (1980) (abrogating the tort of criminal conversation on the basis that it violated Maryland's Equal Rights Amendment); Austin v. Mayor of Baltimore, 286 Md. 51, 405 A.2d 255 (1979) (refusing to abrogate or to clarify the doctrine of sovereign immunity in tort, reasoning that the legislature had determined that the State should be liable only in contract actions).

267. 305 Md. at 565-67, 505 A.2d at 838-39.

268. See Boblitz, 296 Md. at 242, 462 A.2d at 506.
General Assembly.

In *Wilson v. Jackson* the Court of Special Appeals held that in a suit against a public official for a violation of a person's federal civil rights, the official cannot assert a state common-law defense of qualified immunity.

A federal civil rights claim was instituted by the personal representative of a citizen whom a Montgomery County police officer shot and killed. Because the officer acted in the performance of his duty, he was entitled to qualified immunity. In accordance with the common law, the trial judge instructed the jury that the officer was immune unless he acted with actual malice—"knowingly, or deliberately, for an improper motive, and without legal justification." 

Looking to two United States Supreme Court decisions, *Martinez v. California* and *Harlow v. Fitzgerald*, the court held that since this was a federal civil rights action under 42 U.S.C. section 1983, the state standard should not apply. Instead, the trial court should have applied the less stringent federal standard. Relying on its prior decision in *Leese v. Baltimore County*, the court held that under the federal standard one can show malice by proving that the official acted with either actual malice or with a reckless disregard for the injured person's rights. The jury instruction was confined to the state common-law standard under which proof of actual malice is necessary; it did not include the less stringent federal standard, in which a showing of recklessness is sufficient.

---

270. Id. at 749-50, 505 A.2d at 915-16 (citing Martinez v. California, 444 U.S. 277, reh'g denied, 445 U.S. 920 (1980)).
271. Id. at 746-47, 505 A.2d at 914.
272. Even though the police officer could not assert an immunity defense grounded in state common law, he was entitled to qualified immunity under federal law for official acts performed in good faith. Id. at 750, 505 A.2d at 916 (citing Pierson v. Ray, 386 U.S. 547 (1967)).
273. Id. at 752, 505 A.2d at 917.
277. 66 Md. App. at 750, 505 A.2d at 916.
278. The standard of malice required to prove a § 1983 claim, unlike the actual malice standard under state law, "can be satisfied by either actual malice or its legal equivalent." Id. at 751, 505 A.2d at 916 (quoting Leese v. Baltimore County, 64 Md. App. 442, 484, 497 A.2d 159, 181 (1985) (emphasis in *Wilson*)).
Thus, the court found the instruction erroneous and reversed and remanded the case for a new trial.

The court correctly implied that federal law is supreme to state law. Therefore, state officials must obey federal law. Immunizing state officials who deprive citizens of their federal civil rights would void the protections of the federal civil rights laws.

2. Privilege.—In Exxon Corp. USA v. Schoene the Court of Special Appeals held that in an employee’s defamation claim, an employer could claim a conditional, but not an absolute, privilege.

Schoene, the plaintiff, had formerly operated an Exxon service station. In the course of investigating cash shortages at the station, Lent, an Exxon representative, falsely accused Schoene of theft. Exxon contended that by responding to Lent’s request that they discuss a “problem,” Schoene had invited the defamatory statement. Because Schoene thus consented to the statement’s publication, Exxon concluded that it could claim an absolute privilege from liability. The court, however, disagreed: in acceding to the request to discuss the problem, Schoene “could not reasonably be charged with knowledge that Lent’s response would be defamatory.”

Still, the court found sufficient evidence for the trial court to determine whether Exxon could claim a conditional privilege. It is well established in Maryland that a conditional privilege attaches to statements made within the context of the employer-employee relationship that are in furtherance of the protection of the employer’s property. The question of whether a defamatory state-

281. 66 Md. App. at 752, 505 A.2d at 916-17.
282. Id.
284. Id. at 421-22, 508 A.2d at 147.
285. Id. at 416, 508 A.2d at 144.
286. Id. at 417-18, 508 A.2d at 145.
287. Id. at 419, 508 A.2d at 146.
288. Id. at 419-20, 508 A.2d at 146. No Maryland court has yet recognized this absolute privilege; however, other jurisdictions and the Restatement do so. See id. at 420, 508 A.2d at 146 and authorities cited therein. The Restatement (Second) of Torts § 583 (1977) provides: “The consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.” Comment d to § 583 limits the applicability of the privilege as follows: “The extent of the privilege is determined by the terms of the consent. These again are to be determined by the language or acts by which it is manifested in the light of the surrounding circumstances.”
289. 67 Md. App. at 420, 508 A.2d at 147.
290. Id. at 421, 508 A.2d at 147.
291. See id. and authorities cited therein.
ment is conditionally privileged is a question of law for the court.292 The Court of Special Appeals was thus able to determine that Lent’s statements were conditionally privileged.293

On the other hand, the conditional privilege is subject to forfeiture if abused.294 The question of whether Lent abused the privilege is one of fact.295 In Exxon, the court observed, the trier of fact could have found abuse.296 The court held, then, that the trial court erred "in refusing to instruct the jury as to the conditional privilege applicable to Lent’s statements and as to the manner in which that privilege could be abused."297

In Miner v. Novotny298 the Court of Appeals held that the absolute privilege for judicial testimony applied to a citizen’s police brutality complaint.299 Therefore, a citizen’s complaint could not form the basis for a deputy sheriff’s defamation suit.300

After his arrest for driving while intoxicated, Novotny filed a brutality complaint against the arresting deputy sheriff.301 An investigation conducted by the sheriff’s office found the deputy not guilty of misconduct.302 The deputy then brought a defamation suit against Novotny.303 Novotny contended that under the Court of Special Appeals’ decision in Sherrard v. Hull,304 the petition clause of the first amendment305 clothed his complaint with an absolute privi-

292. Id. at 422, 508 A.2d at 147.
293. Id.
294. Id. at 421, 508 A.2d at 147.
295. Id. at 422, 508 A.2d at 147.
296. Id. Lent retracted his accusations shortly after making them. The court felt that this indicated the presence of malice. Id. at 421-22, 508 A.2d at 147.
297. Id. at 422, 508 A.2d at 147.
299. Id. at 176-78, 498 A.2d at 275-76.
300. Id.
301. Id. at 166, 498 A.2d at 270.
302. Id.
303. Id.
304. 53 Md. App. 553, 456 A.2d 59, aff’d, 296 Md. 189, 460 A.2d 601 (1983) (per curiam). In Sherrard the Court of Special Appeals held that the first amendment provides an absolute privilege for remarks made in the course of petitioning a legislative body for a redress of grievances. Id. at 555, 456 A.2d at 61. Although some courts in other jurisdictions disagree, see id. at 563-74, 456 A.2d at 65-71 and authorities cited therein, the Court of Appeals simply adopted in toto the Court of Special Appeals’ opinion. See Sherrard v. Hull, 296 Md. 189, 460 A.2d 601 (1983) (per curiam). Later, in Bass v. Rohr, 57 Md. App. 609, 619-21, 471 A.2d 752, 757-58, cert. dismissed, 301 Md. 641, 484 A.2d 275 (1984), the Court of Special Appeals extended the privilege to statements made before an administrative agency. Id. at 619-21, 471 A.2d at 752.
305. The petition clause provides: “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I.
The lower courts agreed.

In light of the United States Supreme Court’s recent decision in *McDonald v. Smith,* however, the Court of Appeals found it unnecessary to rely on the petition clause. In *McDonald* the Supreme Court held that the framers of the first amendment never intended to provide absolute immunity from liability for defamation. Rather, the qualified privilege established in *New York Times Co. v. Sullivan* and its progeny marks the extent of first amendment protection from liability for defamation.

Following *McDonald,* the Court of Appeals held that Novotny could not claim an absolute privilege under the first amendment. Instead, the court held that he was protected by the absolute common-law privilege established in Maryland in *Gersh v. Ambrose.* In *Gersh* the Court of Appeals extended the absolute privilege afforded judicial testimony to defamatory statements made in the course of administrative proceedings. The *Gersh* court also stated that the decision to extend this privilege should be made on a case-by-case basis and should turn on two factors: (1) the nature of the public function that the proceeding serves; and (2) the adequacy of procedural safeguards to minimize the occurrence of defamatory statements.

The *Miner* court found adequate procedural safeguards. Furthermore, it concluded that the public interest in the filing and investigation of valid brutality complaints outweighs the possible harm that a false complaint may bring to an officer’s reputation.

306. 304 Md. at 166-67, 498 A.2d at 270.
307. Id. at 167, 498 A.2d at 270.
309. Id. at 484.
311. 304 Md. at 170, 498 A.2d at 272.
312. Id. The court wrote: "To the extent that they are inconsistent with *McDonald* and this opinion, *Sherrard* and *Bass* are no longer authoritative rulings." *Id.*
314. Id. at 193, 434 A.2d at 550.
315. Id. at 197, 434 A.2d at 552.
316. 304 Md. at 173-75, 498 A.2d at 273-74. The filing of a brutality complaint triggers an administrative disciplinary proceeding governed by Md. Ann. Code, art. 27, §§ 727-734 (1982), the Law-Enforcement Officer’s Bill of Rights (LEOBR). Under LEOBR, unless the aggrieved person or the person’s guardian has duly sworn to the brutality complaint, no investigation can proceed. *Id.* at § 728(b)(4). A person who knowingly makes a false complaint is subject to criminal liability. *Id.* at § 734C. If the investigation of an officer leads to a recommendation of disciplinary sanctions, the officer has a right to notice and a hearing at which to contest the sanctions. *Id.* at § 730(a). At the hearing, the officer has the right to the assistance of counsel. *Id.* at § 730(b).
317. 304 Md. at 176, 498 A.2d at 275.
Moreover, the court noted that most other courts that have considered this issue have reached this conclusion. The Court of Appeals thus affirmed the lower courts' decisions, although on a different ground.

A person seeking a writ of attachment on a satisfied debt has an absolute privilege against defamation; however, in *Keys v. Chrysler Credit Corp.* the Court of Appeals held that the privilege does not protect such a person from liability for the tort of conversion.

### J. Products Liability

In *Kelley v. R.G. Industries, Inc.* the Court of Appeals held that a manufacturer or marketer of a "Saturday Night Special" handgun may be found strictly liable to persons who suffer gunshot injuries caused from the criminal use of such weapons.

Kelley was shot during a robbery. He brought a tort action in federal court against the manufacturer and marketer of the handgun used in the crime. At a hearing on the defendant’s motion to dismiss, the district court found no controlling state law precedent on the strict liability issue. Thus, it certified the following issues to the Court of Appeals: (1) whether the marketing or manufacturing of handguns generally merits imposition of strict liability; (2) whether strict liability can be imposed upon the manufacturer or marketer of a Saturday Night Special; and (3) whether the handgun that injured the plaintiff was a Saturday Night Special.

Addressing the first question, the court discussed two theories of strict liability advanced by the *Restatement (Second) of Torts.* First, the court held that even if the marketing of a handgun satisfied

---

318. *See id.* and authorities cited therein.
319. *Id.* at 177-78, 498 A.2d at 275-76.
321. *Id.* at 404, 494 A.2d at 203.
323. 304 Md. at 157, 497 A.2d at 1159.
324. *Id.* at 128, 497 A.2d at 1144.
325. *Id.* at 129, 497 A.2d at 1145. The victim, Kelley, set forth several theories for recovery. The first two counts were based on strict liability; the plaintiff claimed that handgun marketing was an "abnormally dangerous activity," and that the handgun was "unreasonably dangerous" due to a defect in the gun's "marketing, promotion, distribution and design." The third count was based on a general negligence theory. The fourth was for damages due to loss of consortium. *Id.*
326. *Id.*
327. *Id.* at 131, 497 A.2d at 1146.
328. *Id.* at 132, 497 A.2d at 1146.
the Restatement's criteria for an abnormally dangerous activity, Maryland law would not permit the imposition of liability unless: the tortfeasor was an owner or occupier of land; and the tortious activity "bears a relation to the occupation and location of the land on which the activity occurs." Since the hazards of handgun use do not bear any relation to the ownership or occupation of land, liability under this doctrine cannot apply to handgun manufacturers or marketers.

Similarly, a handgun is not an abnormally dangerous product under section 402A of the Restatement. For strict liability to be imposed under this theory, Maryland law expressly requires that the product be sold in a defective condition; in other words, the handgun would have to be dangerous beyond the expectation of the ordinary consumer. In the instant case, however, the handgun worked precisely as intended and as expected. The handgun's small size and concealability would not lead to the conclusion that the handgun was defectively designed: these are not conditions that

---

329. Restatement (Second) of Torts § 520 (1977) provides that for an activity to be considered an abnormally dangerous activity it must meet the following six factors:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

330. See 304 Md. at 133, 497 A.2d at 1147 and authorities cited therein.

331. Id.

332. Restatement (Second) of Torts § 402A (1965).

333. 304 Md. at 135, 497 A.2d at 1148. Maryland adopted § 402A in Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). The Phipps court held that to recover under this theory, the plaintiff must establish that:

(1) the product was in a defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

278 Md. at 344, 363 A.2d at 958 (quoting Restatement (Second) of Torts § 402A (1965)).

334. 304 Md. at 135-36, 497 A.2d at 1148 (quoting Phipps, 278 Md. at 344, 363 A.2d 955). The court briefly discussed the "risk/utility" test, which other jurisdictions have applied to determine whether a particular product's design is defective. The court declined, however, to adopt that standard in this case, holding that it only applied "when something goes wrong with a product." 304 Md. at 138, 497 A.2d at 1149.

335. Id. at 136, 497 A.2d at 1148.
cause the gun to malfunction or lead to unexpected injuries. Thus, the court concluded, handgun manufacturers and marketers were not liable under either the abnormally dangerous activity or the strict product liability doctrines for injuries caused by their handguns during the commission of a crime.

The court then addressed the question of whether Saturday Night Specials constitute a special type of handgun justifying imposition of strict liability. Examining both federal and Maryland gun control legislation, the court determined that public policy clearly does not sanction Saturday Night Specials. In the court's view, this legislation indicates that law enforcement, sport, and protection are the only legitimate uses for handguns.

336. Id. at 139, 497 A.2d at 1150 (quoting Riordan v. International Armament Corp., 132 Ill. App. 3d 642, 650, 477 N.E.2d 1293, 1298 (1985)).

337. 304 Md. at 132, 497 A.2d at 1146. The court distinguished Kelley's injury from an injury inflicted when a handgun malfunctions. In the latter case, established principles of product liability may allow recovery.

338. 18 U.S.C. § 922 (1982) bans the importation into the United States of any firearm or ammunition not specifically excepted. That section provides in relevant part:

(1) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States ... any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States ... in violation of the provisions of this chapter.

339. Md. Ann. Code art. 27, § 36B(c)(1) (1982) provides in part: "Nothing in this section shall prevent a person from wearing, carrying, or transporting a handgun within the confines of real estate owned or leased by him or upon which he resides or within the confines of a business establishment owned or leased by him."

18 U.S.C. § 925 (1982), titled "Exceptions: Relief from disabilities," excepts from the general ban on importation those firearms used for law enforcement, military, or other governmental purposes. Furthermore, § 925(a) enables the Secretary of the Treasury to authorize the importation of a firearm or ammunition for scientific or research purposes, for use in connection with competition or training, if the firearm is not
Because of their poor quality, inaccuracy, and unreliability, Saturday Night Specials are not suitable for these legitimate purposes. Moreover, because these guns are inexpensive and easy to conceal, they are most commonly used in criminal activity. In light of these qualities, the court found that the manufacturers and sellers should foresee that their product would be used in criminal activity. Therefore, the court held that the manufacturers and market-

a serviceable firearm, or if the firearm is recognized as suitable or easily adaptable for sporting purposes. 27 C.F.R. § 1178.112 (1986) provides in part:

(c) . . . No firearm shall be placed on the Importation List unless it is found that (1) the caliber or gauge of the firearm is suitable for use in a recognized shooting sport, (2) the type of firearm is generally recognized as particularly suitable for or readily adaptable to such use, and (3) the use of the firearm in a recognized shooting sport will not endanger the person using it due to deterioration through such use or because of inferior workmanship, materials, or design.

342. 304 Md. at 144-46, 497 A.2d at 1153-54. The court observed that federal laws also reflect the prevailing view that Saturday Night Specials have no legitimate purpose. The court cited various federal statutes and regulations that in effect bar the importation of firearms that are not used for military, law enforcement, or sporting purposes. See supra notes 334 and 337. Furthermore, handguns that meet the sporting purposes criteria may nevertheless be banned from importation if the use of the firearm may endanger the user due to deterioration caused by inferior workmanship, materials, or design. See supra note 337.

The court also found that in several hearings on the Gun Control Act of 1968, Saturday Night Specials were specifically singled out as handguns that the Act intended to ban. 304 Md. at 147-53, 497 A.2d at 1154-57. This was because the real purpose of these weapons is for use in criminal activity. See S. REP. No. 1097, 90th Cong., 2d Sess. 76-80, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2164-67. The Senate Report stated:

Substantial numbers of firearms that are sold via the mail-order route in the United States are foreign imported firearms, either of the military surplus category or the category of inexpensive, small-caliber firearms, which have been termed as “unsafe” and as “Saturday Night Specials.” Our law enforcement officials have testified that from 50 to 80 percent of the crime guns that are confiscated each year are foreign imports of either of the above categories of weapons. Many of these imports . . . are rebored and rechambered . . . and the barrels are cut down for concealment purposes.

Id. at 2165.

It appears that these guns are clearly not sanctioned under federal policy. Even the National Rifle Association doesn’t defend Saturday Night Specials. Maxwell Rich, Executive Vice President of the National Rifle Association, testified in Senate hearings that “[Saturday Night Specials] have never to my knowledge been accepted for advertising in our official journal, the American Rifleman. Our reason is that they have no sporting purpose, they are frequently poorly made, and they do not represent value received to any purchaser.” 304 Md. at 146 n.10, 497 A.2d at 1154 n.10 (quoting Hearings on S. 2507 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 315 (1971)).

343. 304 Md. at 155, 497 A.2d at 1159.

344. Id. at 156, 497 A.2d at 1159 (citing Volkswagen of America v. Young, 272 Md.
ers of Saturday Night Specials may be held strictly liable to innocent persons who suffer gunshot injuries from the criminal use of those weapons.345

The court then attempted to define a "Saturday Night Special."346 Because many relative factors must be considered in labeling a gun a Saturday Night Special,347 the court decided a handgun should rarely, if ever, be deemed a Saturday Night Special as a matter of law.348 Instead, this is a question for the trier of fact to decide.349 Once the trier of fact has determined that a handgun is a Saturday Night Special, the manufacturer and any other person in the marketing chain, including the retailer,350 is strictly liable to the

201, 321 A.2d 737 (1974)). The court also drew an analogy to a Michigan Supreme Court case, Moning v. Alfano, 400 Mich. 415, 254 N.W.2d 759 (1977), which held a slingshot manufacturer liable for the injuries sustained by an eleven year old child. Because it marketed the slingshot directly to children, the manufacturer should have foreseen the child's misuse. The Michigan court deemed it unreasonable to market a dangerous product to a class of purchasers who were likely to misuse the product. 400 Mich. at 446-49, 254 N.W.2d at 768-69.

345. 304 Md. at 157, 497 A.2d at 1159.
346. Id.
347. Among the relevant factors are "the gun's barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco, and Firearms, and other related characteristics." Id., 497 A.2d at 1159-60.
348. Id. at 157-58, 497 A.2d at 1160.
349. Id. at 158, 497 A.2d at 1160. Before the question of liability goes to the trier of fact, the plaintiff must establish to the trial court that the gun in question possesses sufficient characteristics of a Saturday Night Special. A handgun's small size and short barrel is not sufficient to make it a Saturday Night Special. Many law enforcement personnel carry high quality, short-barreled guns for legitimate purposes. Rather, the court should consider the size of the gun along with other factors, such as cost, quality, and unreliability. Id.
350. Id. The plaintiff or the plaintiff's decedent must have been injured or killed by a bullet fired from a Saturday Night Special. The shooting must have been a criminal act or must have occurred during the commission of another crime in which the person who fired the gun was a participant in the crime. Contributory negligence and assumption of the risk are not valid defenses; however, the plaintiff cannot recover if he or she was the perpetrator of the crime. Once these elements are satisfied, the defendant will be liable for all damages resulting from the shooting, consistent with established principles concerning tort damages. Id. at 158-59, 497 A.2d at 1160.

Since the issue of whether the handgun in the instant case was a Saturday Night Special was for the trier of fact, the court did not rule on this issue. Still, the court did make some general observations. It was relevant that R.G. Industries, the American subsidiary of the manufacturer (Rohm), has been called the nation's major producer of Saturday Night Specials and was included on a list of domestic manufacturers of handguns that do not meet the federal standards for importation. The guns have been described as "junk guns" having no "legitimate sporting purpose," and all of the guns manufactured by Rohm were considered to be the poorest quality of handguns. The recent suggested retail price of an RG-38S, the handgun used to shoot Kelley, was between $35.00 and $55.00. Federal law bars the importation of Rohm handguns with
crime victim.

Finally, the court applied its decision prospectively: *Kelley* will govern only injuries caused by the guns marketed after October 3, 1985, the date of the decision. It would be unfair to impose liability for guns sold before the decision because until then manufacturers and marketers had little reason to expect that their actions might result in tort liability.

The plaintiff's "misuse" of a product may defeat a products liability claim. In *Ellsworth v. Sherne Lingerie, Inc.* the Court of Appeals defined "misuse" as the use of the product in a manner that is not reasonably foreseeable. In addition, the court held that, unlike assumption of risk, misuse is not an affirmative defense; rather, to establish a prima facie products liability claim, the plaintiff must prove that he or she did not misuse the product.

In *Ellsworth* the plaintiff purchased a nightgown from the defendant, Sherne Lingerie, which issued no warning as to the garment's flammability. While wearing the nightgown inside out, the plaintiff momentarily brushed the inside pocket of her gown across the stove; consequently, her nightgown ignited, and she was severely burned. The plaintiff subsequently sued on a theory of strict liability in tort.

The trial judge instructed the jury that if the plaintiff met her burden of proof in establishing the garment's defectiveness, the burden then shifted to the defendants to establish the plaintiff's misuse of the product. The jury found for the defendants, and

two-inch barrels and Rohm RG-38 .38 caliber handguns with three-inch barrels. *Id.* at 159-61, 497 A.2d at 1160-61.

351. *Id.* at 162, 497 A.2d at 1162.
352. *Id.*. The court also held that the burden of production and persuasion is upon the defendant manufacturers and marketers to show that the handgun was purchased before the date of this decision. The court believed this was appropriate because the facts concerning the date of a sale to a member of the public can be ascertained more easily by the defendant than by the plaintiff. *Id.* at 162 n.31, 497 A.2d at 1162 n.31.

353. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965).
355. *Id.* at 595-96, 495 A.2d at 355.
356. *Id.* at 597, 495 A.2d at 356.
357. *Id.* at 588, 495 A.2d at 351. On its shipping invoice, however, the defendant Cone Mills, which had manufactured the fabric, clearly warned Sherne of the fabric's flammability. *Id.*
358. *Id.*
359. *Id.* at 587, 495 A.2d at 351. The plaintiff also alleged negligence and breach of the implied warranty of fitness. *Id.*
360. *Id.* at 590-91, 495 A.2d at 352.
the Court of Special Appeals affirmed.\textsuperscript{361} On certiorari, the Court of Appeals reversed and remanded for a new trial.\textsuperscript{362} 

First, the court held that the plaintiff bore the burden of establishing absence of misuse.\textsuperscript{363} In the court's view, this duty follows from a plaintiff's other duties in a products liability claim. For example, a plaintiff must establish that the product is defective, \textit{i.e.}, that it is dangerous beyond the knowledge or expectation of the ordinary purchaser.\textsuperscript{364} Then the court defined "misuse." If the plaintiff's injury results from a reasonably foreseeable use of the product, the product is defective.\textsuperscript{365} Conversely, if the injury results from a reasonably unforeseeable use, the product is not defective.\textsuperscript{366} Thus, to prove the existence of a material defect in a product, the plaintiff must establish that he or she used the product in a reasonably foreseeable manner.\textsuperscript{367} Finally, the court found that, as a matter of law, the plaintiff's wearing of the nightgown inside out and near a stove was reasonably foreseeable.\textsuperscript{368} Because the plaintiff had thus met her burden of proof of proper use, the judge should not have allowed the defendant to contend or the jury to determine that the plaintiff had misused the product.\textsuperscript{369}

The trial court, however, did not err in refusing to instruct the jury that contributory negligence is not a defense to strict liability in tort.\textsuperscript{370} The Court of Appeals refused to make such an instruction a

\begin{itemize}
\item \textsuperscript{362} 303 Md. at 613, 495 A.2d at 364.
\item \textsuperscript{363} \textit{Id.} at 598, 495 A.2d at 356.
\item \textsuperscript{364} \textit{Id.} at 591, 495 A.2d at 351.
\item \textsuperscript{365} \textit{Id.} at 596, 495 A.2d at 355.
\item \textsuperscript{366} \textit{Id.} The court cited Moran v. Faberge, 273 Md. 538, 545-46, 332 A.2d 11, 16 (1975). In Moran the court considered whether the defendant perfume manufacturer negligently failed to warn of its product's high flammability. The court noted that the manufacturer's duty "to warn of latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those who are reasonably foreseeable." 273 Md. at 545, 332 A.2d at 15-16 (citations omitted). The court cited as an example of reasonably foreseeable use the wearing of a flammable cocktail robe in the kitchen near a fire. \textit{Id.} at 546, 332 A.2d at 16 (citing \textsc{Restatement (Second) of Torts} § 395 comment k (1965)). The court concluded that the test of foreseeability was not whether the defendant might have expected the actual harm the plaintiff suffered; rather, the test is "whether the actual harm fell within a general field of danger which should have been anticipated." \textit{Id.} at 551, 332 A.2d at 19 (quoting McLeod v. Grant County School Dist., 42 Wash. 2d 316, 321, 255 P.2d 360, 363 (1953) (emphasis in Moran)). The Moran court held that a jury should determine whether the plaintiff's actions fell within that area of general danger. \textit{Id.} at 554, 332 A.2d at 21.
\item \textsuperscript{367} 303 Md. at 595-96, 495 A.2d at 355.
\item \textsuperscript{368} \textit{Id.} at 598, 495 A.2d at 357.
\item \textsuperscript{369} \textit{Id.}, 495 A.2d at 356-57.
\item \textsuperscript{370} \textit{Id.} at 599, 495 A.2d at 357.
\end{itemize}
per se requirement.\textsuperscript{371} For if a plaintiff alternatively pleads both negligence and strict liability, a defendant may be entitled to a jury instruction that refers both to contributory negligence and misuse.\textsuperscript{372} Thus, the court concurred with Maryland Rule 2-520(c), which permits judges to use their discretion in fairly instructing the jury on a particular issue.\textsuperscript{373}

K. Statutes of Limitations

1. Generally.—In Booth Glass Co. v. Huntingfield Corp.\textsuperscript{374} the Court of Appeals held that a defendant's promises or voluntary attempts to repair tortious injury do not toll the general statute of limitations, section 5-101 of the Courts and Judicial Proceedings Article.\textsuperscript{375} The court declined the opportunity to extend the acknowledgment doctrine, which delays accrual of an action until the completion of a continuing service,\textsuperscript{376} to noncontractual claims.\textsuperscript{377} Furthermore, the court suggested that something like the continuous treatment rule, which delays the accrual of an action until the termination of medical treatment,\textsuperscript{378} would apply only for negligence in the repair process.\textsuperscript{379} Thus, the discovery rule still determines, in general, the accrual of action under section 5-101.\textsuperscript{380}

In Booth the plaintiff alleged negligent installation of glasswork in a building completed in June of 1976.\textsuperscript{381} From then until April of 1978, the defendant attempted to repair the defective installation; his assurances that the leaking would be corrected continued until

\begin{itemize}
\item \textsuperscript{371} Id. at 599-600, 495 A.2d at 357.
\item \textsuperscript{372} Id. at 599, 495 A.2d at 357.
\item \textsuperscript{373} Id. at 599-600, 495 A.2d at 357 (citing Md. R. 2-520(c), which permits judges to adopt their own instructions as opposed to requested ones when the judge fairly covers the issue).
\item \textsuperscript{374} 304 Md. 615, 500 A.2d 641 (1985).
\item \textsuperscript{375} Id. at 624-25, 500 A.2d at 645-46. Under the general statute of limitations, "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984).
\item \textsuperscript{376} 304 Md. at 618, 500 A.2d at 642.
\item \textsuperscript{377} See id. at 619, 500 A.2d at 643.
\item \textsuperscript{379} 304 Md. at 622-24, 500 A.2d at 644-45.
\item \textsuperscript{380} Id. at 622, 500 A.2d at 644. Under the discovery rule an action accrues "when the claimant in fact knew or reasonably should have known of the wrong." Poffenberger v. Risser, 290 Md. 631, 636, 431 A.2d 677, 680 (1981).
\item \textsuperscript{381} 304 Md. at 617, 500 A.2d at 642.
\end{itemize}
July or August of 1980. On July 24, 1980, the plaintiff finally filed suit.

The defendant moved for summary judgment on the ground that the three-year statute of limitations had begun to run upon discovery of the defect, and that the action was thus barred. The trial court held that the suit could proceed because the acknowledgement doctrine tolled the statute. In affirming, the Court of Special Appeals relied instead on the continuous course of treatment rule; the acknowledgement theory did not apply since Booth Glass was not under contract to perform repairs.

The Court of Appeals did not consider whether the acknowledgement rule would apply. Nonetheless, the court reversed, holding that the statute of limitations began to run in June 1976, upon the plaintiff's first discovery of negligence; therefore, the three-year limitations period had elapsed when the plaintiff filed suit in July 1980. The court reasoned that the tort sued upon was not of a continuing nature: the plaintiff alleged negligent installation, not continuing negligence in the repair process. Thus, the continuous treatment rule was inapplicable. Instead, the general tort rule of discovery applied.

The Court of Appeals recognized that on similar facts courts in other jurisdictions have employed a theory of equitable estoppel to toll the statute. Yet the court refused to follow that path, observing that: "We have long adhered to the principle that where the legislature has not expressly provided for an exception in a statute of limitations, the court will not allow any implied or equitable exception to be engrafted upon it."

2. Latent Diseases.—In Trimper v. Porter-Hayden the Court of Appeals held that the discovery rule does not apply to actions

382. Id.
383. Id.
384. Id. at 618, 500 A.2d at 642.
385. Id.
386. Id.
387. The court granted certiorari only to consider the intermediate appellate court's application of the continuous treatment rule. Id. at 619, 500 A.2d at 643.
388. Id. at 622, 500 A.2d at 644.
389. Id. at 621-22, 500 A.2d at 644.
390. Id. at 622, 500 A.2d at 644.
391. Id.
392. See id. at 622-24, 500 A.2d at 644-45 and authorities cited therein.
393. Id. at 623, 500 A.2d at 645.
brought under the wrongful death and survival statutes\textsuperscript{395} if death resulted from a latent disease.\textsuperscript{396} Accordingly, the statute of limitations begins to run at the decedent’s death.\textsuperscript{397}

More than three years after their husbands’ deaths, two widows separately\textsuperscript{398} filed wrongful death and survival actions against their deceased husbands’ employers, alleging that their husbands died because of asbestos exposure.\textsuperscript{399} The court, in deciding whether the widows’ actions were time-barred, considered separately the wrongful death statute and the survival statute.\textsuperscript{400}

Wrongful death claims are statutory in nature and are subject to an explicit three-year limitation period.\textsuperscript{401} Hence, the statute’s plain meaning does not allow an extended filing period.\textsuperscript{402} Given the General Assembly’s clear intent to the contrary, the court would not extend the three-year limitation period by permitting the plaintiffs to avail themselves of the discovery rule.\textsuperscript{403} Thus, even though the plaintiffs could not have ascertained the cause of their husbands’ deaths within the limitation period, their wrongful death claims were barred: the discovery rule does not apply to wrongful death actions.\textsuperscript{404}

The survival statute,\textsuperscript{405} however, codifies a common-law cause of action.\textsuperscript{406} Under the survival statute, most actions by or against the decedent’s estate survive the decedent’s death.\textsuperscript{407} Section 5-101 of the Courts and Judicial Proceedings Article,\textsuperscript{408} the general three-
year statute of limitations, governs survival actions. Because the discovery rule generally determines the accrual of actions under section 5-101, the plaintiffs contended that the discovery rule applied as well to survival actions.

Finding no guidance in prior cases from Maryland or other jurisdictions, the court looked to analogous Maryland statutes for indications of legislative intent. Wrongful death and survival cases, the court observed, generally involve similar liability issues and defenses. For wrongful death claims, however, the statute of limitations begins to run at death. Therefore, if the court did not apply the same statute of limitations both to survival actions and wrongful death actions, the resulting inconsistency would undermine legislative policy towards the latter. In addition, the court considered the Workers' Compensation Act provisions concerning death resulting from latent occupational diseases. In such cases, the statute of limitations begins to run at death, regardless of whether a worker's dependents knew that death was caused by the employment.

The court reasoned that these statutes indicate a legislative policy to restrict the application of the discovery rule in cases involving latent disease. Therefore, the court held that a cause of action accrues either: (1) at the time the injured person discovers or through provision of the Code provides a different period of time within which an action shall be commenced."

409. 305 Md. at 34, 501 A.2d at 448.
411. 305 Md. at 39, 501 A.2d at 45. The court considered the applicability of Poffenberger, 290 Md. at 631, 431 A.2d at 677, which established the general discovery rule in Maryland. None of the cases considered in Poffenberger, nor Poffenberger itself, dealt with the running of limitations in instances in which an injured person had died; therefore, the court found that Poffenberger was not dispositive. 305 Md. at 41, 501 A.2d at 451-52.
412. The court looked to decisions in other jurisdictions in an attempt to find a clear policy rationale upon which it could base its decision; however, it found itself unable to discern a general principle from those cases. 305 Md. at 43-49, 501 A.2d at 451-56.
413. Id. at 50, 501 A.2d at 456.
414. Id.
415. Id.
416. Id.

If no claim for disability or death from an occupational disease be filed with the Workmens' Compensation Commission within two (2) years . . . from the date of disablement or death, or the date when the employee or his dependents first has actual knowledge such disablement was caused by the employment, or death, as the case may be, the right to compensation for such disease shall be forever barred.
the exercise of reasonable diligence should have discovered the cause of injury, or (2) at death, whichever occurs first.\textsuperscript{418}

\textbf{L. Workers' Compensation}

1. \textit{Exclusive Remedy}.—Subject only to the most limited exceptions, the Workers' Compensation Act\textsuperscript{419} preempts all common-law remedies for injured employees.\textsuperscript{420} Section 44 of the Act provides one exception: If the worker's injury or death results from the employer's "deliberate intention to produce such injury or death," the worker or the worker's survivors retain the right to bring a common-law tort claim.\textsuperscript{421} In \textit{Johnson v. Mountaire Farms of Delmarva, Inc.}\textsuperscript{422} the Court of Appeals held that even if an employer recklessly exposes an employee to an extremely dangerous working condition, the employer's actions do not satisfy section 44's requirement of "deliberate intention" to produce injury or death.\textsuperscript{423} Therefore, an injured employee is relegated to limited recovery under the Act unless the employer desired or acted with the specific intent to injure the employee.\textsuperscript{424}

In \textit{Johnson} the mother of a deceased sixteen year old worker brought a wrongful death and survivorship action against her son's employer, Mountaire Farms.\textsuperscript{425} She alleged that Mountaire negligently failed to warn her son of the dangerous condition of certain machinery, willfully violated state safety regulations, and recklessly exposed her son to a dangerous working environment.\textsuperscript{426} This

\begin{footnotesize}
\footnotesize
\textsuperscript{418} 305 Md. at 52, 501 A.2d at 457-58.
\textsuperscript{420} Id. at § 15. See Victory Sparkler Co. v. Francis, 147 Md. 368, 376-77, 128 A. 635, 658 (1925).
\textsuperscript{421} Id. at § 15. See Victory Sparkler Co. v. Francis, 147 Md. 368, 376-77, 128 A. 635, 658 (1925).
\textsuperscript{422} 305 Md. 246, 503 A.2d 708 (1986).
\textsuperscript{423} Id. at 255, 503 A.2d at 712.
\textsuperscript{424} Id. at 248, 503 A.2d at 709.
\textsuperscript{425} 305 Md. 246, 503 A.2d at 712. While using a sump pump to remove liquid chicken fat and water from a ground depression, Ms. Johnson's son was electrocuted. Approximately two months before the accident, the Maryland Occupational Safety and Health Administration (MOSHA) had inspected the sump pump and had cited Mountaire for a "serious violation" under Md. Ann. Code art. 89, § 40(b) (1979), which states that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists." The court acknowledged that the sump pump was seriously defective: its "outer covering was broken; the insulation on the conductor was damaged and exposed the conductor itself; the cord was spliced on each end; and the plug lacked a ground prong." After receiving the citations, Mountaire did not correct these violations; however, it did falsely inform MOSHA that they had been corrected. 305 Md. at 248, 503 A.2d at 709.
\end{footnotesize}
reckless, wanton, and wilful misconduct, the plaintiff alleged, amounted to a deliberate intent to cause her son's injury; therefore, she contended, this conduct satisfied section 44's "deliberate intention" exception.\textsuperscript{427}

In response, the court reviewed the purpose and practical effects of the workers' compensation scheme. The General Assembly enacted the Workers' Compensation Act to ameliorate the inadequate common-law tort remedies for workers injured on the job.\textsuperscript{428} The Act benefits employers by limiting their liability,\textsuperscript{429} and it spares employees, employers, and taxpayers the costs of litigation for work-related injury claims.\textsuperscript{430} To ensure an efficient and fair system, however, the Act must also serve as the exclusive remedy for occupational injuries.\textsuperscript{431}

With this in mind, the court followed the majority of jurisdictions that have held that "deliberate intention" contemplates intentional wrongdoing; consequently, the Act requires a specific purpose and intent to cause injury or death.\textsuperscript{432} Reckless, wanton, or willful misconduct does not constitute "deliberate intention."\textsuperscript{433} Since the plaintiff failed to allege that Mountaire "desired" or intended to injure the employee, its actions did not rise to the level of intentional wrongdoing; therefore, the plaintiff failed to overcome the Act's exclusivity provision.\textsuperscript{434}

In Gallagher v. Bituminous Fire & Marine Insurance Co.\textsuperscript{435} the Court of Appeals held that section 15 of the Workers' Compensation Act,\textsuperscript{436} the Act's exclusivity provision, does not bar a worker's com-

\begin{footnotesize}
\begin{enumerate}
\item 305 Md. at 248, 503 A.2d at 709.
\item Id. at 249, 503 A.2d at 709.
\item See id. and authorities cited therein.
\item Id. at 249 n.2, 503 A.2d at 709-10 n.2 (quoting the preamble to Maryland's Workers' Compensation Act, 1914 Md. Laws 1429).
\item Id. at 251, 503 A.2d at 710.
\item Id. at 253-54, 503 A.2d at 711-12.
\item Id. at 252, 503 A.2d at 711. Deliberate wrongdoing differs from reckless, wanton, or willful misconduct. In both the actor knows that because of his or her actions, it is highly probable that harm may result. In addition, however, deliberate wrongdoing requires the actor to have the specific purpose and desire to cause such harm. See id. at 253-54, 503 A.2d at 712 and authorities cited therein.
\item Id. at 255, 503 A.2d at 712.
\item 303 Md. 201, 492 A.2d 1280 (1985).
\item Md. Ann. Code art. 101, § 15 (1985). Section 15 provides in relevant part: Every employer subject to the provisions of this article, shall pay or provide as required herein compensation . . . for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment . . . . The liability prescribed by the preceding paragraph shall be exclusive . . . .
\end{enumerate}
\end{footnotesize}
mon-law claim against an insurer for intentional infliction of emotional distress. Maryland thus joins a substantial number of jurisdictions that hold that an intentional tort claim for late payment or nonpayment of benefits is beyond the exclusivity provision’s scope.

A worker brought an action against his employer’s insurer, alleging that the insurer was both grossly negligent and willfully malicious in witholding the payment of worker’s compensation benefits. The insurer replied and the trial court agreed that the Workers’ Compensation Act provided the plaintiff’s sole remedy and therefore precluded this action.

In rejecting the insurer’s contention, the appellate court stressed the inequities that might result from a contrary decision: an exclusivity defense would allow insurers to badger and harass claimants with impunity. Moreover, the intentional tort alleged is ordinarily unrelated to the original work-related injury; however, the Workers’ Compensation Act governs only work-related injuries.

Still, the defendant pointed out that Maryland imposes a statutory penalty upon insurers that fail to pay benefits. The court, however, refused to join the jurisdictions that hold that such a penalty precludes a worker’s remedies at common law. Because the Act permits the imposition of a penalty even if the insurer is merely extremely careless or inefficient, the court held that “the penalty statute does not preclude otherwise permitted intentional torts actions.”

437. 303 Md. at 210, 492 A.2d at 1284. The court initially reached this result in Young v. Hartford Accident & Indemnity Co., 303 Md. 182, 492 A.2d 1270 (1985), Gallagher’s companion case. In Young the court drew on section 44 of the Act, Md. Ann. Code art. 101, § 44 (1985), which permits an injured employee to bring a common-law claim against his or her employer for the employer’s intentional torts. Reasoning by analogy, the court concluded that such an employee should also be able to bring a common-law claim against his or her employer’s insurer for the insurer’s intentional torts. Young, 303 Md. at 200, 492 A.2d at 1279.

438. See Gallagher, 303 Md. at 207, 492 A.2d at 1282 and authorities cited therein.

439. Id. at 205-06, 492 A.2d at 1282.

440. Id. at 204, 492 A.2d at 1281.

441. See id. at 208-09, 492 A.2d at 1283 and authorities cited therein.

442. Id. at 207, 492 A.2d. at 1282.


444. See 303 Md. at 209-10, 492 A.2d at 1283-84 and authorities cited therein.

445. Id. at 210, 492 A.2d at 1284.
2. Wrongful Discharge.—Section 39A of the Workers’ Compensation Act\(^\text{446}\) prevents an employer from discharging an employee solely on the ground that the employee filed for workers’ compensation benefits.\(^\text{447}\) In *Kern v. South Baltimore General Hospital*\(^\text{448}\) the Court of Special Appeals held that section 39A does not prevent an employer from discharging an employee on the ground of excessive absenteeism due to a work-related injury.\(^\text{449}\) Rather, the plaintiff must show that the discharge violated either an existing rule of law\(^\text{450}\) or another specific statutory provision.\(^\text{451}\)

The plaintiff, an employee of South Baltimore General Hospital (SBGH), filed a claim for and received workers’ compensation benefits for a work-related injury.\(^\text{452}\) Because of excessive absenteeism allegedly resulting from the injury, SBGH later discharged her.\(^\text{453}\) In a suit for wrongful discharge the plaintiff asserted that she was fired not only for excessive absenteeism, but also in retaliation for filing a claim for workers’ compensation benefits.\(^\text{454}\)

Since the plaintiff alleged that one reason for her discharge was excessive absences, she could not argue that she was discharged solely for filing a claim.\(^\text{455}\) Even though the Act should be construed as liberally as possible in favor of the employee,\(^\text{456}\) the court could not disregard the Act’s plain language; therefore, it held, the trial court properly dismissed the plaintiff’s claim.\(^\text{457}\)

The plaintiff contended, however, that if section 39A did not prevent discharge on the grounds of absenteeism, employees would be deterred from filing legitimate workers’ compensation claims.\(^\text{458}\) The court responded that in enacting the workers’ compensation scheme, the General Assembly did not intend to protect employees who could no longer work; rather, it intended to provide a system that would both compensate injured workers without the burden of

\(^{447}\) Id.
\(^{448}\) 66 Md. App. 441, 504 A.2d 1154 (1986).
\(^{449}\) Id. at 452, 504 A.2d at 1159.
\(^{451}\) 66 Md. App. at 452, 504 A.2d at 1159.
\(^{452}\) Id. at 443, 504 A.2d at 1155.
\(^{453}\) Id. at 443-44, 504 A.2d at 1155.
\(^{454}\) Id. at 445, 504 A.2d at 1156.
\(^{455}\) Id. at 447, 504 A.2d at 1157.
\(^{456}\) Id. at 446, 504 A.2d at 1156 (citing Wiley Mfg. Co. v. Wilson, 280 Md. 200, 217, 373 A.2d 613, 622 (1977), and Howard County Ass’n for Retarded Citizens Inc. v. Walls, 288 Md. 526, 530, 418 A.2d 1210, 1213 (1980)).
\(^{457}\) Id.
\(^{458}\) Id. at 452, 504 A.2d at 1159.
a trial and protect employers from high monetary awards.\footnote{Id. at 450, 504 A.2d at 1158.} Thus, if an injured employee can no longer carry out his or her duties, an employer may terminate the employee if it appears that the "period of disability is not determinable."\footnote{Id. at 452, 504 A.2d at 1159.}

At first glance, the court's strict interpretation of section 39A appears harsh. The court did state, however, that if the discharge is a "sham" and the facts suggest that the real reason for the discharge was retaliation for the filing of a claim, the employee may institute a wrongful discharge suit.\footnote{Id. at 452 n.9, 504 A.2d at 1159 n.9.} The court also recognized that removing an employer's right to discharge a permanently disabled employee would burden the employer.

J. Peter Puglia
Barak M. Romanek
F. Leigh Swann