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Recent Decisions
The Maryland Court of Appeals

I. COMMERCIAL LAW

A. Successor Liability and Contract: Maryland Narrowly Construes the “Mere Continuation of the Entity” Exception

In Academy of IRM v. LVI Environmental Services, Inc., the Court of Appeals held that a claim based on the “mere continuation of the entity” exception to the general rule against successor liability in corporate asset acquisitions requires a showing of either a continuation of ownership and management or insufficient consideration. A unanimous court reached its holding after reviewing both Maryland and out-of-state case law as well as the specific factual and procedural circumstances of the case. In so holding, the Court of Appeals reached the logical dictate of its prior decisions and clarified its former interpretation of the exception. The result will produce greater certainty in judicial decisionmaking.

1. The Case.—In 1987, the petitioner, Academy of IRM (IRM), brought suit in the Circuit Court for Anne Arundel County against Diversified Environmental Group, Inc. (Diversified) for moneys due and owing from work performed at a number of project sites throughout the mid-Atlantic region. IRM provided “bulk sampling and air monitoring services” to contractors, including Diversified, involved in asbestos removal, but failed to receive payments on the balance of its outstanding account with Diversified. In May 1988, the circuit court entered a limited order of default against Diversified’s trade name, Desco. The case came before the circuit court again in August 1988.

1. 344 Md. 434, 687 A.2d 669 (1997).
2. Id. at 451, 687 A.2d at 677. For the general rule against successor liability, see infra text accompanying note 28. The general rule is subject to four principal exceptions, which are recognized by a majority of jurisdictions, including Maryland. See infra note 30 and accompanying text.
3. See Academy of IRM, 344 Md. at 451-57, 687 A.2d at 677-80.
4. Id. at 437-38, 687 A.2d at 671. IRM sought to secure payment for work performed pursuant to a contract for Fort Belvoir, a United States Army installation. Id. at 441, 687 A.2d at 672.
5. Id. at 437-38, 687 A.2d at 671.
6. Id. at 438 & n.2, 499, 687 A.2d at 671 & n.2. Although IRM had named both Diversified and its trade name, Desco, in the complaint, the circuit court specifically limited the
for the entry of judgment on the order of default. At this hearing, after finding that Diversified had in fact been notified of its outstanding liability, the court entered judgment against both Desco and Diversified in the amount of $88,967.05.

As a means of satisfying its judgment against Diversified, IRM caused writs of garnishment to be issued against both Diversified Environmental Corporation (DEC) and LVI Environmental Services, Inc. (LVI), which were the same corporation. LVI, then operating under the name DEC, had acquired the assets of Diversified through a series of transactions in November 1987. In essence, LVI purchased the secured interests of Diversified's creditors, called its note, and then effected an agreement for a transfer of Diversified's assets. The asset purchase agreement between LVI and Diversified, dated December 1, 1987, conveyed collateral that was identified as "all of the contract rights, assets, accounts receivable and other tangible and intangible property of the DEBTOR."

As early as September 1987, LVI began doing business for former customers of Diversified, operating out of the same location and using order of default to Desco. This resulted from a finding that service of process had not been properly effectuated as to Diversified. The trial court found that service of process on an agent of Diversified, rather than the requisite corporate officers, was insufficient.

7. Id. at 440, 687 A.2d at 672.
8. Id. The judgment consisted of a principal balance of $78,204, prejudgment interest of $10,763.05, and court costs. Id. The trial court based its ruling on the fact that, as early as April 1987, Diversified had sought confirmation of its outstanding obligation to IRM.
9. Id.
10. Id. Diversified had financed its business operations through secured loan agreements with three separate creditors. Id. at 441, 687 A.2d at 672. One of its creditors, Crouse Group, Inc. (Crouse), was forced to call its note as the result of reorganization proceedings under Chapter 11 of the United States Bankruptcy Code. Id. at 441, 687 A.2d at 672-73.
11. Id.
12. Id. (internal quotation marks omitted).
Diversified's trade name, employees, and equipment. Additionally, two of Diversified's officers were installed as president and executive vice president of LVI upon its incorporation. None of Diversified's shareholders, however, continued to play any role in either LVI's business operations or other concerns.

LVI answered IRM's writ of garnishment, contending that it was not in possession of any of Diversified's property. The circuit court nevertheless entered judgment against LVI on a finding that it "was directly liable to IRM as the successor of [Diversified]." LVI appealed the trial court's judgment to the Court of Special Appeals.

The Court of Special Appeals reversed the judgment of the circuit court. The intermediate appellate court agreed with the appellant that IRM had no legal basis for bringing a garnishment proceeding against LVI. The court noted that "[a] garnishment proceeding is, in essence, an action by the judgment debtor for the benefit of the judgment creditor which is brought against a third party, the garnishee, who holds the assets of the judgment debtor." LVI's foreclosure pursuant to its secured interest in Diversified's assets

13. *Id.*, 687 A.2d at 674.
14. *Id.* at 442 n.4, 687 A.2d at 673 n.4.
15. *Id.* at 454, 687 A.2d at 679.
16. *Id.* at 444, 687 A.2d at 674.
17. *Id.* The circuit court said, "I find that there really was a continuation of the business. It's the same business. It's operated in the same place. [LVI] has the same employees. [LVI] has the same trucks, the same [asbestos removal contractor] numbers." *Id.* at 451, 687 A.2d at 677 (internal quotation marks omitted) (alterations in original).
18. *Id.* at 444, 687 A.2d at 674. LVI relied on three grounds of error: (1) There was no "legal basis for [IRM] to garnish funds of LVI"; (2) LVI was not a "successor corporation liable for the debt of its predecessor"; and (3) The "trial court abuse[d] its discretion in allowing a witness to testify in rebuttal after the witness had been disqualified from testifying in [IRM's] case-in-chief." LVI Envtl. Servs., Inc. v. Academy of IRM, 106 Md. App. 699, 701, 666 A.2d 899, 900 (1995), *aff'd*, 344 Md. 434, 687 A.2d 669 (1997).
20. *Id.* at 708, 666 A.2d at 903-04. Additionally, the court rejected LVI's motion to dismiss for insufficiency of service of process. *Id.* at 706, 666 A.2d at 903. The court ruled that this procedural defense must be raised prior to an answer on the merits. *Id.* at 707, 666 A.2d at 903. By answering the writ of garnishment, LVI made "a voluntary appearance, submitting [itself] to the jurisdiction of the court for all subsequent proceedings." *Id.* (quoting Guen v. Guen, 38 Md. App. 578, 587, 381 A.2d 721, 727 (1978)). LVI, consequently, had effectively waived this procedural defense. *Id.* at 708, 666 A.2d at 903.
21. *Id.* at 708, 666 A.2d at 904 (quoting Fico, Inc. v. Ghingher, 287 Md. 150, 159, 411 A.2d 430, 436 (1980)).
eliminated IRM's standing to sue. In short, Diversified "did not have any right to sue LVI"; thus neither did IRM have such a right.

Second, the court addressed IRM's theory that LVI was liable as Diversified's successor. While agreeing with IRM that such a theory did afford the right to assert a direct cause of action against LVI, the court stated there was no concomitant right to "transform the garnishment proceeding into a direct cause of action." IRM, the court determined, had brought the wrong cause of action against LVI. Thus, to obtain such relief, IRM should have named LVI in its original suit.

The Court of Appeals granted certiorari to determine "[w]hether successor liability may be imposed where the 'successor' has acquired the assets of the debtor through foreclosure of bona fide security interests purchased for value by the 'successor' from the original lenders."

2. Legal Background.—

a. Successor Liability Generally.—The general rule against successor liability in the creditor context is that a successor corporation which acquires the assets of a predecessor corporation does not assume the predecessor's current or future liabilities. The rule, however, is subject to four principal exceptions. These exceptions apply

22. Id. at 709, 666 A.2d at 904.
23. Id.
24. Id.
25. Id. at 709-10, 666 A.2d at 904 (citing Fischer v. Longest, 99 Md. App. 368, 380, 637 A.2d 517, 523 (1994); Md. R. 2-303(b) (requiring the contents of the pleading to "show the pleader's entitlement to relief").
26. Id. at 709, 666 A.2d at 904.
27. Academy of IRM, 344 Md. at 437, 687 A.2d at 671. The Court of Appeals also addressed LVI's renewed motion to dismiss for insufficiency of service of process on the original debtor, Diversified. Id.; see also infra note 75 (discussing the court's treatment of LVI's renewed motion to dismiss for insufficiency of service of process).
28. 1 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 7:1, at 10-12 (rev. 1990); see also infra note 30 and accompanying text (listing exceptions to the general rule against successor liability).
29. See infra note 30 and accompanying text. Two additional exceptions, however, have been employed by a minority of jurisdictions since the mid-1970s. The "product line" and "continuity of the enterprise" exceptions have been employed, by a minority of courts, as a means of holding successor manufacturer corporations liable in the products liability context. See 1 AMERICAN LAW OF PRODUCTS LIABILITY 3d, supra note 28, § 7:22, at 38-39, § 7:27, at 44-46 (discussing treatment of the theories in various jurisdictions). The "product line" exception, first recognized by the California Supreme Court in Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977), imposes strict liability where the successor corporation continues manufacturing the same product line as its predecessor. Id. at 8-9. The focus is on the product and its continued manufacture, rather than a continuation of the actual business entity. See J. Maxwell Tucker, The Clash of Successor Liability Principles, Reorganization Law, and the Just
when: (1) there has been an express or implied assumption of liability by the transferee; (2) the transaction "amounts to" a merger or consolidation; (3) the transferee is a "mere continuation" of the transferor; or (4) the purpose of the transaction is to "fraudulently" avoid liability.\footnote{Smith v. Navistar Int'l Transp. Corp., 737 F. Supp. 1446, 1448 (D. Md. 1988) (mem.); accord Baltimore Luggage Co. v. Holtzman, 80 Md. App. 282, 290, 562 A.2d 1286, 1289-90 (1989) (recognizing the four exceptions to the rule of successor liability); HANKS, supra note 29, § 9.10 (discussing the general rule of successor liability and its four exceptions as addressed by the Maryland courts).}

Strong policy considerations underscore adherence to the general rule and its four principal exceptions. The general rule against successor liability in asset acquisition encourages the principal aim of incorporation, that is, the free transferability of assets.\footnote{See Robert J. Yamin, The Achilles Heel of the Takeover: Nature and Scope of Successor Corporation Products Liability in Asset Acquisitions, 7 HARv. J.L. & PUB. POL'y 185, 208 (1984) (discussing the policy arguments favoring the general rule of successor liability).} In addition, the rule "promote[s] predictability in corporate transactions, free

Demand That Relief Be Afforded Unknown and Unknowable Claimants, 12 BANKR. DEV'S. J. 1, 13-14 (1995) (discussing the "product line" exception created by Ray v. Alad Corp. and the recognition it has received in other jurisdictions).

The "product line" exception has been justified on three principal grounds: (1) the virtual destruction of the plaintiff’s remedies against the original manufacturer caused by the successor’s acquisition of the business, (2) the successor’s ability to assume the original manufacturer’s risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer’s good will being enjoyed by the successor in the continued operation of the business. Id.; see also JAMES J. HANKS, JR., MARYLAND CORPORATION LAW § 9.10 n.187 (Supp. 1992) (discussing the rationale that has been used to support the "product line" exception).

The "continuity of enterprise" exception, alternatively, finds successor corporation liability where "[t]here was basic continuity of the enterprise of the seller corporation, including . . . retention of key personnel, assets, general business operations, and even the . . . name." Turner v. Bituminous Cas. Co., 244 N.W.2d 873, 883-84 (Mich. 1976); accord Cyr v. B. Offen & Co., 501 F.2d 1145, 1152 (1st Cir. 1974) (recognizing an exception to the rule of successor liability where "the transferee corporation was a mere continuation or reincarnation of the old corporation"). This exception is properly characterized as a "less radical departure from traditional corporate law rules" than the "product line" exception. 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123.06, at 276 n.6 (perm. ed. rev. vol. 1990) (citing Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985); Polius v. Clark Equip. Co., 608 F. Supp. 1541 (D.V.I. 1985) (mem.).)

The "continuity of the enterprise" exception is justified on the grounds that [t]he manufacturer’s successor, carrying over the experience and expertise of the manufacturer, is likewise in a better position than the consumer to gauge the risks and the costs of meeting them. The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product.

Cyr, 501 F.2d at 1154.
availability and transferability of capital, and mobility in the business and economic world . . ."32 The four exceptions, alternatively, serve as a counterbalance to the rule against successor liability by protecting the rights of creditors and tort claimants when a successor corporation has explicitly or impliedly assumed its predecessor's liabilities, or attempted a fraudulent evasion of rightful claimants.

The first exception, relating to an express or implied assumption of liability, focuses on the intent of the successor corporation with regard to the predecessor's outstanding obligations,33 and involves "little more than a straightforward interpretation of the contract of sale."34 The second, or de facto merger, exception focuses on a continuation of the predecessor's shareholders as shareholders of the successor.35 The "mere continuation" exception protects creditors when the successor corporation is "substantially the same as the predecessor."36 The fourth exception is a straightforward equitable principle that negates a successor's attempt to secure assets with inadequate consideration.37

b. Maryland Law.—Maryland currently stands among the majority of jurisdictions in recognizing the general rule, subject to its four exceptions, that a successor corporation, absent certain appurtenant considerations, is not liable for the debts of its transferor.38 Three primary decisions have shown a consistent line of reasoning with respect to Maryland law on the issue.

In *Isle of Thye Land Co. v. Whisman,*39 the Court of Appeals held a successor corporation liable on the theory that it had impliedly as-

32. *Id.* at 207.

33. See 15 *FLETCHER ET AL., supra* note 29, §§ 7124, 7328 (discussing conditions under which a successor corporation's promise to assume its predecessor's debts and liabilities may be implied).

34. 3 *JAMES D. COX ET AL., CORPORATIONS* § 22.8, at 22.29 (1995).

35. *Id.*

36. 15 *FLETCHER ET AL., supra* note 29, § 7124.10, at 292 ("The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors."); *see also* Yamin, *supra* note 31, at 226 (noting that in its classic form the "mere continuation" exception requires the "legal and economic ownership [of the predecessor and successor corporations] be essentially the same both before and after the transaction").

37. 15 *FLETCHER ET AL., supra* note 29, § 7122, at 232 (noting that "grossly inadequate consideration" will render an asset transfer "fraudulent . . . regardless of whether the parties had the actual intent to defraud").


39. 262 Md. 682, 279 A.2d 484 (1971).
sumed the contractual liabilities of its predecessor.40 *Isle of Thye* arose out of a series of transactions involving contractual rights to a tract of land, whereby the plaintiff, Whisman, had contracted with a promoter for certain future options for ownership of the land.41

The promoter, Triska, and his subsequently formed corporation later transferred all of their assets, which included the tract of land, to Prestwick, Inc.42 Whisman’s contract rights were neither assumed nor disclaimed upon transfer nor were articles of transfer filed with the State Department of Assessments and Taxation.43 Additionally, Prestwick attempted to exercise certain options pursuant to the Whisman-Isle of Thye Land Company contract, and thereby ratified the contract.44 The court emphasized Triska’s role as the promoter for both Isle of Thye and Prestwick.45 Prestwick, the court reasoned, was therefore liable on the contract with Whisman as “substantially [the promoter’s] alter ego.”46 While the *Isle of Thye* court may not have explicitly enunciated the current jargon, its holding closely tracks the basis of the “mere continuation of the entity” exception employed by the courts in recent years.47

Nearly two decades after *Isle of Thye*, the Court of Special Appeals, in *Baltimore Luggage Co. v. Holtzman*,48 revisited the issue of successor liability. The *Baltimore Luggage* court refused to find a successor corporation liable for a former employee’s fringe benefits pursuant to its predecessor’s employment contract.49 The case arose out of a series of transactions whereby the predecessor corporation sold all of its assets and liabilities to a distinct Rhode Island corporation.50 The transferor, by contractual agreement, expressly indemnified its successor from any liability pursuant to the plaintiff’s employment contract.51 While the court recognized the holding of *Isle of Thye*, it distinguished

40. *Id.* at 707, 279 A.2d at 498.
41. *Id.* at 687-89, 279 A.2d at 487-89.
42. *Id.* at 706, 279 A.2d at 497.
43. *Id.* Although the court did not explicitly state it as grounds for its decision, there was no consideration paid for the transfer of assets; it amounted to a paper transaction. *Id.* at 693, 279 A.2d at 490-91.
44. *Id.* at 698, 279 A.2d at 493.
45. *Id.*
46. *Id.* at 707, 279 A.2d at 497-98.
49. *Id.* at 302, 562 A.2d at 1295.
50. *Id.* at 285, 562 A.2d at 1287.
51. *Id.*
the case under review, thereby limiting the scope in which the "mere continuation of the entity" exception applies. Specifically, unlike the situation in *Isle of Thye*, there was no promoter with whom the plaintiff had contracted. A finding of common ownership or management, thus, could not be supported. Also, there was a valid asset purchase agreement, made at "arm's length," under which the successor did not assume the contractual liability, as opposed to the situation in *Isle of Thye*, where only a "mere paper transaction" had been consummated. Finally, the plaintiff had notice of the asset transfers, whereas the plaintiff in *Baltimore Luggage* had not been prejudiced by the transfer of assets.

Additionally, the court pointed to the statutory law of Maryland, embracing the "mere continuation of the entity" exception, as a means of supporting its decision. The underlying policy of the legislative enactments, the court opined, is the protection of creditors when there is a transfer of assets. If a successor corporation were allowed to extinguish the outstanding liabilities of its predecessor while "maintain[ing] the same or similar management and ownership but wear[ing] a 'new hat,'" a fraud would necessarily result. The *Baltimore Luggage* court, however, disclaimed any strict reliance on the codified law of Maryland in recognizing the "mere continuation of the entity" exception by pointing to a number of "indicia" that may be considered in finding a successor corporation liable for its predecessor's debts. The court noted that the proper "indicia" necessary to

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52. *Id.* at 294, 562 A.2d at 1291.
53. *Id.*
54. *Id.* at 298, 562 A.2d at 1294.
55. *Id.* at 294, 562 A.2d at 1291-92.
56. *Id.* at 295, 562 A.2d at 1292.
57. *Id.* at 296, 562 A.2d at 1292.
58. The court noted, "While Maryland has not articulated the general rule of a successor corporation's liability, it is implicit in the Maryland statutes and case law." *Id.* at 290, 562 A.2d at 1290 (citing *Md. Code Ann.*, CORPS. & ASS'NS § 3-114(e)(1) (1985 & Supp. 1988) (detailing means by which a successor corporation may be held liable following mergers and consolidations); *Maryland Uniform Fraudulent Conveyance Act*, *Md. Code Ann.*, COM. LAW II §§ 15-201 to -214 (1983 & Supp. 1988) (providing rules governing asset transfers by insolvent debtors)). *But see Hanks*, supra note 29, § 9.10, at 324 ("[I]t is difficult to see why [the statutes] should be used as support for an additional judicially-crafted basis for liability.").
60. *Id.* (quoting *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985)).
61. *Id.*
finding a successor liable pursuant to the "mere continuation of the entity" exception are:

common officers, directors, and stockholders; and only one corporation in existence after the completion of the sale of assets. While the two foregoing factors are traditionally indications of a continuing corporation, neither is essential. Other factors such as continuation of the seller's business practices and policies and the sufficiency of consideration running to the seller corporation in light of the assets being sold may also be considered. To find that continuity exists merely because there was common management and ownership without considering other factors is to disregard the separate identities of the corporation without the necessary considerations that justify such an action. 62

More recently, the Court of Appeals, in Nissen Corp. v. Miller, 65 refused to extend the "continuity of the entity" exception to embrace the "continuity of the enterprise" exception 64 in the products liability context. 65 In so doing, the court resolved a split of authority between two federal district court decisions. 66

The plaintiff in Nissen was injured while using a treadmill manufactured and sold by the predecessor corporation. 67 The successor corporation, by an express provision in the cash purchase agreement for assets, had disclaimed liability for any personal injuries caused by


64. See supra note 29; see also 1 American Law of Products Liability 3d, supra note 28, § 7:20, at 36 ("The mere continuation exception focuses on the continuation of the corporate entity, while the continuity of enterprise exception emphasizes continuation of business operation or enterprise.").

65. For an extended treatment of the Nissen decision, see generally Jonathan P. Kagan & Christopher C. O'Hara, Note, The Successor Liability Rule in a Products Liability Setting, 51 Md. L. Rev. 581 (1992) (analyzing Nissen and arguing that the "continuity of the enterprise" exception to the rule of successor liability is inconsistent with Maryland products liability law); James W. Maxson, Case Comment, Nissen Corp. v. Miller: Maryland Courts Reject the "Continuity of the Enterprise" Doctrine, 54 Ohio St. L.J. 261 (1993) (contrasting the need to protect consumers from injurious products with the economic impact on business that the adoption of the "continuity of the enterprise" exception would likely cause).


67. Nissen, 323 Md. at 615-16, 594 A.2d at 565.
the predecessor’s products sold prior to the acquisition. A four-member majority of the Court of Appeals explicitly rejected the adoption of the “mere continuation of the enterprise” exception to the general rule against successor liability and restricted Maryland law to the four major exceptions to the rule.

Echoing the Baltimore Luggage court, the majority recognized that the general rule and its four exceptions are either explicitly codified in, or supported by, the policy rationale of the Maryland Corporations and Associations and Commercial Law Articles. The court stated that the “continuation of the enterprise” exception, however, was “inconsistent with Maryland law” based on a lack of causation “between the defendant’s acts and the plaintiff’s injury.” Furthermore, the court determined that holding the defendant liable on the rationale that it is continuing to operate the business, and is thus a “deep pocket,” is “patently unfair.” The plaintiff’s claim, then, was barred as there had been no evidence that there was a continuation of the ownership and management of the predecessor corporation.

3. The Court’s Reasoning.—The principal issue in Academy of IRM was whether a creditor corporation could recover from a “successor” corporation, which had acquired the debtor’s assets through foreclosure of bona fide security interests, on a theory predicated on the “continuity of the entity” exception to the rule against successor liability. Judge Rodowsky, writing for a unanimous bench, rejected the

68. Id. at 615, 594 A.2d at 565.
69. Id. at 632, 594 A.2d at 573.
70. Id. at 617-18, 594 A.2d at 566; see supra note 58 and accompanying text (discussing the court’s reliance on Maryland statutory law in support of its recognition of the “continuation of the entity” exception in Baltimore Luggage).
71. Nissen, 323 Md. at 633, 594 A.2d at 574.
72. Id. at 627, 594 A.2d at 570 (quoting Polius v. Clark Equip. Co., 802 F.2d 75, 81-82 (3d Cir. 1986)). Furthermore, the court characterized as “nebulous” the rationale employed by the Michigan Supreme Court in Turner v. Bituminous Casualty Co., 244 N.W.2d 873 (Mich. 1976), and as not sufficiently dissimilar from other creditor actions to warrant a deviation from stated policy. Nissen, 323 Md. at 629, 594 A.2d at 572.
73. Nissen, 323 Md. at 624, 594 A.2d at 569. The “deep pocket rationale” would subject large and small corporations alike to potentially debilitating liability. Id. at 625, 594 A.2d at 570.
74. Id. at 633, 594 A.2d at 574.
75. Academy of IRM, 544 Md. at 437, 687 A.2d at 671.

The court, however, first addressed LVI’s renewed motion to dismiss, which was predicated on the theory of improper service of process on its predecessor, Diversified. Id. Like the Court of Special Appeals, the court found LVI’s contention, albeit on a different rationale, of no moment. Id. at 450, 687 A.2d at 677. The court noted that it was deciding this issue anew for “broader public importance” without intimating an opinion on the
circuit court's application of Maryland law to the evidence adduced at trial. 76

The court began its analysis by distinguishing successor liability predicated on "continuity of the entity" from that based on "continuity of enterprise." 77 Relying on its previous rejection of the "continuity of the enterprise" exception in Nissen, 78 the court noted that this exception focuses on "whether there is substantial continuity of pretransaction and posttransaction business activities resulting from the use of the acquired assets." 79 Conversely, the "gravamen of the traditional 'mere continuation' [of the entity] exception is the continuation of the corporate entity . . . ." 80 That is, mere continuation of the entity occurs "where there is a continuation of directors and management, shareholder interest and, in some cases, inadequate consideration." 81

The circuit court, by relying on the corporation's carrying on the same type of business and use of Diversified's office location and employees, had focused its inquiry on the wrong facts when it held LVI liable for Diversified's prior debts. 82 The Court of Appeals found that, in so doing, the trial court neglected to determine whether there had been a continuation of the entity. 83 There was no evidence of common ownership between the predecessor and successor corporations. 84 In effect, the circuit court had employed the "mere
continuation of the enterprise" exception, although the doctrine had been rejected in Maryland.85

The Court of Appeals, however, found that three of LVI’s practices merited special attention.86 Specifically, the court focused on LVI’s use of Diversified’s trade name after taking over Diversified’s business operations, its Maryland license for asbestos removal, and its business dealings relating to a contract originated by Diversified with the Army Corps of Engineers for work at Fort Belvoir.87 Again relying on Nissen, the court agreed with LVI in finding that use of the trade name, an intangible asset akin to goodwill, did not give rise to successor liability.88 The court also discounted the other factual circumstances on which the trial court relied as based on "sketchy evidence . . . legally insufficient to support imposition of the continuation of entity theory."89

The court readily disposed of the case law on which IRM relied as well. Of principal import in its analysis was H.J. Baker & Bro., Inc. v. Orgonics, Inc.,90 a case in which the Supreme Court of Rhode Island employed a five-factor test in imposing successor liability pursuant to a modified continuing business entity theory.91 The Court of Appeals, however, resisted any endorsement of the framework utilized in H.J. Baker and simply noted that none of Diversified’s officers had been “instrumental” in the transfer to LVI, nor had there been inadequate consideration for the transferred assets.92 Moreover, the trial court had not found any evidence of fraud to Diversified’s unsecured credi-

85. Nissen, 323 Md. at 633, 594 A.2d at 574.
86. Academy of IRM, 344 Md. at 452, 687 A.2d at 678.
87. Id. at 452-53, 687 A.2d at 678.
88. Id. at 452, 687 A.2d at 678.
89. Id. at 453, 687 A.2d at 678. Specifically, a witness for IRM testified at trial that because there had never been a novation of the Fort Belvoir contract, which would have substituted DEC for Diversified, the checks issued to DEC remained the property of Diversified. Id.
91. Academy of IRM, 344 Md. at 456-57, 687 A.2d at 680. The factors listed by the Rhode Island court were:

“(1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; and (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law.”
92. Id. at 454, 687 A.2d at 679. The court stated, “[N]o former shareholder in [Diversified] holds any ownership of DEC, LVI . . . , or NICO. No shareholder of [Diversified] is a director of DEC or its parent companies. The only transfusion from old to new was at the level of employees.” Id. at 454, 687 A.2d at 679.
tors by LVI's acquisition of the assets. Given these factual circumstances, the court noted, "successor entity liability does not lie." In summary, the court stated that "[t]he decision of the trial court was based either on a rule of law that is not part of Maryland law or on facts that are insufficient to support continuing entity liability." In other words, the Court of Appeals took the position that the circuit court had either applied the previously rejected "continuity of the enterprise" exception, or had misinterpreted the "continuity of the entity" exception in analyzing the facts of the case.

4. Analysis.—The Court of Appeals employed a narrow construction of the "mere continuation of the entity" exception to the general rule against successor liability in asset acquisitions whereby either inadequate consideration or continuity of ownership and management is necessary to impose liability on a successor corporation for the outstanding contractual obligations of its predecessor. Despite the necessarily fact-bound nature of the inquiry, the court's decision, nevertheless, has girded the incomplete analytical framework previously announced in Baltimore Luggage and Nissen. The certainty thus achieved brings welcome relief to what has been described as the "dreadfully tangled" law of successor liability.

a. Inadequate Precedent.—The circuit court and the Court of Special Appeals both found that IRM had a viable claim against LVI based on a "mere continuation of the entity" theory. Both of these decisions are understandable given that the courts relied on the inexact guidelines set forth in Baltimore Luggage and Nissen. The Baltimore Luggage court's treatment of the "mere continuation" exception left open the question of what factors were essential for imposition of successor liability. Rather than establishing a clear

93. Id. In fact, IRM never argued that the consideration paid by NICO to Diversified's creditors for its secured interests was "not fair." Id.
94. Id.
95. Id. at 457, 687 A.2d at 680.
96. See id.
97. EEOC v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988); see also Yamin, supra note 31, at 226 (finding that the "mere continuation" exception has been "problematic ... because it has never been quite clear just in what sense a corporation must continue in order to trigger the exception").
98. See supra notes 17, 25 and accompanying text. While the Court of Special Appeals reversed the circuit court, its holding was based strictly on the rationale that IRM pursued the wrong procedural course. See supra notes 20-25 and accompanying text.
99. See supra text accompanying notes 61-62 (setting forth the "factors" on which the Baltimore Luggage court relied to determine whether the "continuity of the entity" exception should apply).
and straightforward application to the facts of a given case, the decision is apt to several interpretations. The *Baltimore Luggage* court was not explicit as to whether the continuation of a corporation's management, ownership, or both, were necessary to a finding of liability. Rather, the court chose to adopt a catalog of factors as the proper test, with none particularly identified as the tell-tale markings of the exception. The scope of the inquiry was couched in terms of finding whether a successor corporation is "substantially the same as the predecessor" and has the "same or similar management."

This language could conceivably be read to suggest that one or two common managers, retained by a successor corporation engaged in the same industry as the predecessor and holding minimal stock interests, would be sufficient to impose liability. This test could also imply that a successor that is a close corporation like its predecessor is "substantially the same" or "similar" in terms of corporate structure, thus supporting, without more, a basis for liability. Obviously, these results seem absurd in the abstract as they are devoid of connection to the underlying policy goals of the exception. Nevertheless, the language employed in *Baltimore Luggage* lends more than a modicum of support to varying interpretations.

Despite the *Baltimore Luggage* court's cognizance of the underlying policy of the exception, the pronounced framework does not establish a clear link with the policy's goal of preventing creditor fraud in asset acquisitions. The retained management in the above hypothetical would most likely reflect a concern with continued employment, as opposed to a scheme of "transactional sleight-of-hand." This sort of ambiguous guide was bound to fail given the widely varying factual scenarios that may arise from the equally diverse mechanisms by which corporate assets may be acquired.

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100. See *supra* note 62 and accompanying text.


102. *Id*.

103. See *supra* note 36 and accompanying text.

104. *Baltimore Luggage*, 80 Md. App. at 297, 562 A.2d at 1293 ("The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors.").


106. Of course, this is not meant to suggest that *Baltimore Luggage* was incorrectly decided. Quite the contrary is true. By confining its analysis to the facts in the case at bar, however, the *Baltimore Luggage* court necessarily set the stage for insufficient claims based on the "mere continuation" theory.
The *Nissen* decision reflects a modest progression towards a more definable rule of law from its forerunner, but nevertheless falls short of a reliable basis for consistent decisionmaking. The *Nissen* court endorsed the *Baltimore Luggage* framework without modification.\(^{107}\) The court, however, added needed elaboration to the proper scope of the inquiry. The court established that the “mere continuation” exception focuses on whether there has been a “continuation of ownership and management” as opposed to the continuing business operations of the successor.\(^{108}\) The court thus refined the analytical framework established in *Baltimore Luggage*, but did not shed light on the issue of adequate consideration for the acquired assets.

b. The Gaps Filled.—Fortunately, the *Academy of IRM* court took the initiative to remedy the deficiencies present in Maryland’s earlier interpretations of the “mere continuation” exception.\(^{109}\) The court developed the alternative elements of the inquiry necessary to a finding of successor liability—continuity of ownership and management, and inadequate consideration.\(^{110}\) In order for successor liability to lie, a court must find that at least one of these two alternative elements has been satisfied.\(^{111}\) This exception is now readily applicable to a variety of situations and reflective of the underlying policy rationale.

At the outset, the court reasserted the proper focus of the “mere continuation” exception inquiry as determining whether there has been a “continuation of the corporate entity rather than a continuation of the business operation.”\(^{112}\) A successor corporation’s pursuit of the same line of business—even its use of its predecessor’s plant, equipment, and employees—is thus immaterial to the analysis.\(^{113}\) This result supports a primary reason for the corporate form—the free transferability of assets.\(^{114}\) Furthermore, such an approach facilitates

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108. *Id.* at 620, 594 A.2d at 567.
109. The Court of Appeals side-stepped the Court of Special Appeals’s finding that IRM could not transform the garnishment proceeding into a direct cause of action against LVI, and “assum[ed] . . . arguendo, that successor liability ha[d] been properly raised . . . .” *Academy of IRM*, 344 Md. at 451 n.9, 687 A.2d at 677 n.9; see also *supra* notes 24-26 and accompanying text (discussing the Court of Special Appeals’s holding that IRM could not transform the garnishment proceeding into a direct cause of action).
110. *See Academy of IRM*, 344 Md. at 451-54, 687 A.2d at 677-79 (analyzing alternatively the continuity of ownership and management, and the adequacy of consideration).
111. *Id.* at 457, 687 A.2d at 680.
112. *Id.* at 452, 687 A.2d at 678 (quoting *Nissen*, 323 Md. at 620, 594 A.2d at 567).
113. *See id.* (distinguishing business operations from business activities).
114. *See supra* note 31 and accompanying text.
the opportunity for successor corporations to preserve the assets of the predecessors as viable business units, thereby encouraging the prospects for positive economic growth.\textsuperscript{115}

The most notable improvement over Maryland's previous treatment of the exception was the court's approach to the inadequacy of consideration factor. The \textit{Baltimore Luggage} court restricted its discussion to an abbreviated comment directed to the specific facts of the case.\textsuperscript{116} Inadequate consideration was not addressed in \textit{Nissen}. In \textit{Academy of IRM}, however, the court compared three cases from other jurisdictions.\textsuperscript{117} Two of the cases that found consideration adequate involved assignments for the benefit of creditors in lieu of foreclosure\textsuperscript{118} and a straight foreclosure.\textsuperscript{119} On the other hand, the court found consideration lacking in a case involving a purchase of the predecessor's stock for fifty dollars.\textsuperscript{120}

The profile that emerges suggests that consideration must reflect the real value of the acquired assets as opposed to some groundless valuation. This strand of the framework applied in the "mere continuation" exception analysis adds a critical basis for imposing liability. In terms of protecting creditors, the result is readily evident. A successor corporation must not only be divorced from its predecessor from the perspective of ownership and management, but mere paper transactions bent on prying assets from unsecured creditors will not suffice as an end run around the exception. From the standpoint of judicial decisionmaking, Maryland now has a precedential basis for employing a clear and meaningful analysis—a prescription for decreased litigation and increased certainty in the law.

5. \textit{Conclusion}.—In \textit{Academy of IRM}, the Court of Appeals held that a successor corporation cannot be held liable for the outstanding, unsecured debts of its predecessor pursuant to the "mere continua-


\textsuperscript{116} Baltimore Luggage Co. v. Holtzman, 80 Md. App. 282, 299, 562 A.2d 1286, 1294 (1989) ("[T]here was sufficient consideration running to the seller from the purchasing corporation.").


\textsuperscript{118} See \textit{Donahue}, 413 N.E.2d at 32.

\textsuperscript{119} See \textit{Uni-Com}, 737 P.2d at 308-09.

\textsuperscript{120} See \textit{H.J. Baker}, 554 A.2d at 200.
tion of the entity" exception without a showing that there is a continuation of ownership and management or, alternatively, that there has been inadequate consideration paid for the assets.121 This analytical framework marks a significant improvement of Maryland's previous treatment of the law of successor liability. While it cannot be said that a successor corporation's risk of being beset by an errant claim of liability pursuant to this exception has been eradicated, such a prospect, at least, should be met by a prompt judicial rebuff.

MICHAEL F. DOW

121. Academy of IRM, 344 Md. at 457, 687 A.2d at 680.
II. CONSTITUTIONAL LAW

A. Rejecting the Closing Out of the Central Hudson Commercial Speech Test

In Jakanna Woodworks, Inc. v. Montgomery County, the Court of Appeals unanimously struck down a Montgomery County ordinance requiring merchants to obtain a license before advertising "closing-out sales." The court held the ordinance invalid both as an overly broad regulation of commercial speech and as an unconstitutional prior restraint on speech. The outcome of Jakanna is in accord with the United States Supreme Court's commercial speech jurisprudence, but the Court of Appeals's rationale had a noticeable gap. The court's straightforward use of the Central Hudson test could weaken Jakanna's precedential value if the Supreme Court decides to adopt a stricter standard, as the Court's most recent commercial speech case indicates it soon may do. However, the Court of Appeals ultimately strengthened commercial speech protection through its novel application of prior restraint analysis to a commercial speech case.

1. The Case.—Jakanna Woodworks (the Store) is a small, family-owned furniture business that has been operating in Rockville, Maryland for the last fifteen years. In April 1995, the owners, Morton Jacobs and Anna Wheeler, started looking for a larger space in which to display furniture and to store their inventory. They found a prime location across the street from their Rockville store and signed the lease to the new space in May 1995.

Before moving, Jacobs wanted to sell the entire inventory and to order all new furniture, in an effort to save on moving costs and minimize damage to the merchandise. To attract potential customers to

1. 344 Md. 584, 689 A.2d 65 (1997).
2. MONTGOMERY COUNTY, MD., CODE § 30-10 (1994).
3. Jakanna, 344 Md. at 590, 689 A.2d at 67 (internal quotation marks omitted).
4. Id.
5. See infra notes 68-85 and accompanying text for a full discussion of the test, which was first enunciated by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).
6. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); see also infra notes 117-141 and accompanying text.
7. Jakanna, 344 Md. at 590-91, 689 A.2d at 68.
8. Because this case concerns the impact of particular words, it seems fitting to note that the name of the store, "Jakanna," was most likely created from the names of its proprietors, "Jacobs" (Jak-) and "Anna" (anna).
9. Jakanna, 344 Md. at 591, 689 A.2d at 68.
10. Id.
11. Id.
the sale, Jacobs placed an advertisement in the May 17, 1995 issue of the *Montgomery Gazette*, which read in part:

**PUBLIC NOTICE**

**FURNITURE LIQUIDATION**

One of the metro area's largest wood furniture specialty stores is selling off their [sic] entire store and warehouse inventory.

Every Floor Sample and Every Item In Stock Must Be Sold!

SELLING OUT TO THE BARE WALLS

NOTHING HELD BACK!

All of the information in the advertisement was true, including the Store's address, its hours of operation, and the prices of some items that would be on sale. However, Jacobs did not realize that by including the word "liquidation," he violated section 30-10 of the Montgomery County Code (the ordinance).

In Montgomery County, a merchant may not advertise a "closing-out sale" until it has first obtained a license from the Director of the Office of Consumer Affairs (the Director). The merchant is required to file an application under oath and pay an application fee at least fourteen days before the opening date of the sale. The application must include specific information about the sale, so that the Director may determine whether to grant the license.

Upon receiving the applicant's information, the Director "may issue" a license if she is "satisfied . . . that the proposed sale is consistent

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12. *Id.*

13. *Id.* (emphasis added) (second alteration in original). A copy of the actual advertisement that appeared in the *Montgomery Gazette* can be found in Brief of Appellant at app. 4, Jakanna Woodworks, Inc. v. Montgomery County, 344 Md. 584, 689 A.2d 65 (1997) (No. 18).

14. *Jakanna*, 344 Md. at 591, 689 A.2d at 68.

15. *Id.* Other words that trigger the ordinance include the following: "going out of business," "discontinuance of business," "selling out," and "lost our lease." *Id.* (quoting MONTGOMERY COUNTY, MD., CODE § 30-10(a)(2) (1994)). The Store's advertisement also included the trigger words "selling out." *Id.*

16. A "closing-out sale" is defined under section 30-10 as any sale in connection with which the person conducting the sale represents that the sale is being conducted, or must be conducted, for reasons of

(A) economic or business distress,

(B) inability to continue business at the same location, or

(C) the age or health of an owner of the business.

MONTGOMERY COUNTY, MD., CODE § 30-10(a)(1).

17. *Id.* § 30-10(b)(1).

18. *Id.* § 30-10(b)(2).

19. *Id.* The merchant must submit the following information with the application:

[A]ll relevant facts relating to the sale, including:
with the proposed advertising.\textsuperscript{20} The Director could, at her discretion, investigate the applicant’s premises before deciding whether to grant a license.\textsuperscript{21} According to the Director’s testimony, an inspection "could take a couple of days."\textsuperscript{22} The ordinance does not explicitly limit the time within which the Director must announce her decision regarding the license.\textsuperscript{23}

Because Jacobs did not know about the ordinance, he did not apply for a license before advertising his sale.\textsuperscript{24} Under the Montgomery County Code, a merchant can be fined $500 for each day its advertisement violates section 30-10.\textsuperscript{25} Jacobs received a citation, which required that he either stand trial or pay the fine.\textsuperscript{26} Refusing to pay the fine, the Store opted to stand trial in October 1995 in the District Court of Maryland.\textsuperscript{27} The district court judge found the Store in violation of the ordinance and imposed a $100 fine.\textsuperscript{28}

The Store appealed to the Circuit Court for Montgomery County, and a trial de novo was held before Judge Pincus in January 1996.\textsuperscript{29} The Store argued that the ordinance violated the First and Fourteenth Amendments to the United States Constitution\textsuperscript{30} and Article 40 of the

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\item the first and last dates of the proposed sale;
\item the date when the owner of the business intends to stop the operations of the business at the location or locations listed in the application;
\item a complete inventory of the merchandise to be sold;
\item a list of all persons with an ownership interest in the business if the business does not have publicly-traded shares;
\item the text of all advertising that will be placed in print or electronic media in connection with the proposed sale; and
\item all details necessary to locate exactly and identify the merchandise to be sold.
\end{enumerate}

\textit{Id.}

\textsuperscript{20} \textit{Id.} § 30-10(b)(3).

\textsuperscript{21} \textit{Jakanna}, 344 Md. at 593, 689 A.2d at 69.

\textsuperscript{22} \textit{Id.} (internal quotation marks omitted).

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} MONTGOMERY COUNTY, MD., CODE §§ 1-19, 30-10(d).

\textsuperscript{26} \textit{Jakanna}, 344 Md. at 593, 689 A.2d at 69. The citation read that "the word [liquidation] can only be used in connection with a closing out sale, which requires a License. [Jakanna Woodworks] did not have a License." \textit{Id.} (alterations in original).

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.}

Maryland Declaration of Rights\textsuperscript{31} because it was (1) an overly broad regulation of commercial speech, and (2) an invalid prior restraint.\textsuperscript{32} The Store urged the circuit court to apply a four-part intermediate scrutiny test,\textsuperscript{33} articulated by the United States Supreme Court in \textit{Central Hudson Gas & Electric Corp. v. Public Service Commission},\textsuperscript{34} to resolve the overbreadth issue.\textsuperscript{35} The Store also requested that the circuit court determine whether the statute offered sufficient procedural safeguards to constitute a valid prior restraint.\textsuperscript{36}

The County's sole contention was that the ordinance was presumptively valid because it had a "clear, rational purpose to protect consumers" from deceptive advertising.\textsuperscript{37} However, the Director confirmed that the Store was fined only because the word "liquidation" was included in the advertisement, not because she suspected that the advertisement was false or misleading.\textsuperscript{38}

Judge Pincus held that the ordinance did not violate the First Amendment and that it was a "legitimate exercise of government power" which served "a legitimate governmental interest."\textsuperscript{39} Concluding that section 30-10 was neither unreasonable nor in violation of either the United States Constitution or the Maryland Declaration of Rights, Judge Pincus fined the store $100.\textsuperscript{40} Because the Montgomery County Circuit Court had already provided appellate review of the District Court's decision, the Court of Special Appeals could not re-

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\textsuperscript{31} The full text of Article 40 reads:
That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.
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\textsuperscript{32} \textit{Jakanna}, 344 Md. at 593, 689 A.2d at 69.
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\textsuperscript{33} Id.
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\textsuperscript{34} 447 U.S. 557, 566 (1980).
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\textsuperscript{35} \textit{Jakanna}, 344 Md. at 593, 689 A.2d at 69.
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\textsuperscript{36} Id. at 594, 689 A.2d at 69.
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\textsuperscript{37} Id. (internal quotation marks omitted).
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\textsuperscript{38} Id.
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\textsuperscript{39} Id. (internal quotation marks omitted). Although Judge Pincus neither explicitly named the test he applied nor explained its origin, the Court of Appeals labeled it a "rational basis test." \textit{Id.} at 606-07, 689 A.2d at 75.
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\textsuperscript{40} Id. at 594, 689 A.2d at 69.
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view the circuit court's judgment. The Court of Appeals granted the Store's petition for writ of certiorari in April 1996.

2. Legal Background.

a. Virginia Pharmacy: Creation of the Commercial Speech Doctrine.—In 1976, in the landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, the Supreme Court first announced that commercial speech—i.e., advertising—was entitled to constitutional protection. Prior to Virginia Pharmacy, the Court had considered purely commercial speech unworthy of First Amendment protection, and thus subject to governmental regulation just like any other business activity. The forced dichotomy between commercial and noncommercial speech raised doubts from its very inception, as the Court discovered that political and economic freedoms were often intertwined. Immediately before Virginia Pharmacy, the Court had hinted at the coming revolution in its attitude toward commercial speech, noting that commercial speech was a valuable way of dissemi-


42. *Jakanna*, 344 Md. at 594, 689 A.2d at 69.

43. As Jakanna was a constitutional case of first impression before the Court of Appeals, the legal background of the case will be restricted to commercial speech cases decided by the U.S. Supreme Court.

44. 425 U.S. 748 (1976) (striking down a Virginia statute outlawing the advertising by pharmacists of prescription drugs).

45. For an elucidating history of the roots of the Court's commercial speech doctrine, see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech, 71 Tex. L. Rev. 747* (1993) [hereinafter Kozinski & Banner, *Anti-History*] (tracing the history of the Supreme Court's commercial speech jurisprudence from colonial times to the present). According to Kozinski and Banner, the term "commercial speech" was first coined in 1971 by Judge Skelly Wright, a member of the District of Columbia Circuit Court of Appeals. *Id.* at 756. Commercial speech has been called the "stepchild" of the First Amendment because it has received less constitutional protection than its "sibling," noncommercial speech. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627*, 652 (1990) [hereinafter Kozinski & Banner, *Who's Afraid?*] (criticizing the Court's differential treatment of commercial and noncommercial speech).


47. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding the conviction of a businessman who distributed handbills advertising submarine rides on one side and relaying a political message on the other). In Chrestensen, the Court easily disposed of the commercial speech question by deferring to legislative wisdom: "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." *Id.* at 54.

nating information to the public.\textsuperscript{49} Finally, in \textit{Virginia Pharmacy}, First Amendment protection was extended explicitly to commercial speech.\textsuperscript{50}

In \textit{Virginia Pharmacy}, a state statute prohibited pharmacists from advertising prescription drugs because such expression was considered "unprofessional conduct."\textsuperscript{51} The Court struck down the ban as violative of the First Amendment, despite the purely commercial nature of the speech.\textsuperscript{52} The majority reasoned that society has a strong interest in "the free flow of commercial information," as consumers constantly make decisions about which products to buy and services to seek.\textsuperscript{53} The Court questioned both the State's interest in maintaining "a high degree of professionalism on the part of licensed pharmacists"\textsuperscript{54} and the State's contention that such advertising could lead to aggressive price wars, ultimately resulting in poor service.\textsuperscript{55} The Court interpreted this state interest as a paternalistic attempt to protect the public by holding consumers in ignorance.\textsuperscript{56} In rejecting this form of governmental suppression of commercial speech, the Court emphasized the consumer's First Amendment right to receive information, as well as the merchant's right to distribute it.\textsuperscript{57}

The \textit{Virginia Pharmacy} Court's decision to protect commercial speech was not without caveats. The Court intimated that the protection of commercial speech would probably be less extensive than that of political speech.\textsuperscript{58} Because of the economic implications of com-

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\item \textsuperscript{49} See Bigelow v. Virginia, 421 U.S. 809, 821-22 (1975) (stating that even though the advertisement of abortion services was commercial in nature, the State's interest in prohibiting such speech must be weighed against the value of disseminating information to the public).
\item \textsuperscript{50} \textit{Virginia Pharmacy}, 425 U.S. at 770.
\item \textsuperscript{51} \textit{Id.} at 749-50.
\item \textsuperscript{52} \textit{Id.} at 762.
\item \textsuperscript{53} \textit{Id.} at 764.
\item \textsuperscript{54} \textit{Id.} at 766.
\item \textsuperscript{55} \textit{Id.} at 767-68.
\item \textsuperscript{56} \textit{Id.} at 769.
\item \textsuperscript{57} \textit{Id.} at 756. The Court presented the commercial speech issue as "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients" and concluded that "the answer... is in the negative." \textit{Id.} at 773.
\item \textsuperscript{58} \textit{Id.} at 771-72 n.24. Speaking for the Court, Justice Blackmun stated: Even if the differences [between commercial and noncommercial speech] do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech... may be more easily verifiable by its disseminator than... news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information
\end{itemize}
mercial speech, the broader regulation of the “time, place and manner” of such speech might be tolerated if properly justified by the government. Finally, the Court noted that the heavy presumption against prior restraints applicable to noncommercial speech might not apply to commercial speech cases.

Justice Rehnquist’s dissent in Virginia Pharmacy warned against elevating commercial speech to the same level as that of “protected speech.” He argued that the First Amendment was designed to protect the discussion of “political, social and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo.” Justice Rehnquist further noted Virginia’s interest in combating drug abuse, which might be thwarted by the unregulated advertising of prescription drugs.

The Court struck down another ban on commercial speech that it found to be paternalistic the following year in Linmark Associates, Inc. v. Township of Willingboro. Buoyed by Virginia Pharmacy, the Court unanimously held that a racially integrated town’s prohibition of “For Sale” and “Sold” signs on real estate in efforts to stem “white flight” violated the First Amendment. As in Virginia Pharmacy, the Court held that any ordinance seeking to keep the public in ignorance for purposes of manipulating its conduct violates the First Amendment.

about a specific product or service that he himself provides and presumably knows more about than anyone else.

Id.

59. Id. at 770-71.

60. Id. at 772 n.24. The Court announced its new protection of commercial speech with the following caveat:

[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

Id.; cf. Kozinski & Banner, Anti-History, supra note 45, at 754-56 (noting that Virginia Pharmacy possibly did as much harm as good to commercial speech by emphasizing the distinctions between commercial and noncommercial speech).

61. Virginia Pharmacy, 425 U.S. at 781, 787 (Rehnquist, J., dissenting) (arguing that commercial speech is not as valuable as “protected speech,” or speech concerning political or social issues).

62. Id.

63. Id. at 788-89. Justice Rehnquist provided examples of advertisements that might encourage illicit drug use: “Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief.” “Can’t shake the flu? Get a prescription for Tetracycline from your doctor today.” Id. at 788.

64. 431 U.S. 85 (1977).

65. Id. at 95-97.

66. Id. at 97.
The Court rejected the Township’s claim that information about sales might cause residents to act “irrationally,” reasoning that if the ordinance were allowed to stand, then “every locality in the country [could] suppress any facts that reflect poorly on the locality.”67

b. Central Hudson: Developing the Commercial Speech Doctrine.—Despite the Supreme Court’s show of enthusiasm for striking down what it deemed to be paternalistic bans in Virginia Pharmacy and Linmark, the Court retreated from championing commercial speech a few years later when it formulated an intermediate scrutiny test in Central Hudson Gas & Electric Corp. v. Public Service Commission.68 Rather than analyzing commercial speech as the public’s right to receive information, as it did in Virginia Pharmacy and Linmark, the Court backed away from such strong protection, indicating that there were limits to commercial speech protection.69 The Court set out four parts to its new commercial speech analysis: (1) the speech must concern lawful activity and not be misleading; (2) the government must assert a substantial interest in regulating the speech; (3) the regulation must directly advance that government interest; and (4) the regulation must be no more extensive than necessary to achieve its goal.70

In Central Hudson, the Court struck down a governmental ban on promotional advertising by electric utilities.71 The Court rejected the State’s contention that advertising by a monopoly is valueless, arguing that utilities compete with suppliers of alternative energy sources.72 When the Court applied its new four-part test to Central Hudson’s facts, it found: that the regulation prohibited truthful speech;73 that the State demonstrated substantial interests in conserving energy and maintaining a fair and efficient rate structure;74 and that the State established a direct link between the ban and energy conservation, but not with maintaining equitable rates.75 The Court held, however, that the ban failed the fourth prong because there was a less restrictive alternative available.76

67. Id. at 96.
68. 447 U.S. 557 (1980).
69. Id. at 562-63.
70. Id. at 566.
71. Id. at 571.
72. Id. at 566-68.
73. Id. at 566.
74. Id. at 568-69.
75. Id. at 569.
76. Id. at 570-71. The Court suggested less restrictive means to further the State’s interest, such as limiting the format and content of the advertising or requiring that the adver-
In their concurring opinions, Justices Blackmun and Stevens predicted problems that the Central Hudson test would cause in future commercial speech cases. Justice Blackmun accepted the intermediate scrutiny test for evaluating potentially misleading commercial speech, but believed that the test provided inadequate protection against the government regulation of "truthful, nonmisleading, noncoercive commercial speech." Therefore, rather than endorsing the balancing test announced in Central Hudson, Justice Blackmun preferred the broader rationale of forbidding the government from keeping the public uninformed.

Justice Stevens agreed to strike down the ban, but was uncertain whether Central Hudson should be defined as a "commercial speech" case at all. He chose not to discuss whether the new test gave adequate protection to properly defined commercial speech. Both Justice Blackmun's and Justice Stevens's concurrences provided bases for future opinions in the Court's evolving commercial speech doctrine.

The lone dissenter in Central Hudson, Justice Rehnquist, argued that the new test did not give the government sufficient power to regulate potentially harmful commercial speech. He rejected the notion that commercial speech was worthy of protection similar to political speech. Justice Rehnquist argued that the legislature was entitled to greater deference, especially regarding economic regulations.

tishments include information about the relative efficiency and expense of the offered service under present and future conditions. Id.

77. Id. at 573-79 (Blackmun, J., concurring); id. at 579-83 (Stevens, J., concurring).
78. Id. at 573 (Blackmun, J., concurring). Justice Blackmun considered such regulation a "covert attempt by the State to manipulate the choices of its citizens . . . by depriving the public of the information needed to make a free choice." Id. at 574-75.
79. Id. at 576-79.
80. Id. at 579-83 (Stevens, J., concurring). Justice Stevens warned that "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." Id. at 579 (footnote omitted).
81. Id. at 583.
82. Justice Stevens later penned the principal opinion in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (plurality opinion), which heralded the reworking, if not the possible demise, of the Central Hudson test. Justice Blackmun's desire to do away with the test altogether was echoed by Justice Thomas in his bold 44 Liquormart concurrence.
83. Central Hudson, 447 U.S. at 584 (Rehnquist, J., dissenting).
84. Id. at 584-85.
85. Id. Justice Rehnquist lamented that
[1]he Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court . . . returns to the bygone era of Lochner v. New York in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.
Since the establishment of the *Central Hudson* test, the Court's application of the test has met with mixed success; commentators have concluded that the test is difficult to apply and that the Court simply manipulates the test to fit desirable outcomes.\(^8\) For example, using the *Central Hudson* test, the Court allowed Puerto Rico to outlaw advertisements for legally regulated gambling casinos,\(^8\) and it permitted the Florida Bar to prevent lawyers from contacting accident victims for thirty days after the accident.\(^8\) Yet, the Court recently struck down a state law banning the display of alcohol content on beer cans.\(^8\)

Chief Justice Rehnquist moved from the dissent in *Virginia Pharmacy* and *Central Hudson* to write the majority opinion in *Posadas de Puerto Rico Associates v. Tourism Co.*\(^9\) In *Posadas*, the Court used the *Central Hudson* test to uphold a ban on advertising of casino gambling aimed at Puerto Rican residents.\(^9\) Chief Justice Rehnquist's analysis deferred to the Puerto Rico legislature, arguing in dictum that when the government could completely ban a certain activity, then it could also ban or tightly regulate the advertising of that activity.\(^9\) As Justice Brennan's dissent indicated, the Court was "dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to eviscerate constitutionally protected expression."\(^9\) The Court in

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\(^8\) *See generally Edward J. Eberle, Practical Reason: The Commercial Speech Paradigm, 42 Case W. Res. L. Rev. 411 (1992) (recognizing the inconsistencies of the *Central Hudson* test and offering a new approach to evaluating commercial speech regulations); Joel M. Gora, The First Amendment in the Supreme Court: The Future Lies Ahead, 13 Touro L. Rev. 353 (1997) (discussing the impact of *44 Liquormart, Inc. v. Rhode Island* on the Court's view of the First Amendment); Kozinski & Banner, Who's Afraid?, supra note 45 (criticizing the Court's continued distinction between commercial and noncommercial speech); Sean P. Costello, Comment, Strange Brew: The State of Commercial Speech Jurisprudence Before and After *44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. L. Rev. 681 (1997) (providing a survey of the principal cases that constitute the Court's commercial speech doctrine).*

\(^9\) *Id. at 589 (citation omitted).*

Despite his discomfort with the test, Justice Rehnquist later used the *Central Hudson* analysis to uphold a governmental regulation against gambling advertisements. *See Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986).

\(^8\) *See generally Edward J. Eberle, Practical Reason: The Commercial Speech Paradigm, 42 Case W. Res. L. Rev. 411 (1992) (recognizing the inconsistencies of the *Central Hudson* test and offering a new approach to evaluating commercial speech regulations); Joel M. Gora, The First Amendment in the Supreme Court: The Future Lies Ahead, 13 Touro L. Rev. 353 (1997) (discussing the impact of *44 Liquormart, Inc. v. Rhode Island* on the Court's view of the First Amendment); Kozinski & Banner, Who's Afraid?, supra note 45 (criticizing the Court's continued distinction between commercial and noncommercial speech); Sean P. Costello, Comment, Strange Brew: The State of Commercial Speech Jurisprudence Before and After *44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. L. Rev. 681 (1997) (providing a survey of the principal cases that constitute the Court's commercial speech doctrine).*

\(^8\) *Posadas*, 478 U.S. at 340-47.


\(^9\) *Id. at 340-44.*

\(^9\) *Id. at 345-46.* Justice Rehnquist indicated that "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *Id. at 346.* This "greater-includes-the-lesser" theory was later discredited by the Court in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). *See infra text accompanying notes 129-130.*

\(^9\) *Posadas*, 478 U.S. at 358-59 (Brennan, J., dissenting).
Posadas strayed far from its favorable position on the protection of commercial speech in Virginia Pharmacy.

Three years later, in Board of Trustees of the State University of New York v. Fox, the Court appeared to transform the Central Hudson test from an “intermediate scrutiny” test into something approaching a “rational basis” test. Justice Scalia’s opinion for the Court weakened the fourth prong’s requirement that the government regulation be as narrow as possible, thus granting more deference to the government. Justice Scalia supported a “narrowly-tailored” fit between the state’s interest and its regulation, but warned against interpreting too strictly the word “necessary” in Central Hudson’s fourth prong. Justice Scalia expressed concern that a strict interpretation would lead to a “least-restrictive-means” test. In Fox, the Court again relaxed Central Hudson’s original level of scrutiny, just as it had in Posadas. In a show of judicial restraint, the Court adjusted the Central Hudson test from an intermediate scrutiny standard to a standard that afforded greater deference to the legislature. Despite the acknowledgement that it was deferring to governmental decisionmakers, the Court did not consider its standard to be a rational basis inquiry.

However, six years later, in Rubin v. Coors Brewing Co., relying on Central Hudson, the Court unanimously struck down a federal statute that outlawed the printing of alcohol content on beer cans. Led by Justice Thomas, the Court in Rubin interpreted the fourth prong of the Central Hudson test as meaning that the government reg-

95. Costello, supra note 86, at 703-05.
96. Id.
97. Fox, 492 U.S. at 478 (internal quotation marks omitted).
98. Id. at 478-80. Justice Scalia was referring to the requirement of Central Hudson that the governmental regulation must not be “more extensive than is necessary to serve [the governmental] interest.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980) (emphasis added).
99. Fox, 492 U.S. at 476.
100. Id.
101. Id. at 480.
103. Id. at 478.
ulation must be "no more extensive than necessary,"\textsuperscript{104} rather than the more deferential approach that Justice Scalia had urged in \textit{Fox}.\textsuperscript{105} The Court used the fourth prong to strike down a regulation that was not narrowly tailored to serve the state's explicit interest. In contrast to \textit{Fox}, the Court in \textit{Rubin} returned to the stricter intermediate scrutiny test that was originally formulated in \textit{Central Hudson}.\textsuperscript{106}

In \textit{Florida Bar v. Went For It, Inc.},\textsuperscript{107} the Supreme Court used \textit{Central Hudson} to uphold rules restricting lawyer advertising. The rules, which prohibited lawyers from soliciting accident victims within thirty days of the accident,\textsuperscript{108} were enacted in response to a two-year study exposing the detrimental impact of lawyer advertising on public opinion.\textsuperscript{109} The Florida Bar purportedly sought to prevent the downward slide of the conduct and reputation of its attorneys.\textsuperscript{110}

The five-Justice majority articulated the reasons that the rules survived \textit{Central Hudson} scrutiny. First, the Court found that the rules reflected the Bar's substantial interest in both protecting the privacy of personal injury victims and improving the image of lawyers.\textsuperscript{111} Second, the Bar's two-year study demonstrating the adverse effects of unsolicited advertising by lawyers proved that the rules directly and materially advanced the Bar's interest.\textsuperscript{112} Finally, because the ban lasted only briefly and did not preclude other channels of communication, the Court found that the rules passed the final "reasonable fit" prong.\textsuperscript{113} Justice O'Connor, in her opinion for the majority, used the \textit{Central Hudson} test to reach a "commonsense conclusion" that the reg-

\begin{thebibliography}{113}
\bibitem{104} Id. at 486, 490-91. Justice Thomas reiterated the government's alternatives to banning the disclosure of alcohol content: the government could directly limit the alcohol content itself, or restrict the ban to malt liquors only. \textit{Id}. He concluded that "the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the regulation] is more extensive than necessary." \textit{Id}. at 491.
\bibitem{105} See \textit{supra} notes 94-101 and accompanying text.
\bibitem{106} See \textit{supra} notes 68-76 and accompanying text.
\bibitem{107} 515 U.S. 618 (1995).
\bibitem{108} \textit{Id}. at 620-21.
\bibitem{109} \textit{Id}. at 620.
\bibitem{110} \textit{Id}. at 621.
\bibitem{111} \textit{Id}. at 624-25.
\bibitem{112} \textit{Id}. at 626.
\bibitem{113} \textit{Id}. at 633. The Court reasoned that the Bar has a substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. . . . The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution . . . requires nothing more.\textit{Id}. at 635.
\end{thebibliography}
ulation was valid. However, Justice Kennedy, in his dissent, criticized the Court's sanction of censorship by the Bar. Three of the four Justices who joined the dissent, Stevens, Kennedy, and Ginsburg, formed the plurality opinion the following year in 44 Liquormart, which called for a stricter standard against blanket bans on commercial speech.

c. 44 Liquormart: Rethinking the Commercial Speech Doctrine.—In 44 Liquormart, Inc. v. Rhode Island, although the Supreme Court unanimously struck down a Rhode Island statute prohibiting the truthful advertising of the prices of lawfully sold alcoholic beverages, the Court presented four different opinions. The purpose of the ban was to promote temperance in Rhode Island; the State argued that allowing advertising would lower alcohol prices and increase public consumption. The petitioning liquor store did not display the prices of any items, but ran a newspaper advertisement featuring pictures of vodka and rum bottles with the word "WOW" in large letters next to them. The State Liquor Control Administrator claimed that this was an implied reference to bargain prices for liquor. The entire Court agreed that the Rhode Island ban should be struck down, even though the opinions of the Justices were many and varied.

Justice Stevens authored the plurality opinion and was joined by various members of the Court on different points of his analysis. First, Justice Stevens espoused a stricter standard of review than the Central Hudson intermediate scrutiny test for state regulations that completely ban non-misleading information. Justices Kennedy and Ginsburg

114. Id. at 634.
115. Id. at 644-45 (Kennedy, J., dissenting). Justice Kennedy called the majority opinion "a serious departure ... from the principles that govern the transmission of commercial speech. ... [U]nder the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence." Id. at 645.
117. 44 Liquormart, 517 U.S. at 489.
118. Id. at 504 (plurality opinion).
119. Id. at 505.
120. 44 Liquormart, 517 U.S. at 492.
121. Id. at 492-93.
122. Id. at 489; id. at 518 (Scalia, J., concurring in part and concurring in the judgment); id. at 528 (Thomas, J., concurring in part and concurring in the judgment); id. at 534 (O'Connor, J., concurring in the judgment).
123. Id. at 501-04 (Stevens, J.). Justice Stevens stated that such absolute bans "usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth." Id. at 503 (quoting Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 96 (1977)).
joined his call for stricter scrutiny of such absolute bans on commercial speech. In cases in which the purpose of the regulation is to guard against deceptive commercial speech, Justice Stevens would apply the intermediate scrutiny standard.

Under his analysis, Justice Stevens concluded that the Rhode Island ban would fail not only a more rigorous standard, but even the less stringent, intermediate Central Hudson standard. The ban did not pass the third prong of the Central Hudson test because it did not directly advance the State’s interest in curbing alcohol consumption. The ban also failed the fourth prong because it was more restrictive than necessary.

Next, Justice Stevens explicitly rejected the “greater-includes-the-lesser” rationale from Posadas as illogical, declaring that a ban on speech could be more detrimental than a ban on conduct. Justices Kennedy, Thomas, and Ginsburg signed onto this abandonment of Posadas, while Chief Justice Rehnquist and Justices O’Connor, Souter, and Breyer generally agreed that Posadas was no longer controlling.

Justice O’Connor focused on the ban’s failure to pass the final prong of the traditional Central Hudson test. She emphasized that the fit between Rhode Island’s method (banning all price advertising) and its goal (curbing drinking) was “not reasonable.” However, Justice O’Connor did not agree with Justice Stevens that heightened

124. Id. at 489, 501.
125. Id. at 501.
126. Id. at 504-08.
127. Id. at 505-07.
128. Id. at 507-08. Justice Stevens determined that the State could have attacked the drinking problem by less stringent means, such as increasing taxation on alcoholic beverages, limiting per capita purchases, or launching educational campaigns. Id. at 507.
129. See supra text accompanying note 92.
130. 44 Liquormart, 517 U.S. at 510-12. Justice Stevens cautioned that it [is] quite clear that banning speech may sometimes prove far more intrusive than banning conduct. . . . [A] local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. . . . The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.

131. Id. at 511-12.
132. Id. at 528, 531-32 (O’Connor, J., concurring in the judgment). Justice O’Connor remarked: “Since Posadas . . . this Court has examined more searchingly the State’s professed goal, and the speech restriction put into place to further it, before accepting a State’s claim that the speech restriction satisfies First Amendment scrutiny.” Id. at 531.
133. Id. at 530.
scrutiny should be applied to government regulation of truthful commercial speech.\textsuperscript{134}

Justice Thomas was willing to go the furthest toward giving commercial speech the same protection as political speech.\textsuperscript{135} He viewed paternalistic state bans that withhold information from the public as per se unconstitutional.\textsuperscript{136} As Justice Blackmun argued in \textit{Virginia Pharmacy},\textsuperscript{137} Justice Thomas declared that “all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible”;\textsuperscript{138} he urged the Court to abandon what he called the “inherently nondeterminative” \textit{Central Hudson} test and return to the clearer rule of \textit{Virginia Pharmacy}.\textsuperscript{139}

Despite Justice Thomas’s strong drive to end the distinction between commercial and noncommercial speech and abandon the \textit{Central Hudson} test altogether, four members of the Court chose to use the \textit{Central Hudson} test to strike down the advertising ban.\textsuperscript{140} Justice Stevens’s proposal—to apply strict scrutiny to the regulation of truthful commercial speech, and intermediate scrutiny to the regulation of misleading commercial speech—struck a compromise between Justice Thomas’s categorical approach and Justice O’Connor’s mechanical one.\textsuperscript{141}

In sum, the Court has continued to apply its four-part intermediate scrutiny test from \textit{Central Hudson} to the government regulation of commercial speech. However, while the majority of the Court still thinks that commercial speech should be afforded less protection than political speech, the numerous concurring opinions in \textit{44 Liquormart} suggest that the Court is considering a restructuring of the \textit{Central Hudson} test. In \textit{44 Liquormart}, five Supreme Court Justices—Justices Stevens, Scalia, Kennedy, Thomas, and Ginsburg—questioned

\begin{enumerate}
\item Id. at 532.
\item Id. at 518-28 (Thomas, J., concurring in part and concurring in the judgment).
\item Id. at 526-28. Justice Thomas noted that in cases in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in \textit{Central Hudson} should not be applied. . . . Rather, such an “interest” is \textit{per se} illegitimate and can no more justify regulation of “commercial” speech than it can justify regulation of “noncommercial” speech.
\item Id. at 518 (citation omitted).
\item See supra notes 50-60 and accompanying text.
\item \textit{44 Liquormart}, 517 U.S. at 526 (Thomas, J., concurring in part and concurring in the judgment).
\item Id. at 527-28.
\item Though preferring the traditional route, Chief Justice Rehnquist and Justices O’Connor, Souter, and Breyer still applied a rather strict version of the \textit{Central Hudson} test. Id. at 528-32 (O’Connor, J., concurring in the judgment).
\item See Costello, \textit{supra} note 86, at 687.
\end{enumerate}
the effectiveness of applying the traditional *Central Hudson* test in all commercial speech contexts.

d. The Supreme Court’s “Prior Restraint” Jurisprudence.—The Supreme Court’s formula for determining whether a state licensing regulation constitutes an unconstitutional prior restraint was first articulated in *Freedman v. Maryland.* In *Freedman,* the Court held that a film licensing statute was an invalid prior restraint on free speech because the State’s procedural guidelines unconstitutionally impaired the freedom of expression. Consequently, the Court established the following requirements for the government to avoid creating invalid prior restraints on speech: (1) the government must bear the burden of proof if the license is denied; (2) the administrative agency must act on a license request within a brief time specified by the statute; (3) the denial of a license may not become effective unless the administrator goes to court for an injunction; and (4) judicial review of an appeal must be expeditious.

The Court has also applied the *Freedman* guidelines in contexts other than film censorship. In *Shuttlesworth v. City of Birmingham,* the Court announced that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” An ordinance requiring parade permits was struck down due to the lack of concrete guidelines for the licensing official to follow. The Court reversed the defendant’s conviction for participating in a civil rights protest march without a license on the ground that the ordinance was arbitrarily administered.

The Court held, in *City of Lakewood v. Plain Dealer Publishing Co.,* that speech requiring a license or permit cannot be subject to an “official’s boundless discretion.” In *Plain Dealer Publishing,* no explicit limits were placed on the mayor’s discretion to grant a permit for placing newsracks on public property. Such arbitrary guidelines failed to protect against unreviewable censorship; thus, this prior restraint

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142. 380 U.S. 51 (1965) (striking down a statute that required the licensing of a film before exhibition as an invalid prior restraint).
143. *Id.* at 59-60.
144. *Id.* at 58-59.
146. *Id.* at 150-51.
147. *Id.*
148. *Id.* at 158-59.
150. *Id.* at 764.
151. *Id.* at 755-59.
was invalidated. The Court refused to accept the City's contention that the mayor necessarily would act on good faith, absent specific standards in the statute.

In FW/PBS, Inc. v. City of Dallas, the Court enunciated a "heavy presumption" against the constitutionality of licensing regulations for "sexually oriented businesses." Such prior restraints are presumed unconstitutional in their attempt to suppress certain undesirable expression completely. FW/PBS emphasized two particular evils of prior restraint schemes: (1) that they vest an official with unfettered discretion to grant permits, and (2) that they fail to place time limits on the official's decisionmaking process.

Although Freedman, Shuttlesworth, Lakewood, and FW/PBS do not demonstrate conclusively that the Court will apply its prior restraint analysis to commercial speech cases, they do illustrate the Court's refusal to tolerate arbitrary censorship, which is anathema to any protected speech. To date, the Court has not stated directly that its prior restraint analysis should be applied in the commercial speech context.

3. The Court's Reasoning.—The Court of Appeals began its analysis in Jakanna Woodworks, Inc. v. Montgomery County by noting that the United States Supreme Court's First Amendment commercial speech doctrine applies to the states via the Fourteenth Amendment. The court also acknowledged that it has interpreted Article 40 of the Maryland Declaration of Rights to be co-extensive with the First Amendment. In relying on Supreme Court precedent, the Court of Appeals noted that "[s]everal well-settled principles have emerged from the Supreme Court's interpretation of the First Amendment, both as to commercial speech and as to prior restraints on speech."

152. Id.
153. Id. at 769-70.
155. Id. at 225.
156. Id. at 223.
157. Id. at 225-26.
158. Cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 645 (1995) (Kennedy, J., dissenting) ("The guiding principle ... is that full and rational discussion furthers sound regulation and necessary reform. . . . The Court's opinion reflects a new-found and illegitimate confidence that it ... knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor.").
160. Id. (citing Freedman, 233 Md. at 505, 197 A.2d at 235-36).
161. Id.
a. Applying the Supreme Court's Commercial Speech Doctrine.— The court first characterized Jakanna as a commercial speech case.162 The court next noted that commercial speech is afforded some protection under the Constitution, because such speech "'not only serves the economic interest of the speaker, but also furthers the societal interest in the fullest possible dissemination of information.'"163 The Court of Appeals outlined the intermediate scrutiny test for commercial speech regulation as set forth by the Supreme Court in Central Hudson: (1) the commercial speech must not be misleading or concern unlawful activity; (2) the governmental interest must be substantial; (3) the regulation must directly advance that particular governmental interest; and (4) the regulation must be no more extensive than necessary to serve that interest.164 The court then discussed the Supreme Court's recent application of the Central Hudson test in Florida Bar v. Went For It, Inc.,165 upholding the validity of Florida Bar rules that restricted lawyers' solicitation of accident victims within a month of the accident.166

The Court of Appeals agreed with the Store's argument that the Circuit Court for Montgomery County applied the incorrect test to the ordinance.167 It noted that instead of using the Central Hudson test, Judge Pincus had erroneously applied a more lenient rational basis test, upholding the ordinance in deference to the legislature.168 Because the circuit court did not make any findings of fact, and because the Store continued to argue that its commercial speech was constitutionally protected, the Court of Appeals undertook an independent review of the record.169

The court rejected the County's argument that the Store's advertisement was misleading because it used the words "Public Notice," implying that some official entity was conducting the sale.170 The

162. Id. The court defined commercial speech as "'expression related solely to the economic interests of the speaker and its audience.'" Id. (quoting Central Hudson, 447 U.S. at 561 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976))).
163. Id. (quoting Central Hudson, 447 U.S. at 561-62).
164. Id. at 596, 689 A.2d at 70 (citing Central Hudson, 447 U.S. at 566). See supra notes 68-89 and accompanying text for a detailed discussion of the Central Hudson test.
165. See supra notes 107-114 and accompanying text.
166. Jakanna, 344 Md. at 596, 689 A.2d at 70.
167. Id. at 597-99, 689 A.2d at 71-72.
168. Id. at 607, 689 A.2d at 75.
169. Id. at 606-07, 689 A.2d at 75-76 (citing Bachellar v. Maryland, 397 U.S. 564, 566 (1970) (stating that an appeals court should undertake an independent review of the whole record when a constitutionally protected right is involved)).
170. Id. at 604, 689 A.2d at 74.
County also argued that the advertisement was false because the Store
did not sell all of its inventory as its advertisement had stated it
would. However, the Court of Appeals determined that the Store
satisfied the first prong of the *Central Hudson* test—that its advertise-
ment was not misleading. The court acknowledged the necessity of
"closing-out sales" for businesses in financial straits. The court
noted that it would be unreasonable to expect a merchant to know
whether enough buyers would come to purchase the entire inventory
fourteen days before the actual sale, when the application had to be
submitted to the Director. The court also held that the ordinance
passed the second prong of the *Central Hudson* test. It determined
that the government's interest in protecting the public from misleading commercial speech was substantial.

The County argued that the ordinance passed the third prong as well, because it directly advanced its interest in protecting consumers
by requiring merchants to submit specific information to the Office of
Consumer Affairs when applying for a license. Finally, the County
contended that the ordinance satisfied the fourth prong through its
use of "triggering words," which narrowly tailored the regulation.

The Court of Appeals, however, held that the ordinance failed
both the third and fourth prongs of the test. The court determined
that the ordinance did not directly advance the County's interest by
using trigger words, such as "liquidation," because those words are no
more misleading than words like "50% off," which do not require a
license. Finally, the court reasoned that the ordinance was more
extensive than necessary because it regulated not only deceptive speech, but it also regulated truthful speech, as in Jakanna's advertisement, from which consumers need no protection. The court then
cited examples of Maryland statutes that protect consumers from de-

171. *Id.*
172. *Id.* at 607-08, 689 A.2d at 76.
173. *Id.* at 608, 689 A.2d at 76.
174. *Id.*
175. *Id.*
176. *Id.*; see also Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995) (stating that "[u]nder *Central Hudson*, the government may freely regulate commercial speech that... is misleading"); Friedman v. Rogers, 440 U.S. 1, 15 (1979) (noting that "the State's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated").
177. *Jakanna*, 344 Md. at 605, 689 A.2d at 75.
179. *Jakanna*, 344 Md. at 605, 689 A.2d at 75.
180. *Id.* at 608-09, 689 A.2d at 76-77.
181. *Id.*, 689 A.2d at 76.
182. *Id.* at 609, 689 A.2d at 77.
ceptive advertising by regulating conduct without impermissibly re-
stricting speech.\textsuperscript{183}

\textit{b. Applying the Supreme Court's Prior Restraint Doctrine.—}Judge Chasanow traced the Supreme Court decisions concerning prior restraint, starting with \textit{Freedman v. Maryland.}\textsuperscript{184} Although prior restraints "'present [the] danger of unduly suppressing protected expression,'"\textsuperscript{185} they may pass constitutional muster if the State provides adequate procedural safeguards to protect against unwarranted censorship.\textsuperscript{186} The court reiterated \textit{Freedman}'s procedural safeguards: (1) such restraint may be imposed for "only a specified brief period [of time] during which the status quo must be maintained"; (2) judicial review of the decision must be expeditious; and (3) the censor bears the burden of going to court to suppress the speech as well as the burden of proof in court.\textsuperscript{187}

Judge Chasanow reviewed two decisions following \textit{Freedman} in which the Supreme Court evaluated prior restraints by focusing on two separate problems: (1) regulation that provides unfettered discretion to government officials in the licensing process, and (2) regulation that does not place any limits on the time within which the decisionmaker must issue the license.\textsuperscript{188} The County argued that the Montgomery County ordinance was a valid prior restraint on speech because it (1) provided "narrow, objective and definite" standards to guide the Director in granting or denying a license,\textsuperscript{189} and (2) provided that a license will be issued within a brief and reasonable time period.\textsuperscript{190} Because the ordinance required merchants to apply for a

\begin{itemize}
\item \textsuperscript{183} \textit{Id.} (citing Md. Code Ann., Com. Law II § 11-703 (1990) (prohibiting any person from "advert[is][ing] falsely in the conduct of any business, trade, or commerce, or in the provision of any service"); Md. Code Ann., Com. Law II § 13-303 (1990) (prohibiting any person from engaging in unfair or deceptive trade practices when conducting several consumer transactions)).
\item \textsuperscript{184} \textit{Jakanna}, 344 Md. at 599, 689 A.2d at 72; \textit{see also supra} notes 142-144 and accompanying text.
\item \textsuperscript{185} \textit{Jakanna}, 344 Md. at 599, 689 A.2d at 72 (alteration in original) (quoting \textit{Freedman v. Maryland}, 380 U.S. 51, 54 (1965)).
\item \textsuperscript{186} \textit{Freedman}, 380 U.S. at 58-60.
\item \textsuperscript{187} \textit{Jakanna}, 344 Md. at 600, 689 A.2d at 72 (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227 (1990) (citing \textit{Freedman}, 380 U.S. at 58-60)).
\item \textsuperscript{188} \textit{Id.} (citing FW/PBS, 493 U.S. at 225-26); \textit{see also supra} notes 142-157 (discussing the Supreme Court's prior restraint jurisprudence).
\item \textsuperscript{189} \textit{Jakanna}, 344 Md. at 605, 689 A.2d at 75. Section 30-10 provides in part: [i]f the Director is satisfied from the application that the proposed sale is consistent with the proposed advertising, the Director may issue a license, upon payment of a fee . . .
\item \textit{Montgomery County, Md., Code} § 30-10(b)(3) (1994).
\item \textsuperscript{190} \textit{Jakanna}, 344 Md. at 606, 689 A.2d at 75.
\end{itemize}
license fourteen days before the sale, the County contended that the Director would make the decision within that time frame.

However, the Court of Appeals concluded that the Montgomery County ordinance was an invalid restraint on speech because it granted the Director "unfettered discretion" in the licensing process. Although the ordinance required merchants to submit information to the Director, it never explicitly required the Director to do anything with that information. Because the Director's decision-making powers were not specifically defined, the Store was not guaranteed adequate safeguards against arbitrary censorship. The court noted that the ordinance provided no explicit time constraints on the Director's decision, thus failing to satisfy the "brief and reasonable requirement" under Freedman.

In sum, the Court of Appeals held that section 30-10 was unconstitutional because it (1) did not directly advance the government's interest in regulating misleading advertisements, and (2) was more extensive than necessary to serve that interest. The court also held that the ordinance was an invalid prior restraint because it both granted unbridled discretion to a government official to suppress protected speech, and failed to limit the amount of time in which the official may render her decision.

4. Analysis.—At first glance, the court's holding in Jakanna appears solidly based in the Supreme Court's current commercial speech jurisprudence. However, upon closer inspection, it seems that the Court of Appeals arrived at the proper result but may have applied certain tests too confidently. First, the court applied the Central Hudson test to section 30-10 when the Supreme Court appears to be revising its use of that test. The Maryland court neglected to address the reexamination of the Central Hudson test that the Supreme Court undertook recently in 44 Liquormart, Inc. v. Rhode Island. Second, to evaluate the ordinance as a prior restraint, the court rather boldly ap-

191. Id.
192. Id. The County claimed that, in practice, the decision is made usually within "a couple of days" after an on-site inspection is completed. Id. (internal quotation marks omitted).
193. Id. at 609, 689 A.2d at 77.
194. See supra note 19.
195. Jakanna, 344 Md. at 609-10, 689 A.2d at 77.
196. Id. at 610, 689 A.2d at 77.
197. Id.; see supra text accompanying note 144.
198. Jakanna, 344 Md. at 609, 689 A.2d at 76-77.
199. Id. at 609-10, 689 A.2d at 77.
plied the *Freedman* procedural guidelines, which have traditionally been used for political speech cases, to a *commercial* speech case.

*Jakanna* ultimately demonstrates the Maryland court's eagerness to support commercial speech protection. However, by ignoring *44 Liquormart* and simply applying the *Central Hudson* test, the court may have left its holding in *Jakanna* vulnerable to attack. On the other hand, its original application of *Freedman* to *Jakanna* may serve to bolster the constitutional protection of commercial speech in Maryland.

**a. Central Hudson: A Cautious Approach to Commercial Speech.**—The first gap in the court's opinion is its failure to even mention *44 Liquormart*. The court probably did not apply *44 Liquormart* to *Jakanna* because, as a plurality opinion, *44 Liquormart* did not provide a unified rule of law:

\[201\] *44 Liquormart*’s numerous opinions may well have left the Maryland court confused about how to address commercial speech issues. Another possible reason for shunning *44 Liquormart* is that the Court of Appeals did not consider it analogous to *Jakanna*. While the former was about an absolute ban on advertising liquor prices,\[202\] the latter concerned a licensing requirement for closing-out sales.\[203\] The court may have wanted to “play it safe” by applying the traditional *Central Hudson* intermediate scrutiny test. However, the striking similarity between *Jakanna* and *44 Liquormart* is that the government was suppressing important commercial information through a paternalistic method of protecting the public, reminiscent of the facts of *Virginia Pharmacy*\[204\] and *Linmark*.\[205\]

Notwithstanding Justice Stevens’s reevaluation of the *Central Hudson* test, as well as Justice Thomas’s outright rejection of that test, in *44 Liquormart*, the Court of Appeals applied the *Central Hudson* test in determining the unconstitutionality of the ordinance. The court applied the *Central Hudson* test in a straightforward manner, much as Justice O’Connor employed the test in *44 Liquormart*.\[206\] The court attempted to demonstrate the validity of the *Central Hudson* test by indicating that the Supreme Court had recently used the test in *Florida*

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201. Justice Stevens wrote the plurality opinion, and Justices Scalia, Thomas and O’Connor wrote separate concurring opinions. *Id.*
202. *Id.* at 490.
203. *Jakanna*, 344 Md. at 590, 689 A.2d at 67.
204. See *supra* notes 51-60 and accompanying text.
205. See *supra* notes 64-67 and accompanying text.
206. *44 Liquormart*, 517 U.S. at 528-34 (O’Connor, J., concurring in the judgment) (urging a mechanical application of the *Central Hudson* test to strike down the Rhode Island liquor advertising ban).
However, the five-to-four majority in that case illustrated the problems the Court was encountering with the *Central Hudson* test. The Court of Appeals should have instead included a discussion of *44 Liquormart* because it is the Supreme Court’s most recent attempt to clarify the *Central Hudson* test. Although *44 Liquormart’s* plurality opinion cannot be considered a strong precedent, that case’s multiple opinions signal that the Court is attempting to refine its commercial speech doctrine.

Perhaps the Court of Appeals hesitated to discuss *44 Liquormart* because that case exposed the Supreme Court’s lack of unification about applying the *Central Hudson* test to commercial speech cases. The Maryland court may have applied the *Central Hudson* test under the assumption that the test is here to stay. Regardless of its reasons, the court erred by failing to address *44 Liquormart*, which exposed the Supreme Court’s confusion over the application of the *Central Hudson* test. If the Maryland court had even briefly mentioned *44 Liquormart*, then its *Jakanna* opinion would have reflected the Maryland court’s greater awareness of the evolving commercial speech jurisprudence.

Instead, the court completely ignored *44 Liquormart* and relied on the Supreme Court’s decision in *Florida Bar*, which was arguably less supportive of *Jakanna’s* result than a discussion of *44 Liquormart* would have been. The former dealt with rules of conduct for lawyers, while the latter directly addressed the impact of restrictive ordinances targeted at liquor stores. However, there is one crucial similarity between the Florida lawyers, Rhode Island liquor store owners, and Maryland merchants: The government thought that certain aspects of their conduct should be regulated. Further, when commercial speech rights were violated, the state courts emphasized the “commercial” half of the issue, rather than the “speech” half. When the Supreme Court began to examine the “speech” half more closely in *44 Li-


208. *Florida Bar*, 515 U.S. at 635-45 (Kennedy, J., dissenting) (questioning the majority’s outcome in applying the *Central Hudson* test to the Florida Bar rules).

209. See supra text accompanying notes 116-141.

210. See Costello, supra note 86, at 722-34 (arguing that the Court is heading toward a new commercial speech analysis that affords greater protection to commercial speech).

211. *Jakanna*, 344 Md. at 597-99, 689 A.2d at 71-72 (citing *Florida Bar*, 515 U.S. at 624-33).

212. See supra notes 107-116 and accompanying text.


214. See generally Kozinski & Banner, *Who’s Afraid?*, supra note 45 (strongly urging equal constitutional protection for commercial and noncommercial speech).
the Maryland court looked the other way, refusing to follow the Supreme Court's lead. Thus, while the Supreme Court is moving toward greater protection of commercial speech, Maryland courts may be clinging to an antiquated test. Although the Court of Appeals reached the same conclusion in favor of commercial speech as the Supreme Court did in *44 Liquormart*, its straight application of the *Central Hudson* test overlooked the vigorous debate of *44 Liquormart*.

Because both the Store's brief and the amicus curiae brief relied heavily on *44 Liquormart*, it is odd that the Court of Appeals did not mention the case at all. The County tried to remove Jakanna from the scope of *44 Liquormart* altogether, by arguing that "[t]he County has not promulgated and enforced a paternalistic statute that bans speech for the purpose of 'keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace.'" That statement, however, is erroneous. By requiring licensing before truthfully advertising closing-out sales, Montgomery County impeded the free flow of commercial information that benefits both consumers and businesses. In both Jakanna and *44 Liquormart*, the government attempted to regulate certain commercial speech in order to protect consumers from making their own choices in the marketplace. This paternalistic ordinance by Montgomery County is equally as repugnant to the First Amendment as were the liquor advertising ban in *44 Liquormart* and the prescription drug advertising ban in *Virginia Pharmacy*.

Despite the absence of *44 Liquormart* in the reasoning of its opinion, the Court of Appeals intuitively followed *44 Liquormart*'s lead in heightening the protection of commercial speech. However, the court's application of the inconsistent *Central Hudson* test, without the

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215. See supra text accompanying notes 117-141. Note especially Justice Stevens's plurality opinion and Justice Thomas's concurring opinion.
216. See Costello, supra note 86, at 748.
220. See supra text accompanying notes 16-23, 118-121.
221. See supra text accompanying notes 135-139.
222. See supra text accompanying notes 51-57.
acknowledgment of 44 Liquormart, leaves questions as to the court’s awareness of the Supreme Court’s shifting attitude toward commercial speech. There is a possibility that the Maryland court wanted to distinguish itself as a champion of the traditional Central Hudson test, aligning itself with those Justices on the Supreme Court who are not yet willing to abandon or revise Central Hudson.223

The Court of Appeals may have had good reasons to steer clear of 44 Liquormart. However, because the Supreme Court’s reevaluation of the Central Hudson test was an integral part of 44 Liquormart, it was imperative for the state court to include that decision in its Jakanna analysis.

b. Freedman: Scrutinizing Prior Restraint on Commercial Speech.—In the second part of his opinion, Judge Chasanow easily struck down the ordinance under the Supreme Court’s procedural guidelines for licensing statutes announced in Freedman v. Maryland.224 Over two decades ago, in Virginia Pharmacy, the Court spoke of “common-sense” differences between commercial and noncommercial speech, expressing in dicta that prior restraints on commercial speech do not carry as strong a presumption against validity as do prior restraints on political speech because of the “hardy” nature of commercial speech.225 However, the result reached by the Court of Appeals followed the Supreme Court’s trend in providing greater protection for commercial speech.

Thus, while erring in not addressing 44 Liquormart, the court seemed to be on the cutting edge in its extension of the Supreme Court’s prior restraint doctrine to commercial speech. In Freedman and its progeny, the court found the extra support it needed to buttress its otherwise shaky determination of the ordinance’s unconstitutionality under the Central Hudson test. In finding the ordinance to be an invalid prior restraint, the Court of Appeals lent its holding more credibility.

The Court of Appeals innovatively applied prior restraint precedents, normally used in political speech contexts, to Jakanna—a commercial speech case involving a licensing requirement. Jakanna is unique because it raises both commercial speech and prior restraint issues; the key was to label commercial speech as the dominant issue. Although the Supreme Court has not decided whether its prior re-

223. See supra note 140.
225. See supra text accompanying note 60.
straint doctrine should apply to commercial speech cases, the Court of Appeals has answered in the affirmative.

The court properly relied on *City of Lakewood v. Plain Dealer Publishing Co.*,\(^{226}\) which dealt with the licensing of newsracks on public property, an arguably commercial speech issue.\(^{227}\) Regardless of whether prior restraint analysis has been used before in commercial speech cases, the outcome reached by the *Jakanna* court was consistent with its other finding of overbreadth under the *Central Hudson* test. The court correctly decided under *Freedman* that the Montgomery County Director had unfettered discretion to grant or deny permits and an unlimited amount of time in which to make her decision.\(^{228}\) Therefore, the court concluded that the Montgomery County ordinance constituted an invalid prior restraint on commercial speech in violation of the First Amendment.

By using prior restraint analysis in conjunction with a traditional application of the *Central Hudson* test, the Court of Appeals made definite strides toward narrowing the gap between First Amendment protection of commercial and noncommercial speech. Despite its failure to address the Supreme Court's doubts about the *Central Hudson* test, *Jakanna* provides greater constitutional armor for commercial speech through its prior restraint analysis. This step toward freeing the flow of commercial speech is crucial to the healthy functioning of a democratic society, in which people are free to shop the marketplace of ideas for themselves.\(^{229}\)

5. Conclusion.—In *Jakanna Woodworks, Inc. v. Montgomery County*, the Court of Appeals followed the Supreme Court's recent trend toward greater protection of commercial speech. However, the court's failure to acknowledge the implications of the Supreme Court's 44 *Liquormart* decision left a serious gap in its rationale. Nonetheless, the court's novel and convincing use of prior restraint analysis to invalidate the licensing regulation of commercial speech should ensure *Jakanna*'s precedential value for future commercial speech cases in Maryland.

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\(^{226}\) 486 U.S. 750 (1988).


\(^{228}\) See supra text accompanying notes 194-198.

\(^{229}\) See generally Kozinski & Banner, *Who's Afraid?*, supra note 45 (providing compelling reasons for giving commercial speech the same protection as political speech).
III. CONSTRUCTION LAW

A. Mutual Express Agreement Required Before a Party Can Compel Arbitration

In *Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates Ltd. Partnership*, the Court of Appeals held that by issuing a performance bond that incorporated by reference a mandatory arbitration provision from a contract between a developer and a contractor, a surety could not enforce arbitration against the developer in an action on the bond. The court correctly reached this decision by adhering to the requirement for a mutual express agreement before one party can compel arbitration. In so doing, the court refused to rewrite a contract even when faced with the strong public policy favoring arbitration that has been followed blindly in some other jurisdictions.

1. The Case.—In January 1993, the Scarlett Place Residential Condominium owners filed suit against the complex’s developer, Scarlett Harbor Associates Limited Partnership, and its present and former general partners known collectively as SHALP. In that suit, the condominium owners alleged construction and design defects in the Scarlett Place Residential Condominium situated on the edge of the Inner Harbor in downtown Baltimore City. In response, SHALP filed third-party claims against the subcontractors, including Leonard A. Kraus, Inc. (Kraus) and its surety, the Hartford Accident and Indemnity Company (Hartford).

Kraus and Hartford filed “Petitions to Compel Arbitration and to Stay Proceedings” against them in circuit court. Kraus centered its
claim for compulsory arbitration on its contract with SHALP.\textsuperscript{9} Paragraph 7.9.1 of the contract’s General Conditions provided for arbitration of “‘[a]ll claims, disputes and other matters in question between the Contractor [Kraus] and the Owner [SHALP] arising out of or relating to the Contract Documents or the breach thereof.’”\textsuperscript{10} Likewise, Hartford based its petition for arbitration on that same arbitration clause in the contract between SHALP and Kraus.\textsuperscript{11} Specifically, Hartford predicated its petition on the theory that the bond incorporated the contract by reference and therefore included the arbitration clause.\textsuperscript{12} The trial court granted Kraus’s petition for arbitration, but it denied Hartford’s petition because the plain language of the bond did not clearly indicate an agreement between SHALP and Hartford to arbitrate.\textsuperscript{13}

On appeal, the Court of Special Appeals held, inter alia, that the trial court had correctly denied Hartford’s petition to compel SHALP to arbitrate.\textsuperscript{14} Before this intermediate appellate court, Hartford asserted that by incorporating by reference the SHALP-Kraus contract into the bond, its intent to arbitrate was made clear.\textsuperscript{15} The court, however, found this fact to be indeterminate, stressing that the objective theory of contracts is the basis for interpreting contracts in Maryland.\textsuperscript{16} Rather, the Court of Special Appeals concluded, the bond incorporated the Kraus subcontract purely to “establish the primary obligation on which Hartford’s secondary obligation would de-

\textsuperscript{9} See Hartford, 346 Md. at 124 n.2, 695 A.2d at 154 n.2; see also American Inst. of Architects Document A201/CM: General Conditions of the Contract for Construction (construction management ed. 1980).

\textsuperscript{10} Hartford, 346 Md. at 124 n.3, 695 A.2d at 154 n.3. (quoting the SHALP-Kraus contract).

\textsuperscript{11} Hartford, 109 Md. App. at 235, 684 A.2d at 114.

\textsuperscript{12} Hartford, 346 Md. at 126, 695 A.2d at 155. The SHALP-Kraus contract required Kraus to obtain a performance bond. \textit{Id.} at 125, 695 A.2d at 154. Hartford provided Kraus a bond that named SHALP as the obligee and that read in pertinent part: “‘Whereas, Principal [Kraus] has by written agreement . . . entered into a subcontract with Obligee [SHALP] for Renovation and addition to Scarlett [Place] . . . which subcontract is by reference made a part hereof, and is hereinafter referred to as the subcontract.’” \textit{Id.} at 125, 695 A.2d at 154 (quoting the bond issued by Hartford).

\textsuperscript{13} \textit{Id.} at 125, 695 A.2d at 154-55. The circuit court ruled on many other issues, none of which, however, related to the discussion of arbitration. \textit{See} Hartford, 109 Md. App. at 254-38, 674 A.2d at 114-16.

\textsuperscript{14} Hartford, 109 Md. App. at 240, 674 A.2d at 117.

\textsuperscript{15} \textit{Id.} at 292, 674 A.2d at 143.

\textsuperscript{16} \textit{Id.} at 291, 674 A.2d at 142. The court defined the objective theory as what a reasonable person in the position of the parties would have understood the language of the agreement to mean at the time of its formation. \textit{Id.}
pended.” The court also rejected Hartford’s argument because it overlooked the specificity in the arbitration agreement between SHALP and Kraus. In so doing, the court reasoned that the “incorporation of one contract into another contract does not automatically transform the incorporated contract into an agreement between the parties to the second contract.”

Accordingly, the Court of Special Appeals affirmed the trial court’s decision to deny Hartford’s petition to arbitrate. Hartford then appealed to the Court of Appeals, which granted certiorari to review the question whether a surety, which issued a performance bond that incorporated by reference a mandatory arbitration clause from the contract between the principal and the obligee, can compel the obligee to arbitrate in an action on the bond.

2. Legal Background.—Maryland has consistently adhered to the requirement for a mutual express agreement before a party can compel arbitration. While Maryland recognizes the benefits of arbitration, it correctly refuses to interpret contracts liberally to favor arbitration. Numerous Maryland cases have addressed situations where parties have attempted to compel arbitration, but none have addressed the situation where a non-party to an arbitration agreement attempted to compel a party to arbitrate. Due to the limited number of Maryland decisions focusing on this particular issue, after reviewing the Maryland cases it will be helpful to examine decisions from other jurisdictions to understand fully the development of the law in this area.

17. Id. at 292, 674 A.2d at 143.
18. Id., 674 A.2d at 142. The agreement required arbitration between the owner, SHALP, and the contractor, Kraus, but not between SHALP and any other party associated with Kraus. Id.
19. Id. at 292, 674 A.2d at 143.
20. Id. at 296, 674 A.2d at 144.
22. Hartford, 346 Md. at 126-27, 695 A.2d at 155.
25. See infra notes 28-80 and accompanying text.
26. See infra notes 28-80 and accompanying text.
27. See infra notes 84-112 and accompanying text.
a. Maryland Law.—In Maryland, arbitration is a long-accepted method of resolving legal disputes.\textsuperscript{28} In 1946, the Court of Appeals stated that “[i]t is a fundamental principle that where the parties to a dispute decide of their own accord to submit their dispute to arbitration without restriction or condition, the award . . . is binding and conclusive upon the parties.”\textsuperscript{29} At common law, however, the courts exhibited a generally ambivalent attitude toward arbitration.\textsuperscript{30} While suits to enforce an arbitration award were viewed as “favored” actions, executory arbitration agreements were assigned “unfavored” status, and suits to compel arbitration could not be brought.\textsuperscript{31}

In Maryland, the common law governed the enforcement of arbitration awards until 1965, when the Maryland Uniform Arbitration Act (MUAA)\textsuperscript{32} was adopted.\textsuperscript{33} The MUAA was seen as a “radical departure from the common law.”\textsuperscript{34} Two of the more significant changes were that the MUAA compelled courts to uphold executory agreements to arbitrate and to hear suits to compel arbitration or stay suits pending arbitration.\textsuperscript{35} The Court of Special Appeals, in \textit{Bel Pre Medical Center v. Frederick Contractors},\textsuperscript{36} specifically noted that the enactment of the statute established Maryland’s policy favoring the settlement of disputes through arbitration and “ended the ambivalence of courts under the common law.”\textsuperscript{37} The basis for this public policy in support of arbitration is to save time and judicial resources and “to foster voluntary resolution of disputes in a forum created, controlled and ad-

\textsuperscript{28} See, e.g., Roberts Bros. v. Consumers Can Co., 102 Md. 362, 368, 62 A. 585, 587 (1905) (indicating that arbitration is intended to resolve disputes in a “simple and inexpensive” manner and that fair decisions will be supported by the courts). In 1930, the Court of Appeals extended the preferred status of arbitration by stating that “[a]rbitration is a method favored by law for the settlement of disputes.” O’Ferrall v. De Luxe Sign Co., 158 Md. 544, 552, 149 A. 290, 294 (1930).

\textsuperscript{29} Continental Milling & Feed Co. v. Doughnut Corp. of Am., 186 Md. 669, 674, 48 A.2d 447, 449 (1946).

\textsuperscript{30} See, e.g., id. at 675, 48 A.2d at 450 (warning that if arbitrators exceed their authority, their award is void to that extent).


\textsuperscript{33} See \textit{Bel Pre}, 21 Md. App. at 317, 320 A.2d at 564.

\textsuperscript{34} Id. at 319-20, 320 A.2d at 565.

\textsuperscript{35} Id. at 320, 320 A.2d at 565.


\textsuperscript{37} Id. at 320, 320 A.2d at 565. Maryland’s policy favoring arbitration is consistent with federal policy. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (noting the “congressional policy in favor of settlement of disputes . . . through the machinery of arbitration”).
ministered according to the parties' agreement to arbitrate."\(^{38}\) In accordance with this legislative policy, the role of the courts in Maryland, when dealing with arbitration controversies, is limited to the determination of whether "there [is] an agreement to arbitrate the subject matter of the dispute."\(^{39}\)

Even with the strong public policy favoring arbitration, Maryland courts still require express consent of the parties to compel arbitration.\(^{40}\) The foundations of the consent requirement in Maryland appeared in *Continental Milling & Feed Co. v. Doughnut Corp. of America*,\(^ {41}\) in which the Court of Appeals held that only the specific express consent of the parties to an agreement can create the basis for the arbitrator's jurisdiction.\(^ {42}\) In *Continental*, the operator of a flour mill brought suit in equity against its buyer for underpayment.\(^ {43}\) The parties to the suit contested specific matters submitted for arbitration and sought a ruling to determine whether the arbitrators had exceeded their authority.\(^ {44}\) Upon consideration, the Court of Appeals found that, "[i]n order that an award shall be binding, the arbitrators must follow exactly the authority given them by the agreement of the parties."\(^ {45}\) The

\(^{38}\) *Bel Pre*, 21 Md. App. at 320, 320 A.2d at 565 (citing, among other cases, *Maietta v. Greenfield*, 267 Md. 287, 291, 297 A.2d 244, 246 (1972) (superseded by the recodification of the MUAA, Md. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to -234 (1974))).

\(^{39}\) Id., 320 A.2d at 566; accord *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (holding that the role of the court, in a motion to compel arbitration, should be restricted to determining whether the dispute falls within the scope of the arbitration agreement).

\(^{40}\) See *Curtis G. Testerman Co. v. Buck*, 340 Md. 569, 579-80, 667 A.2d 649, 654 (1995) (holding that a non-party corporate officer was not bound by an arbitration award); Continental Milling & Feed Co. v. Doughnut Corp. of Am., 186 Md. 669, 675-76, 48 A.2d 447, 450 (1946) (holding that the express consent of the parties is required to establish an arbitrator's jurisdiction); see also *A.B. Eng'g Co. v. RSH Int'l, Inc.*, 626 F. Supp. 1259, 1263 (D. Md. 1986) (mem.) (ruling that there was no legal basis to impose arbitration upon a non-party to an arbitration agreement).

\(^{41}\) 186 Md. 669, 48 A.2d 447 (1946).

\(^{42}\) Id. at 675-76, 48 A.2d at 450; accord *Stephen L. Messersmith, Inc. v. Barclay Townhouse Assoc.*, 313 Md. 652, 658, 547 A.2d 1048, 1051 (1988) (holding that, absent an arbitration agreement between the parties, an arbitration panel cannot validly assert jurisdiction).

\(^{43}\) Continental, 186 Md. at 672, 48 A.2d at 448.

\(^{44}\) Id. at 675, 48 A.2d at 450.

\(^{45}\) Id. For authority on the issue of arbitration jurisdiction, the court looked to New York Court of Appeals Chief Judge Cardozo's examination of the issue:

"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. ** No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others."

court reasoned that "the terms of an arbitration agreement must not be strained to discover power to pass upon matters in dispute." Further, the court noted that such provisions must be "clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication." The Continental court found that although the arbitrators had the authority to establish the amount of the underpayment, they had exceeded their authority by making their award for a shorter period of time than that designated in the arbitration agreement. The reduction in the award based on the decreased time period was therefore not binding on the parties.

Forty years later, in A.B. Engineering Co. v. RSH International, Inc., the United States District Court for the District of Maryland noted that in Maryland, arbitration cannot be imposed unless the parties to the arbitration at issue expressly agreed to arbitrate. Specifically, the court considered a dispute that arose from a joint venture created to design transportation infrastructure in Jubail, Saudi Arabia, and held that a non-party parent company could not be compelled to arbitrate based on an agreement signed by its subsidiary. The party attempting to compel arbitration, A.B. Engineering Co. (ABENGCO), urged the court to construe the arbitration agreement liberally in accordance with public policy. ABENGCO argued, because the parent company and its subsidiary were essentially the same entity, an agreement by the subsidiary necessarily bound the parent to that agreement. The court refused, however, to find that the parent company was a de facto party to the agreement and reasoned that "no matter how broadly an agreement is construed, it cannot impose obligations on a person who is not a party to that agreement."

More recently, in Curtis G. Testerman Co. v. Buck, the Maryland Court of Appeals held that a corporate officer who was not a party to an arbitration agreement could not be bound by an arbitration award resulting from arbitration held in accordance with the terms of the

46. Id. at 676, 48 A.2d at 450.
47. Id.
48. Id. at 676-77, 48 A.2d at 450.
49. Id. at 677, 48 A.2d at 450.
51. Id. at 1263.
52. Id. at 1260.
53. Id. at 1263.
54. Id.
55. Id.
56. Id. at 1262-63.
57. Id. at 1263.
agreement.\textsuperscript{59} In so ruling, the court took the opportunity to summarize the status of Maryland arbitration law.\textsuperscript{60} The court emphasized that "the Arbitration Act leaves but one issue for the court to resolve: 'is there an agreement to arbitrate?'"\textsuperscript{61} The court also reiterated that it cannot force a party to submit to arbitration if the party has not voluntarily and expressly agreed to arbitration.\textsuperscript{62} Additionally, the court reflected that, based on the objective theory of contracts, the intent of the parties as expressed in the contractual language controls the analysis.\textsuperscript{63} Moreover, the court explained, only once a valid arbitration agreement exists can a court then consider the application of the strong public policy favoring arbitration.\textsuperscript{64}

Over the years, a number of cases have arisen in which the intent of the parties to arbitrate was unclear because of ambiguous contractual language, and Maryland courts have interpreted such agreements in favor of arbitration.\textsuperscript{65} For instance, in \textit{Gold Coast Mall, Inc. v. Larmar Corp.},\textsuperscript{66} the Court of Appeals addressed the issue of whether a court or an arbitrator should initially determine if a dispute falls within the scope of an arbitration clause.\textsuperscript{67} In \textit{Gold Coast Mall}, a landlord brought an action in equity against its tenant for a percentage of the rentals received by the tenant from its subtenants.\textsuperscript{68} The court found that conflicting clauses, including an arbitration provision, rendered the lease ambiguous as to whether the particular dispute fell within the scope of the arbitration agreement.\textsuperscript{69} The court held that when the intent of the parties to arbitrate is unclear, the strong public

\textsuperscript{59} Id. at 580, 667 A.2d at 654. In \textit{Testerman}, a group of homeowners brought suit over a construction dispute against a contracting company and its president. \textit{Id.} at 572-73, 667 A.2d at 651.

\textsuperscript{60} See \textit{id.} at 579, 667 A.2d at 654.


\textsuperscript{62} See \textit{id.} at 579-80, 667 A.2d at 654 (citing \textit{Gold Coast Mall, Inc. v. Larmar Corp.}, 298 Md. 96, 103, 468 A.2d 91, 95 (1983)).

\textsuperscript{63} \textit{Id.} at 580, 667 A.2d at 654 (citing \textit{Kasten Constr. Co. v. Rod Enters.}, 268 Md. 318, 328-29, 301 A.2d 12, 18 (1973)).

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} See, e.g., \textit{Gold Coast Mall}, 298 Md. at 107, 468 A.2d at 97 (holding that the arbitrator, rather than the court, should initially determine whether a dispute is arbitrable).

\textsuperscript{66} 298 Md. 96, 468 A.2d 91 (1983).

\textsuperscript{67} \textit{Id.} at 99, 468 A.2d at 93.

\textsuperscript{68} \textit{Id.} at 100, 468 A.2d at 93.

\textsuperscript{69} \textit{Id.} at 107, 468 A.2d at 97. The broad arbitration clause provided that "in the event of disagreement between the parties . . . such disagreement shall be submitted . . . to . . . arbitration." \textit{Id.} (second and third ellipses in original) (quoting the arbitration clause in the lease). There were, however, several other clauses in the lease agreement that ap-
policy in favor of arbitration dictates that the arbitrator, rather than
the court, address the question of substantive arbitrability initially.\textsuperscript{70}

In so ruling, the court first defined arbitration as a matter of con-
tract where "parties voluntarily agree to substitute a private tribunal
for the public tribunal otherwise available to them."\textsuperscript{771} The court then
recognized that section 3-207(b) of the MUAA restricted the court's
role to determining only whether there existed an agreement to arbi-
trate the subject matter of the particular dispute.\textsuperscript{72} The court also
examined three other possible situations, all of which were distinct
from the factual scenario in \textit{Gold Coast Mall}, and all of which involved
the scope of arbitration clauses.\textsuperscript{73} First, the court concluded that,
where the language of the arbitration clause is unambiguous and the
dispute plainly falls within the scope of the clause, arbitration should
be compelled.\textsuperscript{74} Second, when the dispute clearly falls beyond the
scope of the agreement, the court explained, the opposing party
should not be compelled to arbitrate.\textsuperscript{75} Third, where the language of
an arbitration agreement imposes arbitration for all disputes arising
under a specific contract, all issues should be arbitrated unless specifi-
cally excluded.\textsuperscript{76}

When attempting to determine the intent of the parties to a dis-
pute, a court must consider collateral agreements that have incorpo-
rated the general contract by reference.\textsuperscript{77} Because bond agreements
are regarded as any other written contract,\textsuperscript{78} when interpreting bonds,
a court must ascertain the intent of the parties and enforce that intent

\textsuperscript{70} Id. at 108, 468 A.2d at 97. Other cases have applied the public policy favoring
arbitration when the language of the arbitration clause is ambiguous. \textit{See, e.g., United
Steelworkers v. Warrior & Gulf Navigation Co.}, 363 U.S. 574, 582-83 (1960) (establishing
the federal policy favoring arbitration); \textit{Bel Pre Med. Ctr. v. Frederick Contractors, 21 Md.
App. 307, 320-22, 320 A.2d 558, 565-66 (1974)} (applying the public policy based on the

\textsuperscript{71} \textit{Gold Coast Mall}, 298 Md. at 103, 468 A.2d at 95.

\textsuperscript{72} Id. at 103-04, 468 A.2d at 95; \textit{accord Md. Code Ann., Cts. & Jud. Proc. § 3-207(b)
(1995)} ("If the opposing party denies existence of an arbitration agreement, the court
shall proceed expeditiously to determine if the agreement exists.").

\textsuperscript{73} \textit{Gold Coast Mall}, 298 Md. at 104-07, 468 A.2d at 95-97.

\textsuperscript{74} Id. at 104, 468 A.2d at 95.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} \textit{See, e.g., Kirby & McGuire, Inc. v. Board of Educ.}, 210 Md. 383, 385, 123 A.2d 606,
608 (1956) (explaining the incorporation of a construction contract into a performance
bond).

\textsuperscript{78} \textit{See Hartford Acc. & Indem. Co. v. W. & J. Knox Net & Twine Co.}, 150 Md. 40, 45,
132 A. 261, 262 (1926) (indicating that the liability of a surety is dependent upon its
agreements).
where possible. Where a contract is incorporated by reference into a bond, the bond and the contract "[will] be read and construed together, as if [the contract is] set forth in the bond." 79

In summary, while Maryland recognizes the strong public policy supporting arbitration, 81 a court cannot compel a party to submit a dispute to arbitration where that party has not agreed contractually to do so. 82 Maryland, however, has never directly addressed the issue of whether a performance bond that incorporates by reference a subcontract containing a provision mandating arbitration of disputes between parties to the subcontract entitles the surety to compel the obligee to arbitrate in an action on the bond. A review of other jurisdictions, therefore, is necessary to gain a full understanding of the development of the law in this area. 83

b. Law from Other Jurisdictions.—In jurisdictions other than Maryland, there has been a clear trend toward a more liberal interpretation of arbitration clauses. 84 The primary impetus for this trend has been the strong public policy favoring arbitration. 85 For example, in Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., 86 the California Court of Appeals held that by incorporating the general contract by reference in its bond, the surety intended and agreed to be bound by the arbitration provision of the contract even though it was not a party to the contract. 87 In Boys Club, the general contractor, McLaughlin, had entered into a contract to construct a recreation facility for the Boys Club. 88 The contractor obtained a performance bond, which incorporated the construction contract by reference, through Fidelity and Deposit Co. of Maryland in favor of the Boys

80. Kirby & McGuire, 210 Md. at 385, 123 A.2d at 608.
82. See, e.g., Curtis G. Testerman Co. v. Buck, 340 Md. 569, 579, 667 A.2d 649, 654 (1995) (finding that although Maryland recognizes the public policy favoring arbitration, an arbitration agreement must first exist between the parties).
83. The Court of Appeals has noted that federal decisions interpreting the Federal Arbitration Act are persuasive when construing the MUAA based on the similar policies behind the two acts. See Testerman, 340 Md. at 580 n.5, 667 A.2d at 655 n.5.
85. See id. at 23 (referring to both a strong federal and prevailing state policy favoring arbitration).
86. 8 Cal. Rptr. 2d 587 (Ct. App. 1992).
87. Id. at 590.
88. Id. at 588.
A dispute over defects in construction arose, and the Boys Club moved to compel the surety to arbitrate. The surety argued that it could not be held to the arbitration agreement because it was not a party to the contract containing that agreement. The court, however, rejected this argument, reasoning that the act of incorporating the construction contract containing the arbitration agreement was an expression by the surety of its intent "to be bound by the arbitration provision in the contract even though it was not a party to the contract." The Boys Club court additionally relied on the strong public policy in favor of arbitration to support its decision to compel the surety to arbitrate.

The United States District Court for the District of Maine also addressed the issue of incorporation by reference in a case in which the performance bond referred specifically to litigation. In Cianbro Corp. v. Empresa Nacional de Ingenieria y Technologia, S.A. the court held that a surety was bound to arbitrate a dispute under its bond, which incorporated by reference a subcontract containing a mandatory arbitration clause. In Cianbro, the owner of the Fairfield Energy Venture contracted with Cianbro to construct a wood-fired power plant. In a subcontract containing a mandatory arbitration clause, Empresa Nacional de Ingenieria y Technologia, S.A. (ENSA)
agreed to provide Cianbro with materials and services.\textsuperscript{98} ENSA obtained a performance bond, which incorporated the subcontract by reference, with the Insurance Company of North America in favor of Cianbro.\textsuperscript{99} A dispute over the performance of ENSA arose, and when the American Arbitration Association released the surety from arbitration, Cianbro brought suit to compel the surety to arbitrate.\textsuperscript{100}

The court, applying section 4 of the Federal Arbitration Act,\textsuperscript{101} relied heavily on the strong public policy supporting arbitration in rejecting the surety's argument that language in the bond agreement referring to litigation manifested the parties' intent not to arbitrate.\textsuperscript{102} Basing its ruling on the incorporation of the subcontract into the bond, the Cianbro court reasoned that "[t]he mere fact that [the surety] is not a signatory to the Subcontract . . . does not preclude it from being subject to the arbitration clause."\textsuperscript{103} Thus, rejecting the allegedly expressed intent of the surety, the court ordered the surety to arbitrate the dispute with the contractor.\textsuperscript{104}

The Florida District Court of Appeals addressed the issue of whether a non-party to an agreement could compel arbitration in \textit{Henderson Investment Corp. v. International Fidelity Insurance Co.}\textsuperscript{105} The Henderson court held that a surety could compel arbitration when its performance bond incorporated by reference a construction contract containing an arbitration clause.\textsuperscript{106} In \textit{Henderson}, an owner had agreed to bind himself to arbitration for all contract disputes between himself and the contractor.\textsuperscript{107} Significantly, the incorporated arbitra-

\begin{itemize}
  \item \textsuperscript{98} \textit{Id.} The arbitration agreement read in pertinent part: "'All other claims, disputes, and other matters in question arising out of or relating to this Agreement or the breach thereof . . . shall be decided by arbitration . . . .' \textit{Id.} at 16 n.1 (quoting Article 14.2 of the subcontract between the general contractor and the subcontractor).
  \item \textsuperscript{99} \textit{Id.} at 16.
  \item \textsuperscript{100} \textit{Id.} at 17.
  \item \textsuperscript{102} \textit{See Cianbro}, 697 F. Supp. at 19 (finding that the language of the bond was not intended to preempt the arbitration clause incorporated by reference from the subcontract).
  \item \textsuperscript{103} \textit{Id.} at 17.
  \item \textsuperscript{104} \textit{Id.} at 18.
  \item \textsuperscript{105} 575 So. 2d 770 (Fla. Dist. Ct. App. 1991).
  \item \textsuperscript{106} \textit{Id.} at 772.
  \item \textsuperscript{107} \textit{Id.} at 771.
\end{itemize}
tion clause specifically identified the owner and the contractor. Later, the owner filed an action against the contractor’s bond alleging breach of contract; as a result, the surety moved to compel arbitration under the arbitration clause of the construction contract.

The Florida District Court of Appeals relied on the general rule of contract law “that where a writing expressly describes another document, the other document is to be interpreted as part of the writing.” Additionally, the court emphasized that the surety’s obligations under the bond agreement are commensurate with those of the contractor under the subcontract. Finally, the Henderson court held that when a surety incorporates by reference a construction contract containing an arbitration clause, it is bound to arbitrate; therefore, the surety “should also be allowed to invoke arbitration as well.”

Even when faced with the strong public policy favoring arbitration, Maryland courts have refused to rewrite contracts. By so doing, Maryland has resisted a trend followed in many other jurisdictions and has preserved the requirement for an express agreement to arbitrate.

3. The Court’s Reasoning.—In Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates Ltd. Partnership, the Court of Appeals addressed the issue of whether a surety, which issued a performance bond that incorporated by reference a mandatory arbitration clause from the contract between the principal and the obligee, can compel the obligee to arbitrate in an action on the bond. The Court of Appeals held that the surety could not force a developer to arbitrate an action on a bond, when that developer had not agreed to arbitrate its claim against the surety. The court’s analysis focused primarily on three areas: the fundamentals of Maryland arbitration law, the ef-

108. Id. The arbitration clause stated in pertinent part: “All claims, disputes and other matters in question between the contractor and the owner arising out of, or relating to, the contract documents or the breach thereof, . . . shall be decided by arbitration . . . .” Id. (quoting the contract between the owner and the contractor).
109. Id.
110. Id. (citation omitted).
111. Id.
112. Id. at 772.
114. See supra notes 84-112 and accompanying text.
115. See, e.g., Testerman, 340 Md. at 579-80, 667 A.2d at 654.
117. Id. at 131-32, 695 A.2d at 157.
fect of incorporating contract clauses, and the balancing of the strong public policy in favor of arbitration against basic common law principles of contract law.\textsuperscript{118}

In addressing the issue of whether a surety can enforce an arbitration agreement in a contract to which it was a non-party, the court began by summarizing the fundamentals of arbitration law in Maryland.\textsuperscript{119} Specifically, the court looked to its decision in \textit{Curtis G. Tes
terman Co. v. Buck} for guidance.\textsuperscript{120} The court emphasized that arbitration is a voluntary process that requires an unambiguous agreement between two or more parties to arbitrate, and that no one can be forced to accept arbitration against her will.\textsuperscript{121} The court reasoned that “[a]rbitration is ‘consensual; a creature of contract. As such, only those parties who consent can be bound.”\textsuperscript{122} Applying these concepts to the facts of \textit{Hartford}, the court found that the only parties who had agreed to arbitrate in this case were SHALP and Kraus.\textsuperscript{123}

The court next reviewed the attempt by Hartford to use the bond’s incorporation-by-reference clause to compel SHALP to arbitrate.\textsuperscript{124} The Court of Appeals, agreeing with the Court of Special Appeals, found that the SHALP-Kraus contract contained a specific agreement “whereby those two parties agree[d] to arbitrate with each other.”\textsuperscript{125} The court indicated that the incorporation clause simply served to indicate the primary contract on which the bond depends.\textsuperscript{126} The court thus concluded that the net effect of incorporat-

\begin{footnotesize}
\textsuperscript{118} See \textit{id.} at 127-32, 695 A.2d at 155-57.
\textsuperscript{119} \textit{Id.} at 127, 695 A.2d at 155.
\textsuperscript{120} \textit{Id.} (citing \textit{Tes
terman}, 340 Md. at 578-80, 667 A.2d at 653-55).
\textsuperscript{121} \textit{Id.} (citing \textit{Gold Coast Mall, Inc. v. Larmar Corp.}, 298 Md. 96, 103, 468 A.2d 91, 95 (1983)).
\textsuperscript{123} \textit{Id.} at 128, 695 A.2d at 155-56. Hartford’s claim to arbitration was based on the incorporation of the SHALP-Kraus contract in a bond agreement that Hartford itself had prepared. \textit{Id.}
\textsuperscript{124} See \textit{id.} at 129, 695 A.2d at 156.
\textsuperscript{125} \textit{Id.} at 128, 695 A.2d at 155. The court also pointed out that because the SHALP-Kraus contract lacked a requirement for inclusion of an arbitration provision in any bond furnished by Kraus, Hartford’s claim for arbitration relied exclusively on the incorporation-by-reference clause contained in the performance bond issued by Hartford. \textit{Id.}, 695 A.2d at 155-56.
\textsuperscript{126} See \textit{id.} at 128, 695 A.2d at 156 (“[O]rdinarily the surety bond will be interpreted in the light of the contract, the performance of which is secured by the bond. The use of an express incorporation by reference clause is therefore more a matter of caution to make certain that the bond will be so construed.” (quoting 13 \textit{George J. Couch, Couch Cyclo
cpedia of Insurance Law} § 47:24, at 244 (2d ed. rev. vol. 1982))).
\end{footnotesize}
ing the arbitration clause of the primary contract into the bond was nothing more than incorporating the explicit agreement between SHALP and Kraus.  

Moreover, the court refused to approve the surety's attempt to expand the obligation of the obligee, SHALP. The obligee, the court found, was not a direct party to the agreement between the principal and the surety, and the obligee never expressly agreed to arbitrate with the surety. The court reasoned that the bond served "‘to protect the [owner] from loss . . . and [could not] be construed to add to, or change any of the terms of the contract.’"  

The court also directly addressed the strong public policy favoring arbitration, a policy that has been the primary reason that other jurisdictions have ruled differently on this issue. In so doing, the court criticized the reliance of courts in other jurisdictions on this policy at the expense of a true analysis of the underlying contract. The Court of Appeals stressed that a proper analysis must include a thorough review of the express language contained within the arbitration clause and must respect the contract rights of the parties. The court noted that, in this case, the arbitration clause explicitly identified the developer and the contractor as the parties to the arbitration clause. In Hartford, the court applied the requirement of a mutual express agreement and refused to follow a blanket public policy favoring arbitration at the expense of the contract rights of one of the parties to the agreement.

127. Id. at 129, 695 A.2d at 156.
128. Id. at 129-30, 695 A.2d at 156-57.
129. Id. The court emphasized that SHALP did not exhibit an element of consensual modification regarding the scope of the agreement to arbitrate. Id. at 130, 695 A.2d at 157. Thus, the court surmised, SHALP's acceptance of the surety agreement could not be viewed as an acceptance of an offer by Hartford to arbitrate. Id.
130. Id. at 130, 695 A.2d at 156-57 (quoting Milske v. Steiner Mantel Co., 103 Md. 235, 247, 63 A. 471, 473 (1906)).
131. See id. at 131, 695 A.2d at 157. The court acknowledged that support for Hartford's position can be found in other jurisdictions, but it dismissed the reasoning in these cases as inconsistent with Maryland's contract analysis. See id. at 130-31, 695 A.2d at 157; see also supra notes 84-112 and accompanying text (discussing the trend in other jurisdictions to rule in favor of arbitration).
132. See Hartford, 346 Md. at 129 n.7, 695 A.2d at 156 n.7 ("The analysis . . . [in other jurisdictions] does not go beyond the fact that the contract containing an arbitration provision has been incorporated into the bond.").
133. See id. at 127-32, 695 A.2d at 155-57.
134. Id. at 128, 695 A.2d at 155; see also supra note 10 and accompanying text.
135. Hartford, 346 Md. at 131, 695 A.2d at 157.
4. **Analysis.**—In *Hartford*, the Court of Appeals held that a court cannot compel a party to submit a dispute to arbitration in the absence of a contractual agreement to do so.\textsuperscript{136} The court's decision, which comports with Maryland precedent,\textsuperscript{137} reflects the Maryland judiciary's refusal to disregard basic contracting principles.\textsuperscript{138} The Court of Appeals appropriately refused to rewrite the clear language of the contract, even to comply with the strong public policy supporting arbitration.\textsuperscript{139}

a. **Hartford Distinguished from Seemingly Similar Cases.**—Although *Hartford* is consistent with Maryland law, a large number of other jurisdictions have held the opposite in factually similar cases.\textsuperscript{140} In those cases, however, there were subtle but significant factual differences. In particular, there are two facts that distinguish *Hartford* from most of these non-Maryland cases in which courts have compelled arbitration in similar circumstances: the party that is being compelled to arbitrate and the specificity of the arbitration agreement.\textsuperscript{141}

First, in *Hartford*, the party seeking to compel arbitration was the surety,\textsuperscript{142} whereas in the majority of non-Maryland cases on point the surety was being compelled to arbitrate.\textsuperscript{143} The specific party seeking

\textsuperscript{136} Id. at 131-32, 695 A.2d at 157.

\textsuperscript{137} See *supra* notes 28-80 and accompanying text. *Hartford* may even be viewed as an extension of Maryland law, because it is the first Maryland case in which a non-party to an arbitration provision attempted to compel a party to the provision to arbitrate.


\textsuperscript{139} See *Hartford*, 346 Md. at 131, 695 A.2d at 157 (recognizing that "there is a strong policy favoring arbitration and a strong policy to avoid repetitious hearings"); see also A.B. Eng'g Co. v. RSH Int'l, Inc., 626 F. Supp. 1259, 1263 (D. Md. 1986) (mem.) (refusing to construe an arbitration agreement liberally to impose obligations on a non-party to the agreement).

\textsuperscript{140} See *supra* notes 84-112 and accompanying text.

\textsuperscript{141} See, e.g., Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co., 8 Cal. Rptr. 2d 587, 590-91 (Ct. App. 1992) (holding a non-party bound to a broadly worded arbitration clause); see also *supra* notes 86-93 and accompanying text.

\textsuperscript{142} *Hartford*, 346 Md. at 126, 695 A.2d at 154.

\textsuperscript{143} See, e.g., Exchange Mut. Ins. Co. v. Haskell Co., 742 F.2d 274, 276 (6th Cir. 1984) (per curiam) (holding that a surety was bound by an arbitration clause in a performance bond that incorporated by reference the terms of a subcontract, which, in turn, incorporated the obligations of the general contract); Cianbro Corp. v. Empresa Nacional de Ingenieria y Tecnologia, S.A., 697 F. Supp. 15, 18 (D. Me. 1988) (order) (holding that an arbitration clause in a subcontract was incorporated by reference into performance and payment bonds, and ordering a surety to arbitrate on the grounds of these incorporations); Boys Club, 8 Cal. Rptr. 2d at 590-91 (holding that by incorporating a construction contract by language in its bond, a surety intended and agreed to be bound by an arbitration provision in the contract, despite being a non-party to that contract).
to compel arbitration is an important factor to be considered in ruling on cases such as those at issue. When a surety bonds the work of a contractor and, in so doing, incorporates the construction contract into the bond agreement, it has taken an affirmative step to include the arbitration clause. It is thus reasonable to require the surety to arbitrate under the incorporated provision, because the surety drafted the bond to include the arbitration clause. Conversely, an owner may have required a performance bond without having necessarily expressly agreed to arbitrate disputes under the bond, as was the case in *Hartford.*

To force the owner to arbitrate would violate that party's clearly expressed intent under the original contract. While the surety may make an informed decision to contract with the principal and bind itself to the obligee, the obligee does not necessarily make such a choice. Therefore, the obligee should not be bound to arbitrate with the surety.

Second, broad, inclusive language in the arbitration clause (as opposed to narrow, exclusive language in the same) may have a major impact on whether a nonsignatory will fall under the scope of the arbitration agreement. For example, if the parties to the original contract agree to a broad arbitration clause consenting to arbitrate all disputes related to the contract, then the arguments for inclusion within the scope of the arbitration agreement are strong. Conversely, if, as in *Hartford,* the parties to the original contract clearly indicate their intent to limit the parties included in the agreement, that intent must be respected in compliance with the objective theory of contracts. The Court of Appeals in *Hartford* was correct in not allowing the surety to compel arbitration. By complying with the specificity of the incorporated arbitration agreement, the court properly adhered to the objective theory of contracts.

**b. Contract Interpretation.**—The objective theory of contracts remains the fundamental and guiding rule in Maryland. Under

144. See *Hartford,* 346 Md. at 130, 695 A.2d at 157.
145. See, e.g., *Hartford,* 109 Md. App. at 292, 674 A.2d at 142-43 (finding that a narrow arbitration clause only requires arbitration between the parties to the agreement and that the act of incorporating one contract into another does not automatically expand the scope of the original arbitration agreement).
146. See, e.g., *Boys Club,* 8 Cal. Rptr. at 590-91 (holding that a surety was bound by a broad arbitration clause where a performance bond incorporated by reference the terms of a general contract containing the broad arbitration clause).
147. See *Hartford,* 109 Md. App. at 290-91, 674 A.2d at 142 (“A fundamental principle of contract interpretation is to ascertain and effectuate the intention of the parties . . . .”).
148. See *Hartford,* 346 Md. at 131-32, 695 A.2d at 157.
149. See *Hartford,* 109 Md. App. at 290-91, 674 A.2d at 142.
that theory, a court determines from the language of the contract what a reasonable person in the position of the parties would have understood at the time of the agreement.\textsuperscript{150} Applying these fundamentals, the Court of Appeals in \textit{Hartford} properly reviewed the intent of the surety and the owner as expressed in the clear language of the agreements and determined that neither party had clearly expressed consent to be bound to arbitration.\textsuperscript{151}

In \textit{Hartford}, the bond agreement made no mention of the surety's intent to arbitrate and \textit{actually indicated an intention to litigate disputes}.\textsuperscript{152} Specifically, the bond had a clause pertaining to the institution of suits: "\textquote{Any suit under the bond must be instituted before the expiration of two years from the date on which final payment under the subcontract falls due.}"\textsuperscript{153} In order to be consistent with Hartford's argument for arbitration, this clause would have to be read out of the bond agreement.\textsuperscript{154} Eliminating this clause would conflict with the principle that a contract should not be interpreted in a manner that disregards a significant portion of the agreement.\textsuperscript{155}

Because the surety failed to indicate an intent to arbitrate in the contract documents, it should not be allowed to choose unilaterally its method of dispute resolution. It would have been easy for the surety, as the drafter of the bond agreement, to include a clause that clearly indicated its desire to arbitrate all or any disputes. Not only did Hartford fail to do this, it created an inconsistency by referring to "any suit" in the bonding agreement and by attempting to incorporate a contract that included an arbitration clause.\textsuperscript{156} Consistent with the rules of contract interpretation, the Court of Appeals correctly interpreted the bond agreement against the party who drafted the document, i.e., Hartford.\textsuperscript{157}

The owners' intent, as expressed in the language of the primary contract, was to arbitrate disputes under the contract, not under the

\begin{itemize}
\item \textsuperscript{150} See \textit{id.} at 290-91, 674 A.2d at 142 (holding that the intent of the parties as expressed in the language of the contract controls the analysis); \textit{accord} Kasten Constr. Co. v. Rod Enters., 268 Md. 318, 328, 301 A.2d 12, 18 (1973) (same).
\item \textsuperscript{151} See \textit{Hartford}, 346 Md. at 129-32, 695 A.2d at 156-57.
\item \textsuperscript{152} \textit{Hartford}, 109 Md. App. at 293, 674 A.2d at 143.
\item \textsuperscript{153} \textit{id.} (quoting the bond issued by Hartford).
\item \textsuperscript{154} See \textit{id.} (noting that to allow Hartford to compel arbitration would require the court to disregard a provision of the bond agreement).
\item \textsuperscript{155} See Bausch \& Lomb Inc. v. Utica Mut. Ins. Co., 330 Md. 758, 782, 625 A.2d 1021, 1033 (1993) (explaining that contracts must be construed in their entirety).
\item \textsuperscript{156} See \textit{Hartford}, 109 Md. App. at 293-94, 674 A.2d at 143.
\item \textsuperscript{157} See \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 206 (1981) (indicating a preference for the meaning that operates against the drafter of the contract when choosing the reasonable meaning).
\end{itemize}
bond.\textsuperscript{158} By refusing to allow the surety to compel the owner to arbitrate, the Court of Appeals correctly refused to expand the obligation of the owner.\textsuperscript{159} In so doing, the court complied with the objective theory of contracts by not forcing the owner to meet an obligation to which he never consented.\textsuperscript{160} Notably, the Court of Appeals had previously recognized this issue in \textit{Milske v. Steiner Mantel Co.},\textsuperscript{161} in which it found that a bond could not enlarge an obligee's commitments under a contract.\textsuperscript{162} The \textit{Hartford} court remained properly committed to the objective theory of contracts even when faced with strong public policy favoring arbitration.

c. \textit{Non-application of the Public Policy Favoring Arbitration.}—Many jurisdictions have demonstrated a willingness to apply the public policy favoring arbitration at the possible expense of the contract rights of the parties involved.\textsuperscript{163} The public policy in favor of arbitration, however, should never trump the parties' actual and clearly expressed intent and freedom to contract. Considering a history of consistent application of the common law, and now the Maryland Uniform Arbitration Act, the Court of Appeals's decision in \textit{Hartford} is well supported.\textsuperscript{164}

A court should not rewrite the plain language of a contract and force a party to forfeit its right to litigate a dispute, even to accommodate the strong and sensible public policy in favor of arbitration.\textsuperscript{165} As

\textsuperscript{158} See supra note 10 and accompanying text.
\textsuperscript{159} See \textit{Milske v. Steiner Mantel Co.}, 103 Md. 255, 247, 63 A. 471, 473 (1906) (finding that because the bond was an independent and collateral contract, it could not change the terms of the general contract).
\textsuperscript{160} See \textit{Hartford}, 109 Md. App. at 290-91, 674 A.2d at 142 (explaining that the objective theory of contracts directs that the intent of the parties as expressed in the language of the contract controls the analysis).
\textsuperscript{161} 103 Md. 235, 63 A. 471 (1906).
\textsuperscript{162} \textit{Id.} at 247, 63 A. at 473.
\textsuperscript{163} See supra notes 84-112 and accompanying text.
\textsuperscript{164} See supra notes 28-80 and accompanying text.
\textsuperscript{165} See Curtis G. Testerman Co. v. Buck, 340 Md. 569, 580-81, 667 A.2d 649, 654-55 (1995) (finding that although Maryland recognizes the strong public policy supporting arbitration, an arbitration agreement must first exist between the parties). The basis for the public policy favoring arbitration is to save time and judicial resources, and to encourage resolution of disputes in a forum chosen by and controlled by the voluntary agreement between the parties. See Bel Pre Med. Ctr. v. Frederick Contractors, 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974) (explaining the support for the MUAA), cause remanded, 274 Md. 307, 334 A.2d 526 (1975). One Maryland court emphasized that public policy should not be invoked to alter a contract: "One may not be required to do what he did not promise merely because what he did promise was not sufficient to meet the requirements of some real or supposed public policy." Mayor of Baltimore \textit{ex rel.} Lehigh Structural Steel Co. v. Maryland Cas. Co., 171 Md. 667, 672-73, 190 A. 250, 253 (1937).
established in Testerman, a valid agreement to arbitrate must exist before the court will apply the public policy favoring arbitration.\textsuperscript{166} The SHALP-Kraus contract indicated SHALP's intent to arbitrate with Kraus.\textsuperscript{167} The incorporation by reference of the arbitration agreement into the performance bond, as argued by Hartford, would require the expansion of the owner's agreement to arbitrate without its express consent.\textsuperscript{168} The performance bond, however, is designed to protect the owner and cannot be interpreted to enlarge the owner's obligation under the contract by expanding its agreement to arbitrate to the surety.\textsuperscript{169} Therefore, the instant case does not make it over that initial hurdle, erected by the Court of Appeals in Testerman, because no agreement existed between SHALP and Hartford to arbitrate.\textsuperscript{170}

In refusing to allow the surety to compel the owner to arbitrate, the Hartford court properly refused to interpret the incorporated arbitration clause liberally. In so doing, the court avoided the dangers inherent in liberal interpretation of such clauses. The court had previously recognized these dangers in Continental Milling & Feed Co. v. Doughnut Corp. of America, when it noted that the fundamental rights of parties involved in an arbitration agreement—such as the right to trial by jury\textsuperscript{171} or public tribunal\textsuperscript{172}—should not be taken away merely by implication.\textsuperscript{173} Instead, the express agreement of both parties is required before arbitration proceedings can take precedence over any fundamental right.\textsuperscript{174}

With this decision, the court gives notice that parties who seek to incorporate clauses from other contracts into their agreement must


\textsuperscript{167} See supra notes 10, 158-162 and accompanying text.

\textsuperscript{168} See supra notes 159-160 and accompanying text.

\textsuperscript{169} See Milske v. Steiner Mantel Co., 103 Md. 235, 247, 63 A. 471, 473 (1906) (finding that because the bond was an independent and collateral contract, it could not change the terms of the general contract); supra note 162 and accompanying text.

\textsuperscript{170} See Hartford, 346 Md. at 128, 695 A.2d at 155-56.

\textsuperscript{171} See Continental Milling & Feed Co. v. Doughnut Corp. of Am., 186 Md. 669, 676, 48 A.2d 447, 450 (1946) (holding that the express consent of the parties is required to establish an arbitrator's authority); see also U.S. CONST. amend. VII (preserving the right to trial by jury in suits at common law); Md. CONST. DECL. OF RTS. arts. 5, 23 (preserving the right to trial by jury in criminal and civil proceedings).

\textsuperscript{172} See Continental, 186 Md. at 675, 48 A.2d at 450 (finding that no one should be compelled to resort to arbitration against her will).

\textsuperscript{173} Id. at 676, 48 A.2d at 450 (finding that express consent of both parties is required to create the basis for jurisdiction of arbitration proceedings, because such rights "cannot be taken away in any case merely by implication").

\textsuperscript{174} See id. (providing protection from unintended contractual arrangements); supra notes 136, 149-162 and accompanying text.
ensure that the language of the contract clearly and unambiguously allows them to benefit from the rights expressed in the incorporated clause. This is especially important in complex contractual arrangements involving multiple parties.\textsuperscript{175} Although modern courts have developed rules, such as joinder and intervention, to accommodate multiple parties in consolidated proceedings,\textsuperscript{176} arbitration agreements rarely include such rules.\textsuperscript{177} Traditionally, arbitration involves disputes between two parties to a written agreement.\textsuperscript{178} The fact that parties are allowed to construct their own agreements and procedures for resolving disputes often results in the failure to address multiparty scenarios.\textsuperscript{179} Therefore, the advantages of arbitration, including speed and judicial efficiency, may ironically be sacrificed in multiparty situations due to the non-availability of "procedural advantages critical to expeditious resolution of a multiparty controversy."\textsuperscript{180} It follows then, that continued adherence to the objective law of contracts in Maryland will ensure a persistent protection against unintended contractual arrangements.

5. Conclusion.—Although the Court of Appeals, in Hartford, acknowledged the strong public policy arguments favoring arbitration, it refused to subjugate the traditional rules of contract and arbitration law to achieve this goal.\textsuperscript{181} Instead, the Court of Appeals properly distinguished Hartford from factually similar cases from other jurisdictions, in which the courts have compelled arbitration, based on the party being compelled to arbitrate and the specificity of the arbitration agreement.\textsuperscript{182} Furthermore, the Court of Appeals stood firmly by the fundamental rules of contract interpretation, including, most importantly, the requirement for an express agreement before a party can be forced into arbitration.\textsuperscript{183} In so doing, the court appropriately refused to rewrite the contract at issue, even to adhere to a strong public policy favoring arbitration.\textsuperscript{184} With this decision, the court gives notice to parties seeking to incorporate clauses from other con-
tracts that the language of both agreements must clearly support the inclusion of the rights the party hopes to incorporate.

Thomas P. Fort
IV. Contracts

A. Exculpatory Clause Requires Statement of Specific Intent

In Adloo v. H.T. Brown Real Estate, Inc., the Court of Appeals held that a real estate listing agreement and a lock-box authorization, each containing an exculpatory clause, did not sufficiently express an intent to shield a real estate company from liability for its negligence. In an opinion written by Chief Judge Bell, the court struck down the exculpatory clause because it did not "clearly, unequivocally, specifically, and unmistakably" express an intention to absolve a party from liability for its own negligence. The court held that although it does not need to contain the word "negligence," a valid exculpatory clause must evidence a clear intent to absolve the party from liability. The court's holding was consistent with Maryland precedent, which has upheld the "clear and unequivocal" standard for exculpatory clauses. The court, however, in its strict application of the standard, selectively analyzed case law and inadequately and inconsistently applied the standard's rationale to the facts of the case. In so doing, the court may have deviated from precedent by applying a more stringent and exacting standard—that of express negligence. By failing to explicitly require an express negligence standard, the court nonetheless retained flexibility to respond to sympathetic parties by refusing to enforce clauses it declares ambiguous.

I. The Case.—Abdolrahman and Monireh Adloo decided to sell their house, located in Silver Spring, Maryland, through an exclusive listing contract with Century 21 H.T. Brown Real Estate, Inc. (H.T. Brown). The listing contract contained the following clause:

REALTOR'S sole duty is to effect a sale of the property. . . . The entire property will be available to REALTOR for showing at all reasonable hours. . . . Neither REALTOR nor his agents or subagents are responsible for vandalism.

2. Id. at 267-68, 686 A.2d at 305.
3. Id. at 256, 686 A.2d at 299.
4. Id. at 267, 686 A.2d at 305.
5. Id. at 266-68, 686 A.2d at 304-05.
6. See infra notes 61, 68 and accompanying text.
7. The Adloo court found that, absent express language absolving a party from liability for its own negligence, the agreement's exculpatory clause applied only to situations enumerated in the clause that occurred without the party's negligence. Id. at 267-68, 686 A.2d at 305.
theft, or damage of any nature whatsoever to the property, nor is REALTOR responsible for the custody of the property, its management, maintenance, upkeep or repair.9

To facilitate the sale of the house, the Adloos allowed a lock-box to be placed on their door, which enabled their home to be shown when they were not there.10 They signed a lock-box agreement which advised them "[t]hat SELLER and BROKER have discussed the safeguarding of personal property and valuables located within [the house]."11 The lock-box contract also contained the following clause: "SELLER further acknowledges that neither Listing or Selling BROKER nor their agents are an insurer against the loss of personal property; SELLER agrees to waive and releases BROKER and his agents and/or cooperating agents and brokers from any responsibility therefore [sic]."12

H.T. Brown real estate agents explained few procedures to the Adloos.13 The Adloos were instructed, however, to disengage their security system to allow real estate agents to use the lock-box and enter their home.14 Moreover, the Adloos were told that if the agency planned to show the house to a prospective buyer, it would call ahead of time.15 On March 25, 1992, a man identifying himself as "Alvin Harris" called H.T. Brown to obtain the lock-box combination to the Adloo house.16 He claimed to be an agent of Shannon and Luchs, another real estate agency, and stated that he intended to show the Adloos' house that afternoon.17 "Mr. Harris" also provided a telephone number at which he could be reached.18 Following company procedure, an H.T. Brown employee contacted the Adloos to request

9. Record Extract at 538, Adloo (No. 1851).
10. Adloo, 344 Md. at 257-58, 686 A.2d at 300; see also Record Extract at 540, Adloo (No. 1851) ([T]he purpose and function of a lock-box is to permit access to the interior of [the house] by the listing Broker and his agents and/or cooperating agents and brokers."). The Adloos used a combination lock-box, which contained a key to the home for sale. Id. at 328 (testimony of Donna McBrain, H.T. Brown realtor). If someone dials the correct combination, the box detaches from the doorknob and a door on the box opens, permitting access to the house key. Id. at 329.
11. Record Extract at 540, Adloo (No. 1851).
12. Adloo, 344 Md. at 258, 686 A.2d at 300.
13. Record Extract at 56-57, 216, Adloo (No. 1851) (testimony of Monireh and Abdolrahman Adloo regarding lock-box procedure instructions provided by the realtor).
14. Adloo, 344 Md. at 258, 686 A.2d at 300.
15. Record Extract at 57, Adloo (No. 1851) (testimony of Monireh Adloo). Mrs. Adloo later testified that she received no other advice from the real estate company, apart from the lock-box authorization, on safeguarding valuables. Id. at 153.
16. Adloo, 344 Md. at 258, 686 A.2d at 300.
17. Id.
18. Id.
permission to show their home.\textsuperscript{19} She left a message on the telephone answering machine when nobody answered at the Adloo home.\textsuperscript{20} Even though her attempt to contact the Adloos was unsuccessful, the H.T. Brown employee called "Alvin Harris" back to give him the lock-box combination a few minutes later.\textsuperscript{21} H.T. Brown made no other attempt to verify "Mr. Harris's" bona fides.\textsuperscript{22}

The Adloos called their answering machine and received the message that a real estate agent planned to show their house that afternoon.\textsuperscript{23} Upon arriving home that evening, Mrs. Adloo gradually became aware that something was wrong when she found the house unlocked and discovered that some of her possessions were missing.\textsuperscript{24} The Adloos eventually discovered that $39,000 in cash, jewelry, rare rugs, artwork, and other property had been taken from their home.\textsuperscript{25} After Mrs. Adloo noticed that "Alvin Harris" was the last name signed in a log she kept for real estate agents to sign, she called the adjacent number and found it disconnected.\textsuperscript{26} She also learned that a real estate license had never been issued in the name of "Alvin Harris."\textsuperscript{27} Moreover, the phone number he had provided was not a Shannon and Luchs number.\textsuperscript{28}

As a result of their loss, the Adloos settled with their insurance carrier\textsuperscript{29} and sued H.T. Brown in the Circuit Court for Montgomery County for negligently disclosing the lock-box combination to "Mr. Harris" without exercising reasonable care to verify that he was indeed a real estate agent.\textsuperscript{30} A jury awarded the Adloos $20,000.\textsuperscript{31} H.T. Brown then moved for a judgment notwithstanding the verdict based on an affirmative defense that the lock-box authorization agreement expressly released them from liability and barred the Adloos' claims as

\textsuperscript{19} Record Extract at 339, \textit{Adloo} (No. 1851) (testimony of Donna McBrain regarding company procedure).
\textsuperscript{20} \textit{Id.} at 73.
\textsuperscript{21} \textit{Id.} at 193-94.
\textsuperscript{22} Company procedure was simply to call the agent back at the number the agent provided. \textit{Id.} at 339.
\textsuperscript{23} \textit{Id.} at 73.
\textsuperscript{24} \textit{Id.} at 74-78.
\textsuperscript{25} \textit{Id.} at 23.
\textsuperscript{26} \textit{Id.} at 77.
\textsuperscript{27} \textit{Adloo}, 344 Md. at 258, 686 A.2d at 300.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 259, 686 A.2d at 300.
\textsuperscript{30} See Record Extract at 23, \textit{Adloo} (No. 1851) (alleging in the complaint that the real estate company "knew or should have known that it was not maintaining proper security precautions").
\textsuperscript{31} \textit{Adloo}, 344 Md. at 259, 686 A.2d at 300.
a matter of law. The trial judge denied the motion, finding that the exculpatory clause, as it appeared in this particular case, was not "an absolute bar to recovery in all situations." In so ruling, the circuit court provided an economic rationale, finding that the real estate agent "was in control of the lock box" and, therefore, "could have kept the loss from happening."

The Court of Special Appeals reversed in an unreported per curiam opinion, holding that the exculpatory clause was enforceable. In emphasizing Maryland's policy of freedom of contract, the court examined the nature of the parties' relative risks and their expectations when entering into the contract, concluding that the seller accepted the risk of theft due to the use of a lock-box. The Court of Appeals subsequently granted the Adloos' petition for a writ of certiorari to consider whether the exculpatory clauses in the real estate listing contract and the lock-box authorization absolved H.T. Brown from liability for its own negligence.

2. Legal Background.—

a. Exculpatory Clauses Are Generally Valid in Maryland.—Maryland public policy, adhering to the doctrine of freedom of contract, grants parties the right and power to construct their own bargains. "Consistent with this policy, parties can generally agree to an exculpatory clause in a contract. Although the term "exculpatory clause" is
sometimes referred to by other names, including "indemnity clause" and "release," all of these clauses act similarly to transfer risk from one party to another. Inclusion of an exculpatory clause releases one or both parties from liability for their wrongful acts.

b. Exceptions to the General Rule: Exculpatory Clauses That Are Invalid by Law.—

(1) Judicially Created Exceptions.—While exculpatory clauses are generally enforced, Maryland courts have recognized several exceptions that invalidate such clauses: (1) intentional, reckless, wanton, or grossly negligent conduct; (2) exculpatory clauses produced by grossly unequal bargaining power; and (3) transactions impacting the public interest.

Traditionally, the public interest exception has applied only to common carriers, public utilities, and others with a public service obligation. Because of a disinclination to "invoke the nebulous public interest to disturb private contracts," the standard for invalidating an

"It is quite possible for the parties expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent. There is in the ordinary case no public policy which prevents the parties from contracting as they see fit . . . ."

Id. (omission in original) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 482 (5th ed. 1984)).

In a 1962 case of first impression, Eastern Avenue Corp. v. Hughes, 228 Md. 477, 180 A.2d 486 (1962), the Court of Appeals held that an exculpatory clause in a lease was valid and not against public policy. Id. at 480, 180 A.2d at 488.

40. See Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) ("[T]hese agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk.").

Despite the interchangeability of the terms, a distinction must be made between exculpatory clauses and indemnity clauses. The exculpatory clause refers to a clause that acts to release one party to the contract from liability for certain future acts of its own negligence that harm the other party. John D. Perovich, Annotation, Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R.3d 321, 323 n.2 (1973). An indemnity clause, also known as a "hold harmless" clause, covers harm sustained by third parties that might be caused by one of the contracting parties, and shifts the financial burden for the payment of damages from the injured party to the contracting party assuming responsibility for such harm. Id.

41. BLACK'S LAW DICTIONARY 566 (6th ed. 1991) (defining exculpatory clause as "[a] contract clause which releases one of the parties from liability for his or her wrongful acts. A provision in a document which protects a party from liability arising, in the main, from negligence").

42. Wolf, 335 Md. at 531-32, 644 A.2d at 525-26 (citing Winterstein v. Wilcom, 16 Md. App. 130, 135-36, 293 A.2d 821, 824-25 (1972)).

43. Id. at 532, 644 A.2d at 526; see also RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1981) (stating the common law rule that prohibits public service workers from exempting themselves from liability).
exculpatory clause under the public interest exception is "strict." In determining what constitutes the public interest, the court disfavors formulaic multi-factor tests and instead prefers a totality of the circumstances approach.

(2) Statutorily Created Exceptions.—The Maryland legislature has also enacted statutes forbidding exculpatory clauses in certain types of contracts about which it had public policy concerns. For instance, responding to Hughes, the General Assembly enacted a statute that voided exculpatory clauses in agreements between tenants and landlords as against public policy. The only other statute enacted in Maryland limiting exculpatory provisions prohibits certain construction industry indemnity agreements.

c. Standards for Determining the Enforceability of Exculpatory Clauses.—If an exception to the validity of exculpatory clauses does not apply, the court will look to the language of the clause. A clause will be enforced by the court if it determines that reasonable parties would have intended that it apply to that particular situation. To make this determination, the trial judge considers the nature of the clause, "its purpose, and the facts and circumstances of the parties at

44. Wolf, 335 Md. at 532, 644 A.2d at 526.
45. Id. at 535, 644 A.2d at 527 (rejecting the six-factor test of Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441 (1963), which was adopted in Winterstein, 16 Md. App. at 137, 293 A.2d at 825).
46. See Winterstein, 16 Md. App. at 142, 293 A.2d at 827 ("If the legislature deems it advisable to extend the prohibition against exculpatory clauses to agreements other than landlords and tenants, it is, of course, free to do so.").
50. See id. ("It is well settled that Maryland follows the objective law of contracts . . . [T]he true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."); Pacific Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985) ("The test [for interpreting the intention of the parties to a contract] is what meaning a reasonably prudent layperson would attach to the term.").

As it is generally applied to exculpatory clauses, the term "enforceability" can be distinguished from the term "validity." The latter refers to whether some public policy demands that the clause be invalidated. See Black's Law Dictionary, supra note 41, at 1075-76 (defining "valid" as "[h]aving legal strength or force . . . incapable of being rightfully overturned or set aside . . . [o]f binding force"). In contrast, a court deciding whether a clause is "enforceable" analyzes a specific fact situation and determines whether the clause applies to that situation. See id. at 365 (defining "enforce" as "[t]o put into execution; to cause to take effect; to make effective").
the time of execution.'\textsuperscript{51} Next, the judge examines the clause to determine if an ambiguity exists.\textsuperscript{52} She assigns words "their ordinary and accepted meanings."\textsuperscript{53} The clause is ambiguous when, "to a reasonably prudent person, the language used . . . is susceptible of more than one meaning."\textsuperscript{54}

\textbf{(1) "Clear and Unequivocal" Standard.}—The general rule in Maryland is that exculpatory clauses must express the parties' intention in "clear and unequivocal" terms.\textsuperscript{55} This "clear and unequivocal" standard was first established in Maryland in 1972 by the Court of Appeals in \textit{Crockett v. Crothers},\textsuperscript{56} when it considered whether to enforce an indemnity clause between two contractors constructing a sewage system.\textsuperscript{57} In \textit{Crockett}, an engineering contractor negligently failed to reveal a water main while drafting plans and specifications.\textsuperscript{58} Relying on those drawings, the building contractor ruptured a water main, causing a home to be flooded, which resulted in a lawsuit.\textsuperscript{59} However, the engineer claimed that a contract clause entitled him to indemnity from the other contractor.\textsuperscript{60} Reasoning that the contractor did not agree "in so many words or otherwise unequivocally" to indemnify the engineer against his own negligence, the court declined to enforce the clause.\textsuperscript{61}


\textsuperscript{52} \textit{Id.}; see also \textit{AM.JUR. 2d Indemnity § 19 (1996)} ("Where the language of the agreement regarding indemnification is not clear and unequivocal, then the indemnity provision is ambiguous and will not be enforced.").

\textsuperscript{53} \textit{Pacific Indem. Co.}, 302 Md. at 388, 488 A.2d at 488.

\textsuperscript{54} \textit{Heat & Power Corp.}, 320 Md. at 596, 578 A.2d at 1208; see also \textit{BLACK'S LAW DICTIONARY}, \textit{supra} note 41, at 1057 (defining "unambiguous" as "[s]usceptible of but one meaning. A contract provision is 'unambiguous' if its meaning is so clear as to preclude doubt by a reasonable person").

\textsuperscript{55} \textit{Heat & Power Corp.}, 320 Md. at 593, 578 A.2d at 1206-07.

\textsuperscript{56} 264 Md. 222, 285 A.2d 612 (1972).

\textsuperscript{57} \textit{Id.} at 227-28, 285 A.2d at 615. The case took place before the enactment of a statute invalidating construction contract exculpatory clauses. \textit{See supra} note 42.

\textsuperscript{58} 264 Md. at 223-24, 285 A.2d at 613.

\textsuperscript{59} \textit{Id.} at 223, 285 A.2d at 613.

\textsuperscript{60} \textit{Id.} at 228, 285 A.2d at 615. Although the clause specifically provided that the engineer would not be liable for damages resulting from his own performance, it did not specifically indemnify the engineer against his own negligence. \textit{Id.} The court affirmed the trial court's finding that the engineer was negligent and, therefore, liable for the damage. \textit{Id.}

\textsuperscript{61} \textit{Id.}
In *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, the Court of Appeals reaffirmed the standard it had set forth in *Crockett*. In *Heat & Power Corp.*, a property owner entered into a contract with a contractor to construct a building according to the owner's design and specification. During construction, the building exploded, injuring an employee of the contractor. The parties did not dispute that the owner was solely negligent in designing a building incapable of being used for its intended industrial purpose. At issue for the court was the interpretation of a contract clause that purported to give rise to a duty of the contractor to indemnify the owner. Applying the standard from *Crockett*, the court stated the contract was not sufficiently "clear and unequivocal" to indemnify the owner against its own negligence.

Maryland courts, however, have been inconstant in applying that standard. While the courts generally recognize the existence of two approaches toward the enforcement of general exculpatory clauses—clauses that typically promise to indemnify another against "any and all claims"—they have not conclusively settled the preferred Maryland approach. The possible approaches are characterized in the following sections.

(a) **Literal Enforcement.**—The most liberal approach to determine whether an exculpatory clause is enforceable is the "literal en-

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63. *Id.* at 593, 578 A.2d at 1206-07. This part of the opinion, however, is dicta because the clause was invalidated by the statute. *Id.* at 592-93, 578 A.2d at 1206.
64. *Id.* at 587, 578 A.2d at 1204.
65. *Id.* at 587-88, 578 A.2d at 1204.
66. *Id.* at 588, 578 A.2d at 1204.
67. *Id.*
68. *Id.* at 593, 578 A.2d at 1206-07.

There are two divergent views on the question of what constitutes a sufficient expression of the intent of the parties concerning the indemnification of the landlord for his own negligence. One view is that the clear and unequivocal requirement is met only by specific reference in the indemnity clause to the landlord's negligence. The other major view is that specific reference is not necessary.

*Id.* (footnote omitted). The more liberal interpretation is appropriately known as the "literal enforcement" approach. *See infra* text accompanying notes 77-89. For a proposed clarification of the distinction between the two interpretive approaches, see *infra* note 131.
forcement" approach to interpreting "clear and unequivocal" clauses. A few Maryland cases have applied this approach to enforce broadly worded exculpatory clauses as long as the clauses clearly and unambiguously encompassed damages from unforeseen events. In one early Maryland case, *Eastern Avenue Corp. v. Hughes*, the Court of Appeals enforced a broadly worded contract. In *Hughes*, a clause between a tenant and landlord provided:

The Tenant covenants and agrees that the Landlord shall not be liable for any injury to his person or damages to his property occasioned by failure to keep the demised premises in repair or howsoever caused . . . and Tenant agrees he will not hold Landlord responsible in any way, whether such accident occurred in any of the Landlord's buildings or on any of its property.

The court held that it had "no doubt that the language used, however strictly construed, [was] broad enough to cover the claim for damages in the instant case." Although the *Hughes* court made a comprehensive statement, it applied no specific standard in its opinion.

More recently, in 1990, the Court of Special Appeals addressed whether a contract clause could exculpate a party from damages caused by unforeseen events, which could presumably include damages caused by a party's negligence, in *State Highway Administration v. Greiner Engineering Sciences, Inc.* In *Greiner*, the State Highway Administration (SHA) contracted with a design consultant to perform engineering services for the construction of a road in western Maryland. The consultant signed an exculpatory clause providing that the SHA

70. Such phrases typically use general exculpatory language such as a promise to indemnify against "any and all claims" without reference to a particular cause of loss or damage. *Cf.* 41 Am. Jur. 2d *Indemnity* § 20 (1995) ("General phrases indicating that the indemnitor agrees to indemnify the indemnitee from and against loss, damage or injury 'from any act or omission' of the indemnitee, or 'occasioned by' the indemnitee, may be sufficient to impose liability on the indemnitor.").

72. 228 Md. 477, 180 A.2d 486 (1962).
73. *Id.* at 480, 180 A.2d at 488.
74. *Id.* at 479, 180 A.2d at 488.
75. *Id.*
76. *Id.* Similarly, in *Rigger v. Baltimore County*, 269 Md. 306, 305 A.2d 128 (1973), the Court of Appeals enforced a broad indemnity clause without citing the standard established in *Crockett* a year earlier. *Id.* at 312, 305 A.2d at 132.
77. 83 Md. App. 621, 577 A.2d 363 (1990). In *Greiner*, neither of the parties claimed the other was negligent. However, the court found that enforcement of an exculpatory clause was not unconscionable even if the event triggering the clause was not within the parties' contemplation when they entered the agreement. *Id.* at 641, 577 A.2d at 373.
78. *Id.* at 624, 577 A.2d at 364.
would not be liable for damages caused by any delay.\textsuperscript{79} After the SHA caused numerous delays and stoppages, the consultant submitted a claim for damages from overruns.\textsuperscript{80} Although the parties had contemplated the impact of ordinary delays, the consultant argued that the character and extent of the delays were such that they were unforeseen.\textsuperscript{81} The court held that Maryland law followed the "literal enforcement approach,"\textsuperscript{82} under which a broadly worded exculpatory clause is enforceable if it clearly and unambiguously encompasses damages from unforeseen events.\textsuperscript{83} In so ruling, the court provided guidance for drafting exculpatory clauses by quoting a Wisconsin court's conclusion that parties can mutually assent to a clause without specifically anticipating all of the potential causes whereby damage may occur.\textsuperscript{84} The court noted that "it is the unforeseen events which occasion the broad language of the clause since foreseeable ones could be readily provided for by specific language."\textsuperscript{85} Because the court held that the clause was clear and unambiguous—and therefore enforceable—it did not need to inquire into the parties' initial contemplation.\textsuperscript{86}

A minority of other states have adopted the literal enforcement approach.\textsuperscript{87} These states explain that this approach is based upon the principle that a literal interpretation of the language of a general exculpatory clause, containing the words "any and all claims," is plainly...

\textsuperscript{79} \textit{Id.} at 629, 577 A.2d at 366-67. The clause stated that "[t]he Consultant agrees to prosecute the work continuously and diligently and no charges or claims for damages shall be made by him for any delays or hindrances, from any cause whatsoever . . . ." \textit{Id.} at 629, 577 A.2d at 367.

\textsuperscript{80} \textit{Id.} at 626-28, 577 A.2d at 365-66.

\textsuperscript{81} \textit{Id.} at 630, 577 A.2d at 367.

\textsuperscript{82} \textit{See id.} at 634-37, 577 A.2d at 369-71 (comparing the "literal enforcement approach" to the "New York approach," which does not enforce a contract clause where the damage was not contemplated by the parties).

\textsuperscript{83} \textit{Id.} at 638-39, 577 A.2d at 371-72.

\textsuperscript{84} \textit{Id.} at 635, 577 A.2d at 370 (quoting \textit{John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.}, 432 N.W.2d 584, 587 (Wis. 1988)).

\textsuperscript{85} \textit{Id.} (internal quotation marks omitted).

\textsuperscript{86} \textit{Id.} at 638-39, 577 A.2d at 371.

\textsuperscript{87} \textit{See, e.g., Hardage Enters., Inc. v. Fidesys Corp.}, 570 So. 2d 436, 437-38 (Fla. Dist. Ct. App. 1990) (holding that "specific wording is not a precondition to finding that a release precludes negligence claims" and that "broad and all-encompassing language" in an exculpatory release clearly and unequivocally reflected the intent of the parties to release a party from any and all liabilities, including those arising out of its own negligence); \textit{Topp Copy Prods., Inc. v. Singletary}, 625 A.2d 98, 99-100 & n.1 (Pa. 1993) (holding that an exculpatory clause that released a party "from any and all liability for damage" clearly and unambiguously reflected the intention of the parties to cover negligence claims).
understood to mean every claim, including claims for negligence. These courts further note that the literal enforcement approach best represents the actual intent of laypersons upon signing a valid exculpatory contract—that they have distributed their risks and intend to waive their rights to bring suit.

(b) **Strict Application of “Clear and Unequivocal.”**—The majority of other states strictly apply the “clear and unequivocal” standard to interpret a party’s intention to exculpate itself from liability for its own negligence. This interpretation requires either a specific reference in the exculpatory clause that directly requires indemnification for a party’s negligence or a clause specifically excluding indemnification for a party’s negligence under certain limited circumstances. This strict interpretation of the “clear and unequivocal” standard requires specific language to express the intent of a party to indemnify the other for its own negligence. General clauses containing broadly worded exculpatory language are insufficient to satisfy the clear and unequivocal requirement; however, this approach also rec-

88. *See* University Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 510 (Fla. 1973) (“This point of view is based upon the theory that the words ‘any and all claims’ are crystal clear; ergo, all means all without exception.”); Alack v. Vic Tanny Int’l, Inc., 923 S.W.2d 330, 345 (Mo. 1996) (en banc) (Robertson, J., dissenting) (arguing for plain interpretation of the word “all”); 41 *AM. JUR. 2D Indemnity* § 20 (1995) (“General phrases indicating that the indemnitor agrees to indemnify the indemnitee from and against the loss, damage or injury ‘from any act or omission’ of the indemnitee, or ‘occasioned by’ the indemnitee, may be sufficient to impose liability on the indemnitor.”).

89. *See* Alack, 923 S.W.2d at 345 (Robertson, J., dissenting) (“[H]ow does anyone know when ‘all’ means ‘every’ and when it means something less?”); Colgan v. Agway, Inc., 553 A.2d 143, 147 (Vt. 1988) (Peck, J., dissenting) (arguing that it is ill-advised to declare that a contract provision that has been “carefully written, unambiguous, and clear to anyone, including a layman. . . .” is ambiguous by simply stating it is).

90. *See,* e.g., *Stewart, 272 So. 2d at 511* (refusing to enforce a generally worded indemnification agreement because it did not contain “a specific provision protecting the indemnitee from liability caused by his own negligence”); *Alack,* 923 S.W.2d at 337 (refusing to enforce an exculpatory clause unless the intention of the parties to release a party for his or her own negligence is expressed in “clear, unambiguous, unmistakable, and conspicuous language”); Barnes v. New Hampshire Karting Ass’n, Inc., 509 A.2d 151, 154 (N.H. 1986) (enforcing a clause “[a]s long as the language of the release clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant’s negligence”).

91. *See* Perovich, *supra* note 40, at 801-02 (describing one view of what constitutes a sufficient expression of the parties’ intent as requiring a specific reference to the party’s negligence).

92. *Id.*

93. *Stewart,* 272 So. 2d at 509-10 (stating that “general language such as ‘any and all claims’ in an agreement” has been held to be insufficient to impose indemnity for an indemnitee’s negligence).
ognizes that the exculpatory clause need not expressly contain the word negligence or require any mandatory words.\textsuperscript{94}

For instance, in \textit{Alack v. Vic Tanny International, Inc.},\textsuperscript{95} the Supreme Court of Missouri held that a general exculpatory clause was ambiguous and did not insulate a health club from liability for injuries sustained by a member as a result of the club's negligence.\textsuperscript{96} Although the clause was quite extensive and appeared to release the club, it did not specifically state that the member released the club from claims arising from the club's negligence.\textsuperscript{97} The court noted that, superficially, the word "all" in a release includes every possible contingency.\textsuperscript{98} However, this would include claims that could not be waived.\textsuperscript{99} The court observed that the reasonable person constructs relationships upon a fault-based foundation, and must have clear notice before such a relationship is altered.\textsuperscript{100} It stated that the exculpatory language must effectively notify a reasonable person such that she actually understands what future claims are being waived.\textsuperscript{101} Thus, the court found that clear and unambiguous language is required to release a party from her own future negligence.\textsuperscript{102}

\begin{itemize}
\item \textbf{(2) The "Express Negligence" Standard.}—Only one state has rejected the clear and unequivocal standard in favor of the strictest of all
\end{itemize}

\textsuperscript{94} See Alack, 923 S.W.2d at 335-36 (noting cases that do not require the use of the word "negligence" to release a defendant from his own negligence liability).

\textsuperscript{95} 923 S.W.2d 330 (Mo. 1996) (en banc).

\textsuperscript{96} \textit{Id.} at 332.

\textsuperscript{97} \textit{Id.} at 337. The health club contract contained the following clause:

\begin{quote}
By the use of the facilities . . . the Member expressly agrees that Seller shall not be liable for any damages arising from personal injuries . . . as a result of their using the facilities and the equipment therein . . . . Member assumes full responsibility for any such injuries . . . and does hereby fully and forever release and discharge Seller . . . from any and all claims, demands, damages, rights of action, or causes of action, present or future . . . .
\end{quote}

\textit{Id.} at 333 n.2.

\textsuperscript{98} \textit{Id.} at 337 ("In a theoretical vacuum, the words 'any' and 'all' might appear unambiguous: 'all' means '[e]very' and 'any' means '[a]ll.'").

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.} (“Our traditional notions of justice are so fault-based that most people might not expect such a relationship to be altered . . . unless done so explicitly.”).

\textsuperscript{101} \textit{Id.} at 337-38.

\textsuperscript{102} \textit{Id.}
standards, that of express negligence. The express negligence standard requires that the intent to indemnify a party for its own negligence must be expressed in specific terms and be derived solely from within the four corners of the contract. Whereas the other approaches are, in essence, balancing tests that give weight to the language, its context, and the surrounding facts, express negligence requires courts to limit their analysis to situations in which the contract language includes words of negligence.

The Supreme Court of Texas adopted the express negligence standard in a workers' compensation suit in Ethyl Corp. v. Daniel Construction Co. In Ethyl, a worker was seriously burned because of the negligence of two contractors; in the resulting lawsuit, the court assessed whether to enforce a contract provision exculpating one of them. The contract between them required one contractor to indemnify the other against "any loss or damage" to persons resulting from their performance under the contract. Arguing for indemnification, the contractor asserted that the words "any loss" revealed an intent to cover the contractor's own negligence. Without determining the result of the case under the "clear and unequivocal" standard, the court changed the law to adopt the "express negligence" standard. The court described its rationale as follows:

As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state

103. See Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508-09 (Tex. 1993) (extending the express negligence doctrine to all exculpatory provisions, including releases and indemnity agreements); Singleton v. Crown Cent. Petroleum Corp., 729 S.W.2d 690, 691 (Tex. 1987) (per curiam) (declaring that the "clear and unequivocal rule" had been abandoned and the "express negligence rule" adopted).

104. Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987) ("The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.").

105. The parties must now expressly state their intent to indemnify a party for its own negligence. Id. ("[W]e overrule those portions [of Texas precedent] stating it is unnecessary for the parties to say, 'in so many words,' they intend to indemnify the indemnitee from liability for its own negligence.").

106. 725 S.W.2d 705 (Tex. 1987).

107. Id. at 706-07.

108. Id. at 707 ("Contractor shall indemnify and hold Owner harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, Subcontractors, and agents or licensees.").

109. Id. at 708.

110. Id.
the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitee. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.\footnote{111}

Thus, the Texas Supreme Court held that the indemnity provision did not meet the express negligence test and was, therefore, unenforceable.\footnote{112}

3. The Court's Reasoning.—In Adloo, the Court of Appeals reversed the Court of Special Appeals, refusing to enforce an exculpatory clause in a real estate contract.\footnote{113} The court found that the real estate listing agreement and lock-box authorization, each containing an exculpatory clause, did not sufficiently express the parties' intent to shield the real estate company from liability for its negligence.\footnote{114} In so ruling, the court began its analysis with a review of the Maryland legal history of exculpatory contractual clauses.\footnote{115} Recognizing the general validity of such clauses, the court noted that they comply with Maryland's public policy of freedom of contract.\footnote{116} It then defined the three public interest exceptions that will invalidate an exculpatory clause.\footnote{117} It disposed of this line of analysis by stating that the court must address the threshold issue of whether the clause applies to the situation presented and if, in fact, the clause is exculpatory in nature.\footnote{118}

Specifically, the court emphasized that whether the clause should be applied in a particular situation depends on the parties' intention

\footnote{111. Id. at 707-08. Also, the risk-shifting purpose of these clauses has amplified the scrutiny that Texas courts apply to them. See Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) ("Because indemnification of a party for its own negligence is an extraordinary shifting of risk, [Texas] has developed fair notice requirements."). In Texas, fair notice requires the use of the express negligence doctrine and a "conspicuous requirement" that "something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." Id. (citation and internal quotation marks omitted) (alteration in original).

\footnote{112. Ethyl, 725 S.W.2d at 708.}

\footnote{113. Adloo, 344 Md. at 268, 686 A.2d at 305.}

\footnote{114. Id. at 267-68, 686 A.2d at 305.}

\footnote{115. Id. at 259-61, 686 A.2d at 301.}

\footnote{116. Id. at 259, 686 A.2d at 301.}

\footnote{117. Id. at 260, 686 A.2d at 301.}

\footnote{118. Id. at 261, 686 A.2d at 301.}
as expressed by the language of the clause. The court looked to Maryland precedent, noting the general rule expressed in Crockett that "contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms." Selectively reviewing case law from other states, the court sought to define the "clear and unambiguous" requirement. The court noted that the standard is stringent and exacting and that various courts require that the clause unambiguously, understandably, clearly, unequivocally, specifically, unmistakably, explicitly, and conspicuously indicate an intent to release a defendant from liability for injury caused by its own negligence. It held that these standards were consistent with Maryland's "objective law of contract interpretation and construction." The court narrowed the list to require that the clause "clearly, unequivocally, specifically, and unmistakably" express the intention to absolve a party for its negligence. However, the court did not require that the clause "contain or use the word 'negligence' or any other 'magic words.'"

Finally, the court applied this standard to the facts in Adloo. It determined the parties' intent by examining each sentence of the lock-box and listing agreements. Construing the first sentence of the lock-box agreement, the court noted that it provided notice that the listing or selling broker "is not an insurer against the loss of... personal property," and the second sentence released the broker from responsibility for any such loss. Because the listing contract was concerned with "vandalism, theft or damage of any nature to the property," the court simply found it did not clearly and unequivocally express the parties' intention to include damage or injury resulting from the real estate agency's negligence.

119. See id. ("Stated differently, the question is the adequacy of the clause to shield one of the parties from liability. That issue turns on the intention of the parties.").
120. Id. at 261-62, 686 A.2d at 301 (citations and internal quotation marks omitted).
121. Id. at 263-66, 686 A.2d at 303-04.
122. Id. at 263-64, 686 A.2d at 303 (citing, among other cases, Baker v. Stewarts', Inc., 433 N.W.2d 706, 709 (Iowa 1988); Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 334 (Mo. 1996) (en banc); Audley v. Melton, 640 A.2d 777, 779 (N.H. 1994)).
123. Id. at 266, 686 A.2d at 304.
124. Id. at 267, 686 A.2d at 305.
125. Id. at 266, 686 A.2d at 304 (citations omitted).
126. Id. at 267-68, 686 A.2d at 305.
127. Id.
128. Id. at 267, 686 A.2d at 305.
129. Id. at 268, 686 A.2d at 305.
the facts suggested the listing clause was broad enough to include thefts resulting from the real estate agency's negligence.\footnote{130}

4. Analysis.—The Court of Appeals's ruling in Adloo, based upon a strict interpretation of the "clear and unequivocal" standard for determining whether a party intended to exculpate another for its negligence, complies with Maryland precedent.\footnote{131} When it applied this standard to the Adloos, however, the court inconsistently interpreted a troublesome standard that seemingly requires the word "negligence" to appear in the contract, yet permits instances where that particular language is not included.\footnote{132} Without providing sufficient rationale, the court simply determined that the parties did not meet that standard.\footnote{133} In so doing, the court overstepped the "clear and unequivocal" standard such that it now encroaches on the domain of another stricter standard, that of express negligence. The effect of the inherent uncertainty in the state of the law in Maryland will likely have a negative impact on the drafting and enforcing of contractual exculpatory provisions.

\textit{a. Interpreting the Correct Standard}.—In holding that the parties in Adloo must clearly and unequivocally express their intention within the contract clause to exculpate for negligence, the Court of Appeals selected a standard consistent with precedent. In both Crockett and Heat & Power, the Court of Appeals refused to enforce clauses that it determined to be ambiguous.\footnote{134} Similarly, the court in Adloo determined that the clause was ambiguous and refused to enforce it.\footnote{135}

Although the court did not explicitly select one of the two interpretive approaches,\footnote{136} its application of the "clear and unequivocal" standard to the facts in Adloo permits the safe presumption that it re-

\footnotesize{\begin{tabular}{l}
130. \textit{Id.} \\
131. \textit{See supra} notes 68-69 and accompanying text; \textit{infra} notes 134, 137-138 and accompanying text. The strict interpretation of the "clear and unequivocal" standard, while adequately characterized in numerous cases, has no name. It is suggested here that a court's strict application of the "clear and unequivocal" standard should be named the "specific intent" approach. This name conveys the court's focus on the intent of the contracting parties and its requirement that the exculpatory clause specifically state that intent. \\
132. \textit{See Adloo}, 344 Md. at 266, 686 A.2d at 304 (stating that the weight of authority does not require the word "negligence"). \\
133. \textit{Id.} at 268, 686 A.2d at 305. \\
134. \textit{See supra} text accompanying notes 61, 68. \\
135. \textit{Adloo}, 344 Md. at 267, 686 A.2d at 305. \\
136. \textit{See supra} note 69 and accompanying text.}

\end{tabular}}
jected the literal enforcement approach. This can be inferred from the court’s refusal to enforce the clause in the listing contract even though it released the real estate agency from the direct cause of damage that eventually occurred—theft. Also, the court refused to enforce the lock-box clause, which released the agency from the loss of all personal property. Because the listing contract anticipated a specific cause of the damage and the lock-box authorization provided a general release, a court following the literal enforcement approach would likely not have inquired whether the parties contemplated a peripheral source of damage such as negligence. If the court had adopted this approach, the court would likely have found that the clauses were enforceable because they clearly and unambiguously encompassed damages from unforeseen events. By eliminating the literal approach, the court apparently adopted the strict approach to the “clear and unambiguous” requirement. Thus, the Court of Appeals required greater specificity in the drafting of exculpatory language than did past Maryland courts.

b. Lack of Clarity and Rationale.—Although the court’s ruling is consistent with precedent, its rationale was inadequate and inconsistent. First, the court failed to explicitly adopt the strict interpretation of the “clear and unequivocal” standard or the “express negligence” standard. After a selective review of the approaches followed in other states, the court came to its conclusion without giving a rationale for its decision. Although the court’s favored approach may be reached by its presumed rejection of the literal enforcement approach and by the language it chose, it remains unclear whether the court also adopted the background rationale of either approach to the clear and unequivocal standard or the express negligence standard.

137. Furthermore, the court’s adoption of language requiring the parties to express their intention “clearly, unequivocally, specifically, and unmistakably” implies a strict interpretation of the “clear and unambiguous” language. Adloo, 344 Md. at 267, 686 A.2d at 305.
138. See id. at 268, 686 A.2d at 305. Instead, the Adloo court emphasized the role of negligence, unmentioned in the contract, in causing the damage rather than the direct cause mentioned in the contract. See id. at 267, 686 A.2d at 305.
139. Id. at 267-68, 686 A.2d at 305.
140. See supra note 86 and accompanying text.
141. See supra note 83 and accompanying text.
142. See supra notes 137-141 and accompanying text.
143. See supra notes 140-141 and accompanying text.
144. See supra text accompanying note 124.
145. See supra note 100 and accompanying text (discussing the Alack rationale); supra note 111 and accompanying text (discussing the Ethyl rationale).
Second, the court seemingly ignored a recent Court of Special Appeals case that, after detailed analysis, supported a less strict approach to analyzing the effect of unforeseen events on the enforceability of an exculpatory clause. In *Greiner*, that court recognized the existence of two possible approaches to interpret the clear and unequivocal standard, investigated each approach, and finally declared what the law was in Maryland. Although the *Adloo* court was not required to follow the lower court, it could have clarified Maryland law and public policy by explicitly rejecting one approach and adopting the other. Had the Court of Appeals followed a similar analysis, it would have settled Maryland law and created less confusion in the lower courts.

Third, the court's inconsistent analysis in *Adloo* may indicate that it actually adopted the express negligence standard. The court primarily requires that the clause "clearly, unequivocally, specifically, and unmistakably" express the parties' intention to exculpate a party for their negligence, but then claims that the weight of authority does not require the use of the word "negligence." However, it is unclear what language would suffice to meet this strict standard without mentioning the word "negligence." Apparently, the court left the door open to construe the intent of the parties in those situations in which the clause or the context suggests something different. When the court subsequently applies this analysis to the *Adloo* clauses, however, one finds this opening to be but a crack. Because the clauses in *Adloo*...
were fairly specific—with one clause mentioning theft\textsuperscript{151} and the other clause releasing a party from the loss of personal property\textsuperscript{152}—it is difficult to imagine a clause that could be enforceable without mentioning the word "negligence." Accordingly, one could infer that a clause that fails to mention negligence will be interpreted by the court as applying only to those situations when there is no negligence by the party claiming indemnification.\textsuperscript{153} The court’s inconsistent rationale, therefore, may have caused it to overstep the “clear and unequivocal” standard to something even more strict—the express negligence standard.

c. Underground Policy.—The undeclared public policy the court expressed in \textit{Adloo} may be that the law will not be allowed to intrude upon justice. In \textit{Adloo}, the court was presented with a dilemma: justice demanded that the real estate agency bear the damages,\textsuperscript{154} and the plaintiff’s plight was sympathetic; yet, this was a poor case in which to develop the law. Apparently, the court resolved this dilemma by predetermining a just outcome and then filling in the gaps with its reasoning. The court ostensibly began by assessing what it called its threshold issue, determining the meaning of the clause.\textsuperscript{155} However, to a reasonable person, the ordinary and accepted meaning of clauses mentioning theft and providing a general release for property damage was that they are enforceable. Next, the court likely foresaw problems in extending the well-settled common law validity exceptions\textsuperscript{156} to the Adloos’ situation. First, there was no intentional or grossly negligent conduct. Second, if the young, unsophisticated plaintiff in \textit{Wolf v. Ford}\textsuperscript{157} did not present a party with a disparate bargaining disadvantage,\textsuperscript{158} then surely the mature and well-educated Adloos also could not.\textsuperscript{159} Likewise, if the fiduciary relationship in \textit{Wolf}
was not sufficiently intertwined with the process of government and justice to affect the public interest, then neither was the real estate broker-client relationship in *Adloo*. The exceptions could not extend to invalidate the Adloos' exculpatory clause.

With Maryland law seemingly settled, the court was left with few options, but with one reliable court device: the court's time-honored practice of finding a contractual term ambiguous and resolving its interpretation in a manner justice compels. The court therefore returned to the threshold issue of determining whether the meaning of the clause was ambiguous. However, without disciplined application of a standard approach to resolving contract ambiguities, "the understandable promptings of sympathy" motivate judicial decisions, leading inevitably to uncertain and inconsistent enforcement by the court. It has been said that contract interpretation is largely an individualized process, which permits a court to interpret a contract with the full contextual background in mind. However, a legal
standard that fails to rein in the purely subjective and unpredictable sympathetic notions of a court also fails to guide laypersons in the preparation of binding agreements.\textsuperscript{165}

d. Implication.—By strictly interpreting the “clear and unequivocal” standard, the Court of Appeals may find that it has—intentionally or otherwise—made the express negligence standard the law of Maryland. Just before it abandoned the “clear and unequivocal” standard, the Supreme Court of Texas warned of forthcoming change because it had “come as close as possible to adopting the express negligence doctrine without doing so.”\textsuperscript{166} If adopted in Maryland, this standard would offer the advantages of certainty, uniformity, and predictability to contracts, as well as the promise that less effort would be required to construe them. On the other hand, express negligence is a formulaic and legalistic approach that could negate the true intent of the parties, even an intent that was otherwise clearly expressed without use of the correct legal words.

The Court of Appeals is unlikely ever to explicitly adopt the express negligence standard. Because it is similar to the rigidly formulaic test the court rejected in \textit{Wolf},\textsuperscript{167} one might assume that express negligence does not meet the court’s need for flexibility. The court would not want to be handcuffed by a doctrine that may prevent the court from making a decision required for justice. In practicable terms, the parties may have allocated the risk of negligence, but if the allocation was not specifically stated in writing, an “express negligence” court would be prevented from enforcing the clause.\textsuperscript{168}

\textsuperscript{165} See Colgan, 553 A.2d at 147-48 (Peck, J., dissenting). Judge Peck argued that the majority failed to follow a standard in refusing to enforce a general exculpatory clause:

\begin{quote}
Gone are the days, apparently, when prospective parties to a contract, and the attorneys who advise them, can look to the courts and precedential decisions, with the slightest degree of confidence and trust, for guidance in the preparation of binding agreements. . . .
\end{quote}

\begin{quote}
. . . [T]he test now, which is controlled entirely by individual whim, is a sufficient hardship to evoke the purely subjective and unpredictable sympathy of the malleable majority of this Court.
\end{quote}

\textit{Id.}

\textsuperscript{166} See Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707 (Tex. 1987).

\textsuperscript{167} See \textit{supra} note 45. Maryland courts have never explicitly addressed the express negligence test.

\textsuperscript{168} See \textit{supra} note 104 and accompanying text.
Rather, the court seems to have implicitly applied the express negligence test without suffering the consequences.

By clearly adopting a standard and consistently applying it, the court would clarify the law in Maryland. If the court favors plain, unsophisticated language or seeks to prevent long, complex contracts drafted by attorneys, it should favor the literal enforcement approach. If it believes that a fault-based tort standard permeates contractual relations, then the court should apply the strict approach to the clear and unequivocal standard. If the court sympathizes with those who unwittingly agree to indemnify another party for their negligence, and seeks to achieve simplicity and consistency in contract drafting, then it should adopt the express negligence standard. With its decision in Adloo, the court clearly favors a strict standard requiring exculpatory clauses to specifically state an intent to release a party from liability for her own negligence. If the court can be convinced to abandon its untenable flexible response tendencies, it can achieve consistency by explicitly adopting the express negligence standard. It is not too burdensome a public policy to ask contracting parties to write "negligence" if they mean negligence.

5. Conclusion.—In finding that a broadly worded exculpatory clause that allocated damages caused by theft, but did not address the effect of negligence, did not "clearly and unambiguously" reveal the intention to absolve a party from liability for its future negligence, the Court of Appeals rendered a fair decision consistent with precedent. However, the facts in Adloo may produce a greater effect than the court intended. The court decided that broadly worded exculpatory clauses are insufficiently specific to waive negligence claims—even when a cause of the damage was contemplated by the parties. Instead, the court implicitly required that the parties anticipate the effect of negligence and mention it in the contract. Although the court in this case breached the boundaries of the strict approach to the "clear and unequivocal" standard, a different set of facts may yet allow it to retreat. Certainly, this court intends to retain the flexibility to provide justice to sympathetic parties. However, this revisionist approach—analyzing contracts after the state's citizens and businesses have already formed their relationships and assigned their risks—is a poor surrogate for a public policy. If the Court of Appeals instead

169. See supra note 138 and accompanying text.
provided a consistent rationale, it would firmly establish when exculpatory language will be enforced.

SCOTT A. CONWELL

B. Enforcing Express Promises in Umbrella Personal Liability Insurance Policies by Interpreting Ambiguity Against Carriers

In Bailer v. Erie Insurance Exchange,¹ the Court of Appeals held that when an umbrella personal liability insurance policy expressly covers invasion of privacy as "personal injury" while excluding "personal injury expected or intended by the insured," the policy is ambiguous and must be construed in favor of coverage for invasion of privacy by unreasonable intrusion upon seclusion of another.² To reach this holding, the court has necessarily extended precedent by concluding that this form of invasion of privacy can only be committed intentionally.³ Furthermore, the court has followed precedent by interpreting ambiguity in an insurance policy against the insurer.⁴ The court's approaches are practical in light of two conflicting public policies: discouraging insurance coverage for intentional torts and upholding the freedom to contract by enforcing the insurer's express obligations.⁵ The court's ruling has properly promoted the latter policy when it conflicts with the former, thereby fulfilling the contracting parties' reasonable expectations.⁶

1. The Case.—Byron C. Bailer and Victoria Bailer, a husband and wife residing in Rockville, Maryland, hired a Danish au pair, Majbrit Meier.⁷ Meier assisted the Bailers with household work and child care in exchange for salary, room, and board.⁸ Meier had her own room and bath during her stay with the Bailers.⁹ One day in the fall

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1. 344 Md. 515, 687 A.2d 1375 (1997).
2. Id. at 517, 687 A.2d at 1376. At common law, invasion of privacy by unreasonable intrusion upon seclusion of another is one of four recognized forms of the tort of invasion of privacy. See infra notes 99, 118-119 and accompanying text (discussing the four types of invasion of privacy).
3. Id. at 534, 687 A.2d at 1384.
4. Id. at 521-22, 687 A.2d at 1378; see also infra text accompanying notes 44, 57, 67.
5. 344 Md. at 534-35, 687 A.2d at 1385 (discussing the rationale for holding that the insurer should honor its express promises and that public policy does not prohibit insurance coverage for invasion of privacy by unreasonable intrusion upon seclusion of another); see also infra text accompanying notes 137-140, 173-180.
6. 344 Md. at 534-35, 687 A.2d at 1385; see also infra text accompanying notes 137-140, 149-159, 173-180.
7. 344 Md. at 517, 687 A.2d at 1376.
8. Id. at 517-18, 687 A.2d at 1376.
9. Id. at 518, 687 A.2d at 1376.
of 1993, while her bathroom was being used for laundry drying, Meier asked for permission to shower in the bathroom adjoining the Bailers’ bedroom. Unbeknownst to Meier, before giving her access to the bath, Mr. Bailer had hidden a video camera in the bathroom, which he turned on and focused on the shower area. Meier used the shower and eventually discovered she had been videotaped. She left her job and the Bailers’ home after this incident. Meier then sued the Bailers in the Circuit Court for Montgomery County for invasion of privacy.

The Bailers requested that their insurer, Erie Insurance Exchange (Erie), defend against Meier’s suit and indemnify them for any losses, because they believed that Erie’s catastrophe liability insurance covered the suit. Erie, however, “declined to do either,” assert-

10. Id.
11. Id.
12. Id. The record did not indicate how Meier had discovered the “surreptitious videotaping.” Id. at 518 n.1, 687 A.2d at 1376 n.1. The depositions of the Bailers indicated that after Meier had showered, “Mr. Bailer retrieved the tape and placed it in the pocket of a jacket hanging in his closet, without having viewed the tape.” Id. Meier obtained the tape later and played it for Mrs. Bailer. Id.
13. Id. at 518, 687 A.2d at 1376.
14. Id.
15. Id. at 518, 520-21, 687 A.2d at 1376-78. The Bailers had purchased three insurance policies from Erie: a basic homeowner’s policy, an automobile liability policy, and a personal catastrophe liability policy. Id. at 517, 687 A.2d at 1376. The catastrophe policy required the Bailers “to maintain in full effect during the policy period, without alteration, the policies shown on the Declarations . . . as underlying insurance . . . .” Id. at 522, 687 A.2d at 1378 (ellipses in original) (internal quotation marks omitted). The “underlying insurance” included the Bailers’ basic homeowner’s and automobile policies. Id. If the claims were covered under the underlying insurance, the catastrophe policy would “appl[y] only to damages in excess of the underlying limit.” Id. (internal quotation marks omitted).

The Bailers did not assert that their homeowner’s policy covered Meier’s suit. According to the Bailers’ homeowner’s policy, under the section “Home and Family Liability Protection,” Erie agreed to pay all sums up to the amount shown on the Declarations, which anyone we protect becomes legally obligated to pay as damages because of bodily injury or property damage resulting from an occurrence during the policy period. We will pay for only bodily injury or property damage covered by this policy. Id. at 522, 687 A.2d at 1378-79 (internal quotation marks omitted). That policy defined “bodily injury” as “physical harm, sickness or disease, including mental anguish, and includes care, loss of services, or resulting death.” Id., 687 A.2d at 1379 (internal quotation marks omitted). Moreover, that policy defined an “occurrence” as “an accident, including continuous or repeated exposure to the same general harmful conditions.” Id. at 522-23, 687 A.2d at 1379 (internal quotation marks omitted). The basic homeowner’s policy’s liability protection provisions contained essentially the same exclusion as found in the catastrophe policy for “[b]odily injury or property damage expected or intended by anyone we protect.” Id. at 523, 687 A.2d at 1379 (emphasis added).
ing that the policy excluded coverage for intentional conduct. Consequently, the Bailers hired a separate attorney to defend them in Meier's suit and sued Erie in the Circuit Court for Montgomery County for breach of contract. Meier settled her action against the Bailers. In the Bailers' suit against Erie, the trial court granted Erie's motion for summary judgment. The Bailers appealed, but before the Court of Special Appeals could review the matter, the Court of Appeals issued, on its own motion, a writ of certiorari to hear the case.

2. Legal Background.—

a. Fundamental Contract Principles and Interpretation of Insurance Policies.—Maryland courts apply contract principles in construing insurance policies. First, the courts use an objective theory of contract for determining the parties' intent and contractual obligations by examining the written insurance policy as a whole, focusing on the circumstances surrounding the execution of the policy. In reviewing the insurance policy, the courts accord the words their ordinary meanings and determine the parties' intent based on what meaning a reasonable person would attach to the words. Second, the courts apply the principle that if the policy language is clear, the policy should be enforced without straining to create ambiguities in that language, presumably because the clear language of the policy best evidences the parties' intent as to their agreement. Third, if ambiguity

16. Id. at 518, 521, 687 A.2d at 1376, 1378.
17. Id. at 518-20, 687 A.2d at 1376-77. The Bailers presented two claims in their action. Id. at 519, 687 A.2d at 1377. The first claim asserted that the Bailers were "entitled to insurance coverage including defense." Id. (internal quotation marks omitted). The second claim sought damages for breach of contract, including attorney's fees and costs incurred in defense of Meier's claim as well as attorney's fees and costs accrued in the Bailers' suit against Erie. Id.
18. Id. at 518, 687 A.2d at 1376.
19. Id. at 519, 687 A.2d at 1377.
20. Id. at 518, 687 A.2d at 1376.
22. See Pacific Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985) (reciting a few "well-established principles" for interpreting insurance contracts in Maryland and emphasizing that in "determin[ing] the intention of the parties to the insurance contract . . . [the court should] construe the instrument as a whole" (citations omitted)).
23. Id.
24. See General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985) ("[W]hen the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.").
remains after considering the parties' intentions from the policy as a whole, and after admitting any relevant parol evidence, the courts should construe ambiguity in the policy against the insurer as the drafter of the contract.\textsuperscript{25} Fourth, the courts apply the rule that when the policy's provisions appear inconsistent, the judge should first attempt to resolve the inconsistency without nullifying any provisions of the policy.\textsuperscript{26} Finally, the courts adopt the principle that when a contract has two possible constructions, one of which would produce an absurd result and the other of which would effectuate the purpose of the agreement, the latter construction should prevail.\textsuperscript{27} Consequently, application of this principle fulfills the parties' reasonable expectations.\textsuperscript{28}

\textit{b. Interpreting Ambiguity in Insurance Policies.} — The judicial policy of enforcing express promises in insurance contracts by interpreting ambiguity against the insurer is evident in cases that resolve ambiguity stemming from the legal nuances of the contract terms. In these cases, the court construes ambiguity in favor of the insured by rejecting the insurer's narrow interpretation of the contract. In \textit{United States Fidelity \& Guaranty Co. v. National Paving \& Contracting Co.},\textsuperscript{29} the Court of Appeals considered whether an insurance policy that expressly covered liability resulting from an independent contractor's negligence obligated an insurer to indemnify an insured for liability arising out of an automobile collision caused by the insured's contractor's employee.\textsuperscript{30} The court answered in the affirmative, holding that the insurer's express promise to cover damage caused by an independent contractor's negligence does not limit coverage to situations where the independent contractor solely causes the injury or where the contractor is sued for negligent performance of a nondelegable duty.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{25} See \textit{United States Fidelity \& Guar. Co. v. National Paving \& Contracting Co.}, 228 Md. 40, 50, 178 A.2d 872, 876-77 (1962); \textit{see also} RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").
\item \textsuperscript{26} See, e.g., \textit{Chew v. DeVries}, 240 Md. 216, 221, 213 A.2d 742, 744-45 (1965) ("[I]f a reconciliation can be effected by a reasonable interpretation, such interpretation should be given to . . . apparently repugnant provisions, rather than nullify any.").
\item \textsuperscript{27} \textit{Born v. Hammond}, 218 Md. 184, 188, 146 A.2d 44, 47 (1958).
\item \textsuperscript{28} \textit{Id.} at 189, 146 A.2d at 47.
\item \textsuperscript{29} 228 Md. 40, 178 A.2d 872 (1962).
\item \textsuperscript{30} \textit{Id.} at 44, 178 A.2d at 873.
\item \textsuperscript{31} \textit{Id.} at 53, 178 A.2d at 878.
\end{itemize}
National Paving involved an automobile collision between a contractor of the insured, National Paving and Contracting Company (National) and a bus driver. National was insured by a United States Fidelity & Guaranty Company (USF&G) policy that agreed to pay "all sums which [National] shall become legally obligated to pay as damages because of bodily injury . . . sustained by any person, caused by accident and arising out of the hazards hereinafter defined." The policy defined "hazards" as, inter alia, "[o]perations performed by independent contractors." When the bus driver sued National for its contractor's negligence, USF&G refused National's request to defend the suit.

At trial, a verdict was directed in favor of National, but on appeal the Court of Appeals reversed the directed verdict and remanded for a new trial. Before the new trial, National settled the case with the bus driver. Because USF&G chose not to participate in the settlement, National paid $37,500 to the bus driver and then sued USF&G under its insurance policies.

In National's suit against USF&G, the trial court ruled in favor of National, holding that the policy covered National's liability. On appeal, USF&G argued that because National's settlement with the bus driver precluded a judicial determination of National's obligation to pay, National was not "legally obligated" to pay within the meaning of the policy, and thus USF&G was not bound to reimburse National.

The court rejected USF&G's "narrow" interpretation, agreeing with the trial court that the words in the coverage provision "caused by accident and arising out of the hazards hereinafter defined" referred to the injury, not to National's legal liability. The court held that, for the coverage to apply, the injury, not the "legal obligation," must have been caused by accident and must have arisen out of the independent contractor's operation. The court found that the policy's provision did not contain language which either expressly or by implication restricted coverage to situations when the independent contractor alone caused the injury, or when a contractor was sued for

32. Id. at 44, 178 A.2d at 873.
33. Id. at 49, 178 A.2d at 876.
34. Id.
35. Id. at 44-45, 178 A.2d at 873.
36. Id. at 45, 178 A.2d at 873-74.
37. Id. at 46, 178 A.2d at 874.
38. Id.
39. Id.
40. Id. at 47-48, 50, 178 A.2d at 875-76.
41. Id. at 50-51, 178 A.2d at 876-77 (emphasis added).
42. Id.
the negligent performance of a nondelegable duty performed by the independent contractor.\textsuperscript{43} Reasoning that if the bus driver's injuries arose out of the operations of the independent contractor, then USF&G was liable to National under the policy's coverage, the court resolved the ambiguity in favor of National and enforced USF&G's obligations in providing coverage.\textsuperscript{44}

In 1962, the same year it issued \textit{National Paving}, the Court of Appeals resolved an ambiguity in another insurance policy in \textit{Haynes v. American Casualty Co.}\textsuperscript{45} The \textit{Haynes} court held that damage to another's land caused by the insured contractor's employees who, contrary to his instructions, encroached upon another's land and cut down the trees, was within the contractor's liability policy covering property damage caused by accident, even though the employees intentionally cut the trees.\textsuperscript{46} In so ruling, the court noted "the fact that an injury is caused by an intentional act does not preclude it from being caused by accident if in that act, "something unforeseen, unusual and unexpected occurs which produces the result.""\textsuperscript{47}

In \textit{Haynes}, the insurer, American Casualty Company, argued that the insured's employees had acted voluntarily and intentionally in cutting the trees, and the damage naturally resulted from the act.\textsuperscript{48} Therefore, even though the result may have been unforeseen and unintended, the policy would not cover damage caused by the insured's

\textsuperscript{43.} Id. at 53, 178 A.2d at 878.
\textsuperscript{44.} Id. at 50-51, 55, 178 A.2d at 876-77, 879.
\textsuperscript{45.} 228 Md. 394, 179 A.2d 900 (1962).
\textsuperscript{46.} Id. at 399-401, 179 A.2d at 903-04. The appellant in that case, Mack C. Haynes, had purchased a manufacturer's and contractor's liability policy from the appellee, American Casualty Company, to cover against accidents in his excavating operations. \textit{Id.} at 395, 179 A.2d at 901. The insurance policy at issue in \textit{Haynes} provided:

"Coverage B—Property Damage Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of hazards hereinafter defined."

"Definition of Hazards

"Division 1—Premises—Operations. The ownership, maintenance or use of premises, and all operations."

\textit{Id.}

While doing excavation work in Baltimore County, Haynes pointed out to his employees the property line within which the work was to be done and then left them for several hours. \textit{Id.} When he returned, he found that the employees had encroached on an adjacent property and cut down 48 trees. \textit{Id.} When the landowners sued Haynes for the resulting damage, the insurer began defending the action, but later denied liability under the policy. \textit{Id.} Haynes then sued his insurer for breach of contract. \textit{Id.} at 396, 179 A.2d at 901-02.

\textsuperscript{47.} Id. at 397, 179 A.2d at 902 (quoting M.R. Thomason, Contractor v. United States Fidelity & Guar. Co., 248 F.2d 417, 420-21 (5th Cir. 1957) (Rives, J., dissenting)).
\textsuperscript{48.} Id. at 396, 179 A.2d at 902.
employees' misjudgment. Conversely, Haynes asserted that the contract, when read as a whole, provided coverage. Moreover, Haynes pointed out that a majority of the jurisdictions reject any distinction between the terms “accidental means” and “accidental results,” so that any intentional or voluntary act of the insured that causes damage unforeseen by him at the time comes within the meaning of the term “caused by accident.”

The court found Haynes's arguments persuasive, and held that the policy covered the damage to the adjacent property. The court noted that the case involved “a technical trespass . . . through the unwitting and heedless act of the insured’s employees in going upon the land of another, contrary to the insured's instructions, and cutting the trees.” The court concluded, however, that American Casualty could not contend that the injury to another's property was intentional. The court explained: “To argue that, because the means employed were not accidental, the resulting damage cannot be construed as being ‘caused by accident,’ though the damage was in no way reasonably anticipated, is to rely upon a fine distinction which would never occur to, or be understood by, the average policy holder.”

The court reasoned that it would construe the phrase “caused by accident” too narrowly if it held that recovery under such a provision was limited not only to those cases where the result was unintended, but also where the means used were accidental. The court then concluded that, where an insurance company attempts to limit coverage by employing ambiguous language, the ambiguity will be resolved against the insurer.

Twelve years after Haynes, in Allstate Insurance Co. v. Sparks, the Court of Special Appeals held that a provision of a homeowner's policy excluding coverage for property damage “which is either expected

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49. Id.
50. Id. Although not explicitly stated, Haynes's assertion seems to rest on the fact that when the policy's provisions are considered together, the policy covered “destruction of property . . . caused by accident and arising out of . . . hazards,” which was defined in another provision as “all [excavating] operations” on the property in question. Id. at 395-97, 179 A.2d at 901-02.
51. Id. at 396, 179 A.2d at 902.
52. Id. at 399-401, 179 A.2d at 904.
53. Id. at 399, 179 A.2d at 903.
54. Id.
55. Id.
56. Id. at 400, 179 A.2d at 904.
or intended from the standpoint of the Insured" did not relieve the insurer of liability for a fire caused at a mill when the insured's son ignited gas fumes while attempting to steal gas.59 In that case, the insured, Frances Sparks (Sparks), allowed her son James to use her car one night.60 James drove to the premises of the Farmers Supply Company (Farmers Supply) with his friends to steal gas from the company's feed truck.61 While siphoning the gas, James unwittingly illuminated the dark area with a cigarette lighter, thereby igniting the gas fumes in the area of the truck.62 The fire "destroyed the Farmers Supply mill and substantially all of its contents."63

The insurer, Allstate Insurance Company (Allstate), sought a judgment declaring that Sparks's insurance policies did not cover the losses resulting from the fire.64 Allstate viewed the fire as an "intentional act" excluded by the terms of the insurance policies.65 The court rejected this argument, reasoning that although the son intended to steal gas, he did not intend to cause the resulting fire.66 Thus, the conduct was not "intended" as defined by the coverage, and Allstate had a duty to cover the damage caused by this accident.67

Three years later, in Harpy v. Nationwide Mutual Fire Insurance Co.,68 the Court of Special Appeals held that a homeowner's insurance policy, which excluded coverage for personal liability as to bodily injury or property damage expected or intended by the insured, did not cover the insured's sexual assault of his daughter, even though the insured contended that he did not intend or expect that his daughter would suffer the injuries she alleged in her complaint as a result of the

59. Id. at 740-41, 744, 493 A.2d at 1111, 1113.
60. Id. at 740, 493 A.2d at 1111.
61. Id.
62. Id.
63. Id.
64. Id. Sparks had purchased a homeowner's policy and an automobile policy from Allstate. Id. The homeowner's policy, under a "Family Liability" clause, provided coverage for "all sums which the Insured shall become legally obligated to pay as damages... caused by an occurrence." Id. at 741, 493 A.2d at 1111 (internal quotation marks omitted). The policy defined an "Insured" to include members of the "Named Insured's household." Id. Further, the policy defined an "occurrence" as an "accident... which results, during the policy period, in bodily injury or property damage." Id. However, the policy excluded coverage of "property damage which is either expected or intended from the standpoint of the Insured." Id. The court found that the homeowner's policy applied. Id. at 744, 493 A.2d at 1113.
65. Id. at 741, 494 A.2d at 1111.
66. Id. at 744, 494 A.2d at 1113.
67. Id.
Cheryl J. Harpy (Cheryl), a minor, sued her father, Joseph T. Harpy (Harpy), for sexually abusing her in various ways, including sexual intercourse. The suit specifically alleged assault and battery, intentional infliction of emotional distress, and negligence.

Harpy had purchased two homeowner's insurance policies from Nationwide Mutual Fire Insurance Company (Nationwide). Believing that these policies covered Cheryl's suit against him, Harpy demanded that Nationwide defend him in the suit. In response, Nationwide sought a judgment declaring that neither of the policies provided defense or coverage. While conceding that the policies did not cover either assault and battery or intentional infliction of emotional distress, Harpy asserted that his intent to harm his daughter was a disputed material fact relevant to the daughter's negligence claim. The court rejected this assertion, agreeing with the trial court that "for the law to define sex with one's nine to thirteen year old
daughter to be anything but intentional injury is ridiculous."\textsuperscript{76} The court remarked further that for a father in such a situation to claim that he did not expect or intend to cause injury to his daughter "flies in the face of all reason, common sense and experience."\textsuperscript{77} Accordingly, the court affirmed the trial court’s granting of a declaratory judgment and summary judgment in Nationwide’s favor.\textsuperscript{78}

In 1995, a Tennessee federal court reviewed an ambiguous insurance policy in \textit{Lineberry v. State Farm Fire & Casualty Co.}\textsuperscript{79} and held that when a policy expressly covers injuries resulting from invasion of privacy, an inherently intentional tort, but excludes injuries intended or expected, "the coverage is illusory, and the policy is ambiguous and must be interpreted against the insurer and in favor of the insured."\textsuperscript{80} In \textit{Lineberry}, two men had built a "secret viewing room" which had two-way mirrors.\textsuperscript{81} One man engaged in sexual activities with a woman and another videotaped the activity from the viewing room.\textsuperscript{82} Four women who had been secretly videotaped sued the men who, in turn, sued their insurer for defense and indemnification under their personal liability umbrella policy.\textsuperscript{83} The policy defined "loss" to mean "‘an accident that results in personal injury.’"\textsuperscript{84} In turn, "personal injury” meant “‘false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; . . . libel, slander, defamation of character or invasion of rights of privacy; and . . . assault and battery.’”\textsuperscript{85} The policy, however, provided that State Farm would not cover personal injury or property damage “‘which is either expected or intended by [the insured.]’”\textsuperscript{86}

The \textit{Lineberry} insurer, State Farm Fire & Casualty Company (State Farm), argued that it was not obligated to defend or indemnify the insured because the injuries they caused did not result from an “accident” and the policy excluded intentional conduct.\textsuperscript{87} The court recognized that invasion of privacy is “an inherently intentional tort” and

\begin{itemize}
  \item \textsuperscript{76} Id. at 482-83, 545 A.2d at 722 (alteration in original) (internal quotation marks omitted).
  \item \textsuperscript{77} Id. at 485, 545 A.2d at 724 (quoting CNA Ins. Co. v. McGinnis, 666 S.W.2d 689, 691 (Ark. 1984)).
  \item \textsuperscript{78} Id. at 487, 545 A.2d at 725.
  \item \textsuperscript{79} 885 F. Supp. 1095 (M.D. Tenn. 1995) (mem.).
  \item \textsuperscript{80} Id. at 1099.
  \item \textsuperscript{81} Id. at 1096 (internal quotation marks omitted).
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id. at 1097 (emphasis omitted).
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id. (emphasis added).
  \item \textsuperscript{87} Id.
\end{itemize}
thus cannot be committed by accident.88 Because the policy expressly covered invasion of privacy and expressly excluded coverage for intentional torts, the court found the policy to be ambiguous and construed it in favor of the insured.89 Accordingly, the court ordered State Farm to defend and indemnify the insured.90

c. The Tort of Invasion of Privacy.—Maryland first recognized the tort of invasion of privacy in Carr v. Watkins.91 In that case, Carr sued Watkins and others for divulging to Carr’s employer information about criminal charges brought against Carr years before, which allegedly prompted Carr’s employer to discharge him.92 Carr’s suit alleged, inter alia, invasion of privacy.93 The trial court held that Carr could not maintain the invasion of privacy claim because Maryland had not yet recognized that tort.94 After reviewing the case law of other jurisdictions, the court followed the lead of thirty-one states and the District of Columbia in recognizing the tort of invasion of privacy.95

After Watkins, courts focused on the reasonableness of a defendant’s conduct in determining whether an invasion of privacy has occurred.96 This approach parallels that of the Restatement (Second) of Torts, which sets forth that a defendant’s intrusion upon a plaintiff’s private affairs will not subject the defendant to liability for invasion of privacy unless “the intrusion would be highly offensive to a reasonable person.”97 For instance, in Beane v. McMullen,98 the court held that reasonableness of a defendant’s conduct under the facts presented is

88. Id. at 1099.
89. Id.
90. Id.
91. 227 Md. 578, 588, 177 A.2d 841, 846 (1962).
92. Id. at 581, 177 A.2d at 842.
93. Id.
94. Id.
95. Id. at 586-88, 177 A.2d at 845-46.
96. See infra text accompanying notes 98-108.
97. RESTATEMENT (SECOND) OF TORTS § 652B (1976) (emphasis added). The Second Restatement further explains that the defendant’s intrusion does not amount to an invasion of privacy “unless the interference with the plaintiff’s seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable [person], as the result of conduct to which the reasonable [person] would strongly object.” Id. § 652B cmt. d (emphasis added). For example, under the Second Restatement’s view, no liability would exist when a defendant knocks at the plaintiff’s door or calls the plaintiff on occasion to collect a debt. Id. However, liability would exist “when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff.” Id. In some cases, a plaintiff’s right to privacy has not been violated even if she has been “seriously annoyed” by a defendant’s conduct. Id. For example, a landlord’s conduct does not amount to an invasion of her tenant’s privacy when she calls the tenant at nine o’clock on
a determining factor in all types of invasions of privacy, except perhaps appropriation of name or likeness. Specifically, Beane involved landowners who brought an action against the owners of an adjacent property for an alleged invasion of privacy. Applying the reasonableness test, the Beane court held that the defendant owners' making a relatively small number of complaints to government officials about their neighbors' possible violations of local laws was reasonable and did not justify the plaintiff landowners' recovery under the theory of invasion of privacy.

Similarly, in Household Finance Corp. v. Bridge, the court held that the issue of what action a creditor may take to collect a debt and yet remain immune from liability for invasion of privacy must be decided on a case-by-case inquiry of reasonableness. Bridge involved a debtor's suit against her creditor for invasion of privacy. In that case, a creditor attempted to recover a debt by repeatedly calling the debtor and her parents over a period of eleven months. During Sunday morning to demand rent payment, even though she knows that the tenant is not ready to pay it and that the tenant objects to such a call on Sunday. Id. 98. 265 Md. 585, 291 A.2d 37 (1972).

99. See infra note 118 and accompanying text (listing the four types of invasion of privacy). The tort of invasion of privacy consists of "a complex of four distinct wrongs." Restatement (Second) of Torts § 652A cmt. b (1976). These "distinct wrongs" have a common denominator: "each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." Id.

These forms of invasion of privacy may overlap. Id. § 652A cmt. d. The same conduct or a series of conduct may constitute two or more types of invasion of privacy. Id. A hypothetical illustrates this point: "A breaks and enters B's home, steals a photograph of B, and publishes it to advertise his whiskey, together with false statements about B that would be highly objectionable to a reasonable man." Id. A may be liable for invasion of privacy by intrusion upon B's seclusion, by the appropriation of B's likeness, by giving publicity to B's private photograph, and by giving publicity to B that places him in a false light before the public. Id. Although B may rest his cause of action "upon any or all of these grounds, . . . he may have only one recovery of damages for invasion of privacy." Id.

In addition to these four recognized forms of invasion of privacy, other forms may be held to be actionable, because several courts, including the United States Supreme Court, have "spoken in very broad general terms of a somewhat undefined 'right of privacy' as a ground for various constitutional decisions involving indeterminate civil and personal rights." Id. § 652A cmt. c.

100. 265 Md. at 600-01, 291 A.2d at 45.
101. Id. at 588-93, 291 A.2d at 37-42.
102. Id. at 599-600, 291 A.2d at 44-45.
104. Id. at 540, 250 A.2d at 884 ("[T]he question of how far a creditor may go to collect his debt must be decided on the individual facts of each case [and] . . . on the ground of reasonableness.").
105. Id. at 532-35, 250 A.2d at 879-81.
106. Id. at 533-34, 250 A.2d at 880-81.
these calls, the creditor used allegedly objectionable language, threatening the debtor that she could go to jail, that her reputation could be ruined, and that she could lose her job.\footnote{107} Balancing “the interest of the creditor in collecting his debt against that of a debtor of ordinary sensibilities,” the \textit{Bridge} court held that the creditor’s conduct did not constitute unreasonable intrusion of the debtor’s right to be left alone as to support a cause of action for invasion of privacy.\footnote{108}

3. The Court’s Reasoning.—In \textit{Bailer v. Erie Insurance Exchange}, the Court of Appeals held that when an umbrella personal liability insurance policy ambiguously covers invasion of privacy as “personal injury” while excluding “personal injury expected or intended by the insured,” the ambiguity must result in favor of coverage for invasion of privacy by unreasonable intrusion upon seclusion of another.\footnote{109} The court addressed the merits of the Bailers’ breach of contract claim, which rested entirely on the personal catastrophe policy and consisted of accrued damages, including counsel fees.\footnote{110} At the outset, the court noted that the coverage of the Bailers’ catastrophe policy was integrated with the underlying automobile and homeowner’s liability coverages, so as to support the Bailers’ assertion “that the parties in-

\footnote{107. \textit{Id.}, 250 A.2d at 880.}
\footnote{108. \textit{Id.} at 543-44, 250 A.2d at 886.}
\footnote{109. 344 Md. at 517, 534, 687 A.2d at 1376, 1385. The court began by noticing that the trial court had erred in deciding this declaratory judgment action. \textit{Id.} at 519, 687 A.2d at 1377. The trial court’s “final order . . . simply recite[d] that Erie’s motion for summary judgment was granted as to all counts” without “declar[ing] the rights of the parties.” \textit{Id.} (citing Broadwater v. State, 303 Md. 461, 469, 494 A.2d 934, 938 (1985) (holding, after reviewing various prior decisions, “that the trial judge erred . . . in failing to declare the rights of the parties”)). The court observed, however, that because Meier had settled her lawsuit against the Bailers before the appeal, “the need for a declaration of the rights of the parties, in order for it to operate prospectively, has become moot.” \textit{Id.} Thus, the Bailers’ claim that they were “entitled to insurance coverage including defense” against Meier’s lawsuit was no longer at issue. \textit{Id.} (internal quotation marks omitted).}
\footnote{110. \textit{Id.} at 520, 687 A.2d at 1377. The personal catastrophe policy that the Bailers purchased from Erie provided: “‘[Erie] will pay the ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage covered by this policy. This policy applies only to damages in excess of the underlying limit of Self-Insured Retention.’” \textit{Id.} The Bailers relied on this policy, which defined “‘[p]ersonal injury’ as “false arrest, wrongful detention or imprisonment, malicious prosecution, wrongful entry or eviction, \textit{invasion of privacy}, or humiliation caused by any of these.” \textit{Id.}, 687 A.2d at 1377-78. Erie, on the other hand, relied on the exclusion provision of the policy. \textit{Id.} at 521, 687 A.2d at 1378. In the “What we do not cover—Exclusions” section, the policy stated: “We do not cover . . . personal injury or property damage \textit{expected or intended} by anyone we protect. We do cover reasonable acts committed to protect persons or property.” \textit{Id.} (emphasis added). The circuit court rested its decision on this exclusion provision. \textit{Id.}}
tended for the policy to cover liability for invasion of privacy." The court noted that the Bailers' "catastrophe policy enlarges the coverage from 'bodily injury' to 'personal injury' and then defines the latter term specifically to include certain enumerated torts among which is invasion of privacy." The court further observed that the catastrophe policy explicitly indicated its intention to operate both as excess insurance over the limit of the required underlying insurance and as primary coverage for certain risks not covered at all by the underlying policy. The court then concluded that the policy covered liability for invasion of privacy claims.

Next, the court addressed Erie's contention that no ambiguity existed in the policy because it should be construed to cover negligent invasions of privacy, while excluding intentional invasions. The court rejected Erie's proposed distinction between intentional and negligent invasions of privacy. In doing so, the court pointed out that it had recognized the tort of invasion of privacy in Carr v. Watkins and that subsequent cases have approved the definition of "invasion of privacy" as set out in section 652A of the Restatement (Second) of Torts. The court noted that "Meier alleged [the] form of invasion of privacy consisting of 'unreasonable intrusion upon the seclusion of another, as stated in § 652B.'" The court also cited with approval Snakenberg v. Hartford Casualty Insurance Co., which held that

111. Id. at 522, 687 A.2d at 1378.
112. Id. at 523, 687 A.2d at 1379.
113. Id.
114. Id. at 524, 687 A.2d at 1379.
115. Id. at 525, 687 A.2d at 1380.
116. Id.
118. Bailor, 344 Md. at 525, 687 A.2d at 1380. The Second Restatement provides:
§ 652A General Principle
(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
(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 .

119. Bailor, 344 Md. at 526, 687 A.2d at 1380 (quoting RESTATEMENT (SECOND) OF TORTS § 652A(2)(a)). Section 652B states: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B.
“wrongful intrusion into private affairs always involves an intentional act. It is mistaken to conclude . . . that if malice is not an element of invasion of privacy, neither is intent. The tort cannot be committed by unintended conduct amounting merely to lack of due care. Intentional conduct is a necessary element of the cause of action.”

Therefore, the court concluded that invasion of privacy by unreasonable intrusion upon seclusion of another could only be committed intentionally.

The court then addressed Erie's assertion that intentional conduct and intentional results must be distinguished. According to Erie, even if invasion of privacy is exclusively an intentional tort, and even if the policy covered intended conduct that produced unintended results, the policy's exclusion still applied because Mr. Bailer intended the injury. Erie further contended that one could reconcile the insuring provision and the exclusion by distinguishing between intended means and an unintended result. Under Erie's contention, the insurance policy would cover an invasion of privacy that produced an unintended result, even if the means were intended, but would exclude coverage for Mr. Bailer's conduct, because he had intended it and expected the resulting harm.

In addressing Erie's argument, the court distinguished policies that contain an exclusion and an express covenant insuring against liability for one or more intentional torts from those policies that do not have such apparently conflicting provisions. The court then identified three approaches in dealing with the conflicting provisions: (1) avoid the conflict, (2) apply the distinction between intentional

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121. Bailer, 344 Md. at 527, 687 A.2d at 1381 (quoting Snakenberg, 383 S.E.2d at 7). The Court of Appeals noted that "[t]he homeowner's policy in Snakenberg did not expressly insure against damages for liability for invasion of privacy." Id. The court also observed that "Erie has not briefed whether forms of invasion of privacy, other than 'Intrusion Upon Seclusion' under Restatement § 652B, can be committed unintentionally, and Erie does not argue that its policy, properly construed, insures against liability for some other form of that tort." Id. The court then declined to "express [an] opinion on such a possible construction," stating that "[i]t is sufficient for present purposes to hold that the tort in the form alleged here does not accommodate Erie's proffered distinction between negligent and intentional conduct. That proposed distinction does not resolve the intrinsic contradiction in the policy." Id.

122. Id. at 534, 687 A.2d at 1384.

123. Id. at 528, 687 A.2d at 1381.

124. Id.

125. Id. (citing Haynes v. American Cas. Co., 228 Md. 394, 396-98, 179 A.2d 900, 901-03 (1962)).

126. Id.

127. Id. at 528-29, 687 A.2d at 1381-82.
and unintentional conduct, or (3) deem the policy ambiguous and hold in favor of the insured. After discussing the cases representing each approach, the court followed the third approach, as exemplified in Lineberry. Applying this reasoning, the court concluded that Erie's proposed reconciliation of the conflict in the policy terms did not apply to Meier's claim against the Bailers.

Moreover, the court observed that the Bailers' catastrophe policy is a personal—not commercial—liability policy. As such, a reasonable person in the Bailers' position at contracting time could infer that Erie's promise to pay damages for liability for invasion of privacy referred to an intrusion upon seclusion. Namely, people owning at least one house and one car normally purchase an excess insurance policy to cover liability resulting from invasion of privacy by unreasonable intrusion upon seclusion of another. They would not, however, contemplate the term "invasion of privacy" as relating primarily to "exotic and usually commercial-context torts as appropriation of another's name or likeness, unreasonable publicity, or false light publicity." The court then held that "[i]ntrusion upon seclusion must always be intentional in order to be tortious, and it is the intrusion

128. Id. at 529, 687 A.2d at 1382.
129. Id. at 529-31, 687 A.2d at 1382-83 (citing Fuisz v. Selective Ins. Co. of Am., 61 F.3d 238, 240-43 (4th Cir. 1995) (holding that a personal liability insurance policy's exclusion of intentional acts excluded coverage of all claims for injury arising out of defamation where the insured was alleged to have specifically intended to cause injury); Lineberry v. State Farm Fire & Cas. Co., 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995) (mem.) (resolving ambiguity in an insurance policy in favor of the insured); Shapiro v. Glens Falls Ins. Co., 347 N.E.2d 624, 625-26 (N.Y. 1976) (mem.) (holding, without explanation, that willful and malicious defamation was not covered under a personal excess policy that provided coverage for liability for personal injury, including libel, slander, defamation of character, invasion of privacy because such personal injury could be "neither expected nor intended from the standpoint of the Insured").
130. Id. at 531, 687 A.2d at 1383. The court adopted the reasoning in Lineberry, which held that an insurance policy is ambiguous when it expressly covers injuries resulting from invasion of privacy, an inherently intentional tort, but excludes injuries intended or expected, and the ambiguity must be resolved in favor of the insured. Id. (citing Lineberry, 885 F. Supp. at 1099); see also Knowles v. United Servs. Auto. Ass'n, 832 P.2d 394, 396 (N.M. 1992) ("Exclusionary clauses in insurance policies are to be narrowly construed . . . with the reasonable expectations of the insured providing the basis for . . . analysis."); Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2, 7 (S.C. Ct. App. 1989) (holding that "wrongful intrusion into private affairs always involves an intentional act"). For the facts of Lineberry, see supra text accompanying notes 79-90.
131. Bailor, 344 Md. at 533-34, 687 A.2d at 1384.
132. Id. at 534, 687 A.2d at 1384.
133. Id.
134. Id.
135. Id.
that constitutes the harm against which that form of invasion of privacy is intended to protect.”

Finally, the court rejected Erie’s claim that a construction that permitted insurance of an intentional injury would counter public policy, pointing out that Erie had failed to cite any appropriate authority to support its claim. The court also noted that Erie failed to submit any evidence to clarify the parties’ intent once the policy was determined to be ambiguous. The court reasoned that the Bailers’ personal catastrophe policy was “designed for persons who own their own homes, own one or more automobiles, and are sufficiently concerned about protecting their assets that they insure for excess and enhanced coverage in addition to their underlying liability coverage.” Furthermore, the court observed that Erie failed to present any evidence that people with coverage become motivated by the insuring agreement intentionally to invade the seclusion of others. Therefore, the court read the insurance policy as providing coverage for invasion of privacy by unreasonable intrusion upon the seclusion of another. Upon these findings, the court reversed the trial court’s judgment and remanded the case for the entry of a summary judgment on liability in favor of the Bailers.

Judge Chasanow filed a dissenting opinion, in which he criticized the majority for “nullifying a specific limitation of coverage in an insurance policy” by “straining to provide insurance coverage for a 'peeping Tom' with a video camera.” Judge Chasanow asserted that

136. *Id.*. The court pointed out that Meier alleged an intentional intrusion. *Id.* Thus, no basis existed for contending that the policy would insure for intentional intrusions upon seclusion that did not result in intended or expected harm, but that the policy would not insure for intentional intrusions upon seclusion that did result in expected or intended harm. *Id.*, 687 A.2d at 1384-85. In the instant case, “the insured’s conduct, the invasion, and the claimant’s harm, the invasion, are one and the same.” *Id.*, 687 A.2d at 1385. The court concluded: “Erie’s proposed disjuction in the context of this specific claim against the Bailers postulates that the policy insures and does not insure for the same conduct, at the same time, and in the same respect. The policy is at least ambiguous, and Erie was obliged to defend and indemnify.” *Id.*

137. *Id.*, 687 A.2d at 1385.

138. *Id.* at 535, 687 A.2d at 1385.

139. *Id.*

140. *Id.* (citing *First Nat’l Bank of St. Mary’s v. Fidelity Deposit Co.*, 283 Md. 228, 241-43, 389 A.2d 359, 366-67 (1978) (holding that public policy does not prohibit insurers from issuing policies that cover liability for punitive damages awarded in a civil action for malicious prosecution, even though malice provided the basis for the damages). The court concluded that “[t]he instant case is an even weaker one for voiding the insuring agreement on public policy grounds than was... *First Nat’l Bank of St. Mary’s.*” *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 536, 687 A.2d at 1385 (Chasanow, J., dissenting).
the court could reconcile the seemingly inconsistent provisions of the policy by holding the policy to cover only negligent, as opposed to "expected or intended," conduct. He also claimed that the court departed from precedent, which set forth that unreasonableness of the invasion of privacy was the test, not the intentionality of the conduct.

4. Analysis.—In Bailer v. Erie Insurance Exchange, the Court of Appeals held that an umbrella personal liability insurance policy is ambiguous when it both expressly covers invasion of privacy as "personal injury" and excludes "personal injury expected or intended by the insured," and the ambiguity must be construed in favor of coverage for invasion of privacy by unreasonable intrusion upon seclusion of another. The ruling is consistent with prior cases construing ambiguity in an insurance policy against the insurer. However, the Bailer ruling extends precedent by concluding that invasion of privacy by unreasonable intrusion upon seclusion of another can only be committed intentionally.

a. Following Precedent with Respect to Contract Interpretation.—The Bailer court followed precedent by interpreting ambiguity in insurance policies against the drafters. As in National Paving, Haynes, and Sparks, the Bailer court resolved any potential ambiguity in the insurance policies in favor of the insured. Under the circumstances surrounding the execution of the insurance policies, the results in National Paving, Haynes, and Sparks appear reasonable given the parties' expectations. In National Paving, for example, National purchased the insurance with the expectation that the policy would cover the negligent conduct of National's independent contractor, as explicitly stated in the policy. In that case, the court cor-

144. Id. at 537, 543-44, 687 A.2d at 1386, 1387-90.
145. Id. at 536-37, 687 A.2d at 1386; see also supra text accompanying notes 96-108.
146. 344 Md. at 517, 534, 687 A.2d at 1376, 1384-85.
147. See supra text accompanying notes 29-67.
149. See supra text accompanying notes 29-44.
150. See supra text accompanying notes 45-57.
151. See supra text accompanying notes 58-67.
152. See supra text accompanying notes 123-131.
rectly rejected the insurer’s clever, but narrow, interpretation of the policy. 154 Likewise, in Haynes, the court declined to accept a narrow interpretation of “caused by accident” to mean unintentional conduct. 155 The court chose not to distinguish between “accidental means” and “accidental results” for purposes of interpreting the insurance policy because such distinction would defeat the purpose for which the insured had purchased the insurance policy in the first place. 156 Similarly, in Sparks, the court rejected the insurer’s narrow interpretation of the insurance policy, distinguishing intentional conduct from unintended result to rule in favor of coverage for the insured. 157

As National Paving, Haynes, and Sparks aptly illustrate, where an insurer presents a narrow interpretation of an insurance policy, Maryland courts have refused to accept the narrow construction when a broader reading would provide insurance coverage as consistent with the insured’s expectation. 158 This approach is proper because when an insurance policy could have two meanings, one of which makes it fair by fulfilling the insured’s reasonable expectations and the other of which makes it unreasonable by denying coverage contrary to the policy’s purpose, the former meaning should prevail. 159 Courts have been especially willing to apply this rule in cases where two seemingly conflicting provisions exist. 160 These cases, however, should be distinguished from those in which the policies expressly exclude conduct “intended or expected” without specifying the intentional torts covered. In the latter type of cases, such as Harpy, the courts have been inclined to uphold exclusion of coverage. In Harpy, for example, the policy excluded “intended or expected” conduct, but did not expressly cover intentional conduct such as sexual abuse. 161

Moreover, the courts’ approaches in National Paving, Haynes, Sparks, and Harpy are sound because the insured may reasonably be expected to rely on the plain language of the policy in bargaining for a certain type of coverage. Thus, when an insurance policy expressly

154. Id. at 50, 178 A.2d at 876 (rejecting the insurer’s interpretation because it was “a narrow one for which [the court found] little support either in the language of the contract itself or in the decisions”).
156. Id.
158. See supra text accompanying notes 41-44, 48-57, 64-67.
159. See supra text accompanying notes 41-44, 45-57, 59-67.
160. See supra text accompanying notes 45-57, 79-90.
provides coverage for a particular intentional tort, the insured has a legitimate expectation of coverage. If the insurers want to exclude coverage for a certain type of liability, such as intentional torts, they must—and undoubtedly can—draft policies with unequivocal exclusion provisions. When the insurers fail to do so, and the contract remains arguably ambiguous, it is a good policy to interpret the insurance contract in favor of the insured, thereby imposing a responsibility on the insurers to draft clear language. Insurers presumably know the type of coverage they offer and have control over the selection of the insurance policy’s terms. When the insurers draft clear language indicating what liability the policy covers or excludes, future disputes between the insurer and insured may be obviated. Thus, it is wise to hold the insurer accountable for clearly excluding a certain type of liability if there is any doubt whether the policy covers the liability. It seems that if the insurers were permitted to take advantage of the ambiguity in the policy, they would be inclined to draft ambiguous policies if doing so tends to exonerate them from their obligations.

It is significant to note, however, that the clarity of the language of an insurance policy should be judged from a reasonably prudent person’s standpoint, not from a jurist’s viewpoint. This is the key difference between the majority and the dissent in Bailer. Dissenting in Bailer, Judge Chasanow focused primarily on the technical distinctions of the term invasion of privacy, as viewed from a jurist’s vantage. Specifically, Judge Chasanow indicated that the distinction between negligent and intentional invasion of privacy has been recognized by several jurisdictions. Assuming, arguendo, that negligent invasion of privacy has been recognized as a cause of action, Judge Chasanow’s position might be correct if one assumed also that an ordinary insured can fully understand the legal nuances of the contract

162. See Shapiro v. Glen Falls Ins. Co., 347 N.E.2d 624, 626 (N.Y. 1976) (Wachtler, J., dissenting) (“[W]here an ambiguity exists the language of the entire contract should be construed against the insurer whose experts on insurance draftsmanship and attorneys selected the language and should have clearly excluded the risk if there was any doubt.”).
163. See supra note 162 and accompanying text.
165. Bailer, 344 Md. at 536-47, 687 A.2d at 1385-91 (Chasanow, J., dissenting).
166. Id. at 543, 687 A.2d at 1389 (citing Boyles v. Kerr, 806 S.W.2d 255, 259 (Tex. Ct. App. 1991) (stating that “the basis for liability in a privacy action may rest upon a negligent, as well as an intentional, invasion”), rev’d, 855 S.W.2d 593 (Tex. 1993); Prince v. St. Francis–St. George Hosp., Inc., 484 N.E.2d 265, 268 (Ohio Ct. App. 1985) (noting that “a negligent invasion of the right of privacy . . . can just as effectively invade one’s right of privacy as an intention to do so”)).
terms as can a judge. If these assumptions were made, then the seemingly inconsistent provisions in the Bailor insurance policy could be reconciled because "invasion of privacy" could be committed both intentionally and negligently.

However, Judge Chasanow's approach is problematic because an ordinary person would likely not appreciate such fine legal distinctions before purchasing an insurance policy presumably drafted by sophisticated attorneys. The insured, conversely, would likely rely on the insurer's promises as expressly stated in the policy. If the insurers wanted to exclude certain coverage, they should have phrased the policy such that, to an ordinary person, the exclusion was unambiguous. Thus, to protect the ordinary insured from potentially deceptive trade practices, the court should err on the side of interpreting insurance policies to provide for the coverage expressly stated in the policy."167 This task can be accomplished by determining the ambiguity from the insured's standpoint, taking into account the surrounding circumstances from which the parties' intent can be inferred, rather than from a jurist's hindsight.

Judge Chasanow's approach would also be impractical because it would produce an absurd result. Under the dissent's view, the exclusion in the insurance policy would swallow the coverage.168 The dissent attempted to distinguish between intended conduct that produced an intended result (to which the exclusion applied) and intended conduct that produced an unintended result (to which the exclusion did not apply).169 However, with respect to invasion of privacy, Erie failed to present any situations in which the policy would cover intended means that produced an unintended result.170 Hence, under the dissent's view, perhaps no situations would exist where the tort of invasion of privacy would be covered by the policy. If so, Erie would be exonerated of its contractual obligations, while the Bailers' expectation of coverage, based on Erie's express promises, would remain unfulfilled.171 Thus, Judge Chasanow's interpretation would destroy the purpose of the Bailor contract because it does not provide for


168. Bailor, 344 Md. at 525, 687 A.2d at 1380 ("The complexity in the case before us lies in the exclusion. If the exclusion totally swallows the insuring provision, the provisions are completely contradictory. That is the grossest form of ambiguity . . . .").

169. Id. at 543-44, 687 A.2d at 1389-90 (Chasanow, J., dissenting).

170. Bailor, 344 Md. at 535, 687 A.2d at 1385.

171. Id.
situations in which the insured would benefit from the bargained-for exchange. This result would prove unreasonable, no matter what legal doctrines one may employ to support the result.\textsuperscript{172}

\textit{b. Conflicting Public Policies.——}Some states have passed laws that prohibit insurance for intentional conduct. For example, section 533 of the California Insurance Code provides that “[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.”\textsuperscript{173} Similarly, many courts have held that insurance

\textsuperscript{172} Doctrinally, Judge Chasanow asserted:

[The Court of Appeals] has never before held that invasion of privacy must be intentional; to the contrary, [the court has] indicated [in \textit{Beane}] that for most forms of the tort, including unreasonable intrusion upon seclusion, the requirement is that the defendant must have acted unreasonably, not that the defendant must have acted intentionally.

\textit{Id.} at 541, 687 A.2d at 1388 (Chasanow, J., dissenting) (citing \textit{Beane} v. McMullen, 265 Md. 585, 291 A.2d 37 (1972)). Judge Chasanow then postulated a hypothetical of a potentially negligent invasion of privacy in the \textit{Bailers} context: the camera had been placed in the bathroom in response to the theft of jewelry or other items from that room, and the Bailers negligently failed to tell Ms. Meier about the camera when they permitted her to use the shower. \textit{Id.} at 544, 687 A.2d at 1389-90 (citation omitted). However, the conduct presented in this hypothetical situation is arguably not “unreasonable.” The only time that a defendant’s conduct could be “unreasonable” appears to be when he acts intentionally. Thus, because the installation of the camera in the hypothetical served a legitimate purpose, the court may deem such conduct reasonable under the circumstances. Therefore, such conduct would perhaps not be considered an invasion of privacy by “unreasonable” intrusion upon the seclusion of another. If the court did not hold the conduct to be unreasonable, then the invasion would, by definition, not be intentional under the \textit{Restatement (Second) of Torts}. See supra notes 118-119 and accompanying text. To hold otherwise would lead to an undesirable expansion of the tort of invasion of privacy. Namely, had the court adopted the dissent’s view, the tort would be unduly broadened because people would be held liable for such “negligent” invasions of privacy as the hypothetical situation cited by the dissent. \textit{Bailer}, 344 Md. at 527 n.4, 687 A.2d at 1381 n.4. As the majority aptly stated:

The dissenting opinion would hold that the “Intrusion Upon Seclusion” form of invasion of privacy can be committed unintentionally. That enlarges the tort beyond the confines of Restatement (Second) of Torts—confines beyond which this Court thus far has not gone. Although the dissent’s position is one way of resolving the ambiguity in this case, that position imposes personal injury liability for negligent conduct that does not result in bodily injury. Thus, those persons who have only an underlying homeowner’s policy in the language of the Bailers’ underlying policy would have no insurance against this new liability. Under the majority position, persons who unintentionally intrude have not committed a tort, have no liability, and have no need for indemnification.

\textit{Id.}

\textsuperscript{173} \textsc{Cal. Ins. Code} § 533 (West 1993). Other states have enacted similar laws. See, e.g., \textsc{Mass. Gen. Laws Ann.} ch. 175, § 47 (West 1987) (“[N]o company may insure any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing . . . .”); \textsc{N.D. Cent. Code} § 26.1-32-04 (1995) (“An insurer is not liable for a loss caused by the willful act of the insured . . . .”).
coverage for personal liability resulting from intentional conduct violates public policy.\textsuperscript{174} The public policy against insurance for intentional conduct derives from the notion "that no one shall be permitted to take advantage of his own wrong."\textsuperscript{175} The second reason for this policy is to deter policy holders from engaging in willful misconduct.\textsuperscript{176} However, the public policy of deterring intentional misconduct conflicts with another policy, which requires insurers to honor their express obligations. One court keenly observed, "There is more than one public policy. One such policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation."\textsuperscript{177} In light of these competing policies, it is important to evaluate carefully the circumstances of each case and determine the outcome accordingly. The \textit{Bailer} court properly reconciled these competing policies by holding, under the unique facts of that case, that the insurer should fulfill its promise by covering conduct that it expressly insured.\textsuperscript{178} Thus, the court put the responsibility of determining whether that conduct is, in fact, insurable squarely on the insurer.\textsuperscript{179} Because the policy in favor of enforcing express promises is important, if the insurers have decided to issue


\textsuperscript{175} Hartford Accident & Indem. Co. v. Village of Hempstead, 397 N.E.2d 737, 742 (N.Y. 1979) (quoting Messersmith v. American Fidelity Co., 133 N.E. 432, 433 (N.Y. 1921)).


\textsuperscript{177} Creech v. Aetna Cas. & Sur. Co., 516 So. 2d 1168, 1174 (La. Ct. App. 1987); accord Sheets v. Brethren Mut. Ins. Co., 342 Md. 654, 654, 679 A.2d 540, 549 (1996) ("The function of an insurance company is more than that of premium receiver." (internal quotation marks omitted)); Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 581 (N.D. 1993) (ruling that, in enacting a statute prohibiting insurance for intentional conduct, the legislature did not intend to "benefit insurance companies by allowing them to collect premiums for coverage they do not intend to provide").

\textsuperscript{178} \textit{Bailer}, 344 Md. at 517, 522-27, 531-34, 687 A.2d at 1378-81, 1383-85.

\textsuperscript{179} See id. at 534-35, 687 A.2d at 1385 (stating that Erie failed to "cite to us any cases involving insurance" contracts against public policy and to present any "evidence that persons to whom personal catastrophe policies are marketed become motivated by the insuring agreement intentionally to invade the seclusion of others").
policies that expressly cover intentional torts, the insurers should be estopped from arguing later that "public policy" vindicates them from their obligations.\textsuperscript{180}

c. Extending Precedent with Respect to the Tort of Invasion of Privacy.—Prior to \textit{Bailer}, Maryland cases involving invasion of privacy focused on the reasonableness of a defendant's conduct in determining whether a cause of action based on the invasion is justified.\textsuperscript{181} In \textit{Beane v. McMullen},\textsuperscript{182} the court held that reasonableness under the facts presented is a determining factor in all types of invasions of privacy, except perhaps appropriation of name or likeness.\textsuperscript{183} Similarly, in \textit{Household Finance Corp. v. Bridge},\textsuperscript{184} the court held that the question of how far a creditor may go to collect the debt and yet not be liable for invasion of privacy must also be decided by reasonableness.\textsuperscript{185} By definition, invasion of privacy by intrusion upon seclusion of another must be "unreasonable."\textsuperscript{186} Therefore, the reasonableness test properly could be applied to \textit{Beane}, \textit{Bridge}, and \textit{Bailer}. The \textit{Bailer} court, however, went further to clarify that, for the invasion to be "unreasonable," it must also be intentional.\textsuperscript{187} This clarification comports with the definition of invasion of privacy under the \textit{Restatement (Second) of Torts}.\textsuperscript{188} Moreover, this clarification is proper because \textit{Beane} and \textit{Bridge} did not involve the interpretation of conflicting insurance policy provisions as did \textit{Bailer}.\textsuperscript{189} Because \textit{Beane} and \textit{Bridge} dealt with one's invasion of another's privacy, the question was one of the degree of the invasion, and the court needed only to focus on the question of reasonableness to resolve the cases before it.\textsuperscript{190} Stated differently, the court in \textit{Beane} and \textit{Bridge} did not need to focus on the intent behind the defendant's conduct to decide those cases.\textsuperscript{191}

\textit{Bailer}, however, involved an insurance policy that expressly provided coverage for invasion of privacy, but excluded coverage for con-

\textsuperscript{180} See supra text accompanying notes 137-142, 177.
\textsuperscript{181} See supra text accompanying notes 98-108.
\textsuperscript{182} 265 Md. 585, 291 A.2d 37 (1972).
\textsuperscript{183} Id. at 600-01, 291 A.2d at 45.
\textsuperscript{184} 252 Md. 531, 250 A.2d 878 (1969).
\textsuperscript{185} Id. at 540, 250 A.2d at 884.
\textsuperscript{186} See supra notes 118-119 and accompanying text.
\textsuperscript{187} \textit{Bailer}, 344 Md. at 527, 687 A.2d at 1381.
\textsuperscript{188} See supra notes 109-110 and accompanying text.
\textsuperscript{189} See supra text accompanying notes 98-108.
\textsuperscript{190} See \textit{Beane}, 265 Md. at 600-01, 291 A.2d at 45-46; \textit{Bridge}, 252 Md. at 540-41, 250 A.2d at 884-85.
\textsuperscript{191} See \textit{Beane}, 265 Md. at 600-01, 291 A.2d at 45-46; \textit{Bridge}, 252 Md. at 540-41, 250 A.2d at 884-85.
duct expected or intended.192 Faced with such facts, the Bailor court had to resolve the issue of intent of the insured's conduct in order to reach its ruling.193 While clarifying the elements of invasion of privacy, the court did not overrule Beane or Bridge, because reasonableness remains a crucial factor in determining whether invasion of privacy by unreasonable intrusion upon seclusion of another has been committed.194 Nevertheless, the Bailor court, by holding that invasion of privacy by unreasonable intrusion upon seclusion requires intent,195 has properly extended the rulings in Beane and Bridge.

5. Conclusion.—A savvy insurer may attempt to nullify explicit coverage of intentional torts in one section of an insurance policy by inserting an ambiguous provision excluding coverage in another section. However, as the Bailor ruling illustrates, the insurer’s attempt in taking away with the left hand what the right hand gave may not escape the confines of fundamentally reasonable contract interpretation. By construing ambiguity in an umbrella personal liability insurance policy against the insurer, the Bailor court has aptly resolved two conflicting public policies: enforcing express promises when they become due and excluding coverage for intentional torts.196 When these two policies conflict, it becomes proper and necessary to promote the former policy over the latter, even if it means having to interpret a policy broadly “to provide insurance coverage for ‘a peeping Tom’ with a video camera.”197

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192. Bailor, 344 Md. at 520-21, 687 A.2d at 1377-78.
193. Id.
194. Id. at 525-27, 687 A.2d at 1380-81.
195. Id. at 527, 687 A.2d at 1381.
196. See supra note 5 and accompanying text.
197. Bailor, 344 Md. at 536, 687 A.2d at 1385 (Chasanow, J., dissenting).
MARYLAND COURT OF APPEALS

V. CRIMINAL LAW

A. Recognizing and Limiting the Routine Booking Question Exception

In Hughes v. State, the Court of Appeals recognized and limited the application of the routine booking question exception to the procedural safeguards of Miranda v. Arizona. The court held that a question on an arrest intake form asking whether the arrestee was a narcotic or drug user fell outside of the exception, and therefore the arrestee's answer, absent Miranda warnings, could not be introduced at trial. In analyzing and applying the seemingly contradictory jurisprudence offered by the Supreme Court regarding the application of Miranda warnings to routine questions asked during booking, the Court of Appeals, in Hughes, correctly interpreted the standard to be used—questions that the police know or should know are reasonably likely to elicit an incriminating response are excluded from the exception. By adopting the approach urged by Justice Marshall's dissent in Pennsylvania v. Muniz, the Court of Appeals limited the scope of the exception to those questions that the police officer objectively has no reason to anticipate will incriminate the arrestee. This limitation is consistent with the purpose of Miranda: to protect the rights of criminal suspects from undue influence and coercion.

1. The Case.—On October 14, 1993, Michael Patron Hughes was arrested by Corporal David Morrissette of the Prince George's County Police Department for his suspected involvement in the distribution of illegal drugs. The arrest resulted from a narcotics surveillance operation in Landover Hills during which two plain-clothed police officers watched a small group of individuals suspected of drug trafficking, while approximately fifteen uniformed officers waited nearby to execute any necessary arrests. The plain-clothed officers observed the area for twenty to twenty-five minutes, during which time they observed three or four individuals enter the area, approach one member of the group, and then leave the area. The officers also saw

3. Hughes, 346 Md. at 84, 695 A.2d at 134.
5. See Miranda, 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.").
6. Hughes, 346 Md. at 84, 695 A.2d at 134.
7. Id.
an individual who appeared to be serving as a lookout. The plain-clothed officers informed the other uniformed officers, including Corporal Morrissette, that they had witnessed a series of apparent drug transactions. As the uniformed officers approached the group, the individuals, including Hughes, fled. Corporal Morrissette chased Hughes, who discarded a bag as he ran. This bag was later determined to be a glassine bag containing eight rocks of crack cocaine. Morrissette apprehended Hughes, arrested and searched him, and confiscated a pager and $62.00 in mostly small bills.

During the booking process, Morrissette filled out a standard Prince George’s County Police Department arrest form. Morrissette asked Hughes for his name, address, and telephone number, and also whether he was a “narcotic or drug user.” Hughes denied that he was a narcotics or drug user. Hughes “was subsequently charged with possession with intent to distribute cocaine, possession of cocaine, conspiracy to distribute cocaine, and conspiracy to possess with intent to distribute cocaine.”

During Hughes’s trial in the Circuit Court for Prince George’s County, the State’s Attorney asked Morrissette how Hughes had responded to the “drug or narcotics user” question. Hughes objected, arguing that his response to the question was inadmissible because at the time the question was asked, he had not been advised of his Miranda rights. The court sustained the objection and directed the prosecutor to ask Morrissette...

9. Id.
10. Hughes, 346 Md. at 84, 695 A.2d at 134.
11. Id.
12. Id.
13. Id. at 84-85, 695 A.2d at 134. The amount of crack cocaine contained in the bag appears to be in dispute. The opinion of the Court of Special Appeals stated that the bag contained only seven rocks of crack cocaine. Hughes, No. 808, slip op. at 2.
14. Hughes, 346 Md. at 84-85, 695 A.2d at 134.
15. Id. at 85, 695 A.2d at 134.
16. Id.
17. Id. If Hughes had answered “yes,” Morrissette would then have asked the “type” of narcotic or drug Hughes used. Id.
18. Id. at 84, 695 A.2d at 134; see also Md. Ann. Code art. 27, § 286(a)(1) (1996) (“Except as authorized by this subheading, it is unlawful for any person: (1) To manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to . . . distribute . . . a controlled dangerous substance.”).
19. Hughes, 346 Md. at 85, 695 A.2d at 134-35.
20. Id., 695 A.2d at 135.
21. Id.
why he had asked that question. When Morrissette stated he did not know why, the court examined the arrest form to ascertain the origin of the question, and overruled the objection. Morrissette was permitted to testify regarding Hughes's answer to the question.

During closing argument, the State's Attorney asked the jury to consider Hughes's response that he was not a drug or narcotic user as evidence that Hughes intended to distribute the cocaine, rather than consume the drugs for his own personal use. The jury found Hughes guilty on all four counts: possession with intent to distribute

22. Hughes, No. 808, slip op. at 3.
23. Id. After examining the form, the trial court stated:
   "This appears to be Prince George's County Form No. 3245, which has been in use since December of 1984. It looks like a standard booking form arrest report from the police department for an adult. And it seems to contain just basic information which is needed in order to process a criminal case and a person accused, and I'm going to overrule the objection and allow the answer."
   Id. (quoting the trial judge).
24. Hughes, 346 Md. at 85, 695 A.2d at 135. The testimony that the judge permitted was as follows:
   [State's Attorney]: Corporal Morrissette, I'm showing you what has been marked as State's Exhibit No. 4, and what is that document, just for the record?
   [Morrissette]: Prince George's County Police Department arrest report.
   [State's Attorney]: And who filled that document out?
   [Morrissette]: I did.
   [State's Attorney]: And on Question No. 18, which is part of the preprinted booking information, did you ask the defendant whether or not he was a narcotics or drug user?
   [Morrissette]: Yes.
   [State's Attorney]: And what was his response?
   [Morrissette]: No, he was not.

Id. The second time Corporal Morrissette was asked about Hughes's response to the "narcotics or drug use" question, Hughes failed to object. Hughes, No. 808, slip op. at 3-4. On appeal to the Court of Special Appeals, the State argued that Hughes had waived his right to object to the statement's admission because of his failure to object at trial. Id. at 3. The Court of Special Appeals held, however, that Hughes's failure to object to the second question did not constitute a waiver of his right to challenge the admission. Id. at 4 (citing Watson v. State, 311 Md. 370, 535 A.2d 455 (1988)). The court reasoned that because the trial court had already ruled unequivocally that Corporal Morrissette would be permitted to answer, a second objection would serve only to highlight the defendant's response. Id.

25. Hughes, 346 Md. at 86, 695 A.2d at 135. In her closing argument, the prosecutor stated:
   "You also have a statement that was made during the booking process by the defendant that he doesn't use drugs. Well, you may consider that however you wish. You can ignore it totally if you want to, whatever you want to do, but I think that that is—you can take that into consideration. If he says he doesn't use drugs, then he presumably didn't have this for his own personal use, he intended to do something with it, or if you decide that because he was being booked at that time that maybe he wasn't telling the whole story, that's fine, but even without that statement, you certainly have a quantity of drugs with the surrounding circumstances that indicate that he in fact intended to sell it or give it away."
   Id.
cocaine, possession of cocaine, conspiracy to distribute cocaine, and conspiracy to possess with intent to distribute cocaine.\textsuperscript{26}

Hughes appealed his conviction to the Court of Special Appeals.\textsuperscript{27} He argued that the trial court committed reversible error in admitting Morrissette's testimony regarding Hughes's answer to the "narcotics or drug use" question because Hughes had not received \textit{Miranda} warnings prior to answering the question.\textsuperscript{28} In considering the argument that the "narcotics and drug use" question was inadmissible because Hughes had not yet received the \textit{Miranda} warnings, the Court of Special Appeals noted that its own interpretation of the routine booking question exception has extended it to instances in which the response to the question was incriminating.\textsuperscript{29} The court then chronicled the somewhat contradictory measures adopted by other courts to evaluate the exception.\textsuperscript{30} The court ultimately adhered to the interpretation of the United States Supreme Court, established in \textit{Pennsylvania v. Muniz},\textsuperscript{31} exempting routine booking questions (i.e., "biographical data necessary to complete booking or pretrial services")\textsuperscript{32} from the requirements of \textit{Miranda} unless the questions are asked to obtain incriminating information.\textsuperscript{33}

The Court of Special Appeals held that the question asked of Hughes fell within the routine booking question exception for several reasons.\textsuperscript{34} First, the court found persuasive the fact that the question is asked of all arrestees, regardless of the reason for their arrest.\textsuperscript{35} Second, the court reasoned that the question is necessary to determine whether the arrestee may need medical attention.\textsuperscript{36} Finally, because

\begin{itemize}
  \item \textsuperscript{26} \textit{Id.} at 84, 695 A.2d at 134. Hughes was sentenced to 20 years of imprisonment, with 10 years suspended. \textit{Hughes}, No. 808, slip op. at 1.
  \item \textsuperscript{27} \textit{Hughes}, 346 Md. at 86, 695 A.2d at 135.
  \item \textsuperscript{28} \textit{Hughes}, No. 808, slip op. at 3. Hughes also argued that the evidence was insufficient to support the convictions for conspiracy to distribute cocaine and conspiracy to possess with intent to distribute cocaine, but the court denied that argument. \textit{Id.} at 10-12.
  \item \textsuperscript{29} \textit{Id.} at 5 (citing Clarke v. State, 3 Md. App. 447, 240 A.2d 291 (1968)).
  \item \textsuperscript{30} \textit{Id.} at 6-9. Some courts have held that \textit{Miranda} warnings must be given prior to routine booking questions if the questions are reasonably likely to elicit an incriminating response, while others have held that \textit{Miranda} warnings are necessary only if the questions are asked for the purpose of eliciting incriminating information. \textit{See infra} notes 53-117 and accompanying text.
  \item \textsuperscript{31} 496 U.S. 582 (1990).
  \item \textsuperscript{32} \textit{Id.} at 601 (plurality opinion) (internal quotation marks omitted).
  \item \textsuperscript{33} \textit{Hughes}, No. 808, slip op. at 6-8.
  \item \textsuperscript{34} \textit{Id.} at 10.
  \item \textsuperscript{35} \textit{Id.} at 8.
  \item \textsuperscript{36} \textit{Id.} The court made an analogy to the facts in \textit{State v. Geasley}, 619 N.E.2d 1086, 1093 (Ohio Ct. App. 1993), in which the Ohio Court of Appeals held that a question regarding an arrestee's medical condition constituted a legitimate police concern, and therefore, was exempt from the requirements of \textit{Miranda}. \textit{Hughes}, No. 808, slip op. at 8.
\end{itemize}
no evidence was presented alleging that the police officer asked the question for the purpose of eliciting an incriminating answer, the court refused to read such an intent into the question. The court found no error in the trial court’s admission of the defendant’s response into testimony, and affirmed the conviction. The Court of Appeals granted certiorari to consider the validity and the scope of the “routine booking question” exception to *Miranda* as applied to the facts of *Hughes*.

2. **Legal Background.**—Since the Supreme Court first enunciated the procedural requirements necessary to ensure the voluntariness of statements made to police officers, the question of when *Miranda* warnings are required has troubled both state and federal courts. While the Supreme Court has established clear definitions of terms such as “custodial interrogation,” the Court has not conclusively ruled on the subject of the routine booking question exception.

The landmark case of *Miranda v. Arizona* established procedural safeguards that must be followed anytime a person is subjected to “custodial interrogation.” In *Miranda*, the Court reversed the conviction of the defendant because the prosecution entered into evidence a confession signed by the accused that was obtained after he had been interrogated by police officers for two hours. The police officers failed to inform the defendant of his legal right to counsel and his right to remain silent.

37. *Hughes*, No. 808, slip op. at 9 (“We agree with appellant that if the Corporal’s question had been asked to elicit an incriminating response, it would not have fallen within the exception, but appellant has presented no such evidence.”).

38. *Id.* at 10.


40. *Hughes*, 346 Md. at 83-84, 695 A.2d at 134.

41. See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (outlining the guidelines to be used to inform suspects of their right against self-incrimination).

42. *Id.* at 444 (noting that by “custodial interrogation,” the Court means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”); see also *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (“[T]he term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” (footnote omitted)).

43. See *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion) (“Muniz’s answers to these first seven questions . . . fall within a ‘routine booking question’ exception . . . .”).

44. *Miranda*, 384 U.S. at 444.

45. *Id.* at 491-92.

46. *Id.* at 492.
The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."\(^47\) The Court required that an individual subject to a custodial interrogation must be warned prior to questioning:

that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.\(^48\)

The Court's rationale for requiring warnings prior to any custodial interrogation stemmed from its deep concern with preserving the sanctity of the Fifth Amendment's right against self-incrimination in light of the inherently coercive nature of police interrogation.\(^49\) The Court devoted a significant portion of the opinion to tracing the evolution of the Fifth Amendment, alternatively using phrases such as "fundamental to our system of constitutional rule"\(^50\) and "the essential mainstay of our adversary system"\(^51\) to describe an individual's right against self-incrimination. This commitment to safeguarding the prohibition against self-incrimination from abuses via psychological manipulation can be traced throughout the cases that followed *Miranda*.\(^52\)

Following *Miranda*, state and federal courts, including courts in Maryland, recognized an exception to the *Miranda* warning requirements. In *Clarke v. State*,\(^53\) the Court of Special Appeals held that *Miranda* was not violated when a police officer asked an arrestee his name, address, and place of employment even after the arrestee ex-

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\(^{47}\) *Id.* at 444.

\(^{48}\) *Id.* at 479.

\(^{49}\) See U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . "); *Miranda*, 384 U.S. at 457 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."). The Court examined a variety of studies about the physical intimidation and torture that can occur during a criminal interrogation. It also included a detailed discussion regarding the psychological warfare engaged in by interviewing officers, some of which was gathered from police training manuals instructing new officers on coercive techniques. *Id.* at 445-55. The Court strongly objected to this type of baiting and tricking of suspects. *Id.* at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

\(^{50}\) *Miranda*, 384 U.S. at 468.

\(^{51}\) *Id.* at 460.

\(^{52}\) See infra notes 76-103 and accompanying text.

pressly requested that he wanted an attorney. Stating that these questions did not "constitute an interrogation of the type contemplated by the Court in *Miranda*," the Court of Special Appeals distinguished questions asked during booking of arrestees from those intended to elicit an incriminating response. Because the booking process did not constitute custodial interrogation, the warning requirements were not necessary.

A number of Maryland cases followed the distinction established in *Clarke*. In *Propst v. State*, the Court of Special Appeals held that questions asked during the booking process about an arrestee's address did not require *Miranda* warnings even though evidence regarding control of the residence was an element of the crime. In *Grimes v. State*, a case in which a suspect was asked his name prior to being given *Miranda* warnings, the Court of Special Appeals held that the question was "not proscribed by *Miranda*, and ... his answers [were] not rendered inadmissible by the exclusionary rule announced in *Miranda*," even though the question was asked during the defendant's arrest, and not during a formal booking procedure at the police station.

Maryland courts placed a limit on the routine booking question exception in cases in which the circumstances were extenuated. In *Nasiriddin v. State*, the Court of Special Appeals held that a trial court's admission of a statement that the defendant made "voluntarily" during the alleged booking process constituted reversible error. In *Nasiriddin*, the defendant was arrested for leaving the scene of an accident, and brought into the police station for booking. Prior to

54. *Id.* at 451, 240 A.2d at 294.
55. *Id.*
56. *Id.* That the defendant's response did, in fact, incriminate him was not dispositive to the court's consideration. *Id.* at 449-50, 240 A.2d at 293. When asked during booking, the defendant stated that he was employed by the Topaz House. *Id.* at 449, 240 A.2d at 293. The police checked that location and found a truck loaded with stolen property, which the defendant was suspected of stealing. *Id.* at 449-50, 240 A.2d at 293.
57. *Id.* at 451, 240 A.2d at 294.
59. *Id.* at 43, 245 A.2d at 92.
61. *Id.* at 586, 409 A.2d at 771. The Court of Special Appeals explicitly noted in *Grimes* that this interpretation had not been recognized by the Court of Appeals, which had declined to decide the issue in *Mills v. State*, 278 Md. 262, 363 A.2d 491 (1976). *Grimes*, 44 Md. App. at 586 & n.2, 409 A.2d at 771 & n.2.
63. *Id.* at 501, 298 A.2d at 503.
64. *Id.* at 482-83, 298 A.2d at 492-93.
questioning the defendant, the police searched his car, wherein they found marijuana and other drug paraphernalia. Although the defendant requested an attorney, the police officer asked the defendant questions for three hours, under the pretext of obtaining information necessary to complete the arrest forms. One of the questions concerned the physical condition of the defendant. The officer appeared concerned about the defendant’s health because the defendant had alternated between extreme agitation and near despondency throughout the arrest process. After the defendant stated he was fine, the officer followed up by asking whether the defendant “had any problem related to drugs at that time.” The defendant answered, “No, not at this time.” The police officer claimed that the defendant then spontaneously stated that he “had a problem in the past with heroin and that he had taken a methadone maintenance program treatment, . . . and he had been treated with methadone.”

Distinguishing *Nasiriddin* from prior cases recognizing a routine booking question exception, the Court of Special Appeals rejected the State’s argument that the question regarding the defendant’s prior drug history was a routine booking question that was not intended to elicit an incriminating response. The court held that the police of-

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65. *Id.* at 483, 298 A.2d at 493.
66. *Id.* at 490-91, 298 A.2d at 497.
67. *Id.* at 495-96, 298 A.2d at 500.
68. *Id.*
69. *Id.* at 496, 298 A.2d at 500.
70. *Id.* at 497, 298 A.2d at 500.
71. *Id.*
72. *Id.* at 499-500, 298 A.2d at 501-02. The court stated:

We do not agree, as the police would have it, that the statements were obtained under routine booking procedures. We have held [in *Propst* and *Clarke*] that, absent unusual circumstances, routine booking procedures are not included within the types of interrogation proscribed by *Miranda*. There were clearly no unusual circumstances in either *Propst* or *Clarke*. In the former, the address given by the accused when they were booked was used to show a fact required to be proved by the State, control of the premises by the accused. In the latter, investigation of the accused’s place of employment, given during the booking, turned up stolen merchandise from which criminal agency was established. But here the inculpatory statements did not result from a question routinely asked as part of usual booking procedures. They resulted from a question asked by the police some time in the course of a three hour procedure to “process” *Nasiriddin* for booking and followed a general question whether he wanted medical care. The specific question was whether Nasiriddin had “any problem related to drugs at that time.” Nasiriddin answered: “No, not at this time” and continued that he had a problem in the past with heroin and had taken methadone maintenance program treatment. The direct answer to the question had inculpatory implications and what followed was patently inculpatory. We are not able to say that the
ficer's concerns about the defendant's health should have been satisfied by the first question, and, therefore, the officer's subsequent question about the defendant's drug use, "asked within the frame of reference of the officers' knowledge of the narcotic paraphernalia being found in Nasiriddin's automobile, was precluded by Miranda in the light of Nasiriddin's prior requests for an attorney." The Court of Special Appeals considered the context in which the question was asked and did not rely solely on the officers' subjective intent to determine whether the question was reasonably likely to elicit an incriminating response.

Maryland was not alone in its struggle to apply the holding of Miranda to increasingly complex fact scenarios. In Rhode Island v. Innis, the Supreme Court reconsidered the scope of Miranda and expanded its safeguards by broadening the scope of circumstances constituting custodial interrogation. With regard to Miranda jurisprudence, Innis concerns a defendant's statements and actions prior to booking, but after he has been arrested, advised of his Miranda rights, and invoked his right to counsel. In Innis, as three police officers transported the defendant to the police station, one of the officers-initiated a conversation with the other officers about the missing weapon, which had been used in the robbery and murder of two taxicab drivers. The officer expressed concern about the possibility of a handicapped child finding the gun. The suspect interrupted the conversation and asked the officers to turn the car around so that he could take them to the location of the gun. When the State tried to use this statement against the defendant, the defendant contended that the statement was inadmissible because the conversation in the police car constituted custodial interrogation in violation of Miranda's

question which primed the pump and forced the flow of the inculpatory admissions was without the ambit of Miranda.

Id. at 500-01, 298 A.2d at 502 (citations omitted).
73. Id. at 501, 298 A.2d at 502.
74. Id., 298 A.2d at 503.
75. Id. (noting that the relevant consideration was totality of information that the police possessed). Additionally, the Nasiriddin court mentioned that the police officers did not intend to interrogate Nasiriddin. Id. at 491, 298 A.2d at 497. This lack of intent, however, was not dispositive to the court's consideration of the question.
76. 446 U.S. 291 (1980).
77. Id. at 300-01 (expanding custodial interrogation to include "express questioning or its functional equivalent").
78. Id. at 298.
79. Id. at 293-94.
80. Id. at 294-95.
81. Id. at 295.
requirement to stop questioning a suspect once he has requested an attorney.\textsuperscript{82}

The Supreme Court, noting that \textit{Miranda} defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way,"\textsuperscript{83} refused to construe \textit{Miranda} narrowly to mean that procedural safeguards are necessary only when express questioning occurs.\textsuperscript{84} The Court expanded the definition of "custodial interrogation" to encompass "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect,"\textsuperscript{85} and held that the police officers' conversation did not constitute a custodial interrogation.\textsuperscript{86}

Thus, \textit{Innis} requires courts, when determining whether police action constitutes a "custodial interrogation," to consider what knowledge police actually have, or are presumed to have, when they question criminal defendants.\textsuperscript{87}

\textit{Innis} was not without its critics. Justice Stevens's dissent in \textit{Innis} advocated an even broader interpretation of custodial interrogation, arguing that "any police statement or conduct that has the same purpose or effect as a direct question" should be considered custodial interrogation under \textit{Miranda}.\textsuperscript{88} Justice Marshall's dissent took issue with the majority's application of the expanded definition of "custodial interrogation" to the facts of the case.\textsuperscript{89} Although he agreed with the majority's objective evaluation of whether the police knew or should have known that a question would produce an incriminating response, Marshall was "utterly at a loss" regarding the application of this objective standard to the facts of the case.\textsuperscript{90} He thought that the
police officers' conversation in the car did constitute an interrogation, and thus the defendant's statements should not have been admitted.\textsuperscript{91}

State and federal courts applying the \textit{Innis} standard have held that the routine booking question exception does not apply if a police officer knows or should know that the routine question is reasonably likely to produce an incriminating response. In \textit{State v. Conover},\textsuperscript{92} the Court of Appeals analyzed whether statements made during the booking of a defendant after he exercised his right to counsel were the type of Fifth Amendment violations that \textit{Miranda} and \textit{Innis} intended to prevent.\textsuperscript{93} While holding that administrative questions asked of all arrestees do not usually require \textit{Miranda} warnings, the court opined that any such \textit{Miranda} analysis must be mindful of the "evils addressed by \textit{Miranda} and the goals of the safeguards there established."\textsuperscript{94}

Federal courts have interpreted \textit{Innis} to require a stricter examination of routine booking questions. In \textit{United States v. Mata-Abundiz},\textsuperscript{95} the Court of Appeals for the Ninth Circuit held that an INS investigator's question to a defendant regarding his citizenship was not excepted from \textit{Miranda} protection as a routine booking question because the question was reasonably likely to elicit an incriminating response.\textsuperscript{96} The court stated that the relationship between the question asked and the suspected criminal act is "highly relevant" to determining the knowledge that the police should have had.\textsuperscript{97}

In \textit{United States v. Disla},\textsuperscript{98} the Ninth Circuit again considered the routine booking question exception in light of the \textit{Innis} reasoning. During the execution of a search warrant for unrelated items at a particular address, police officers found large quantities of illegal drugs

\begin{itemize}
  \item \textsuperscript{91} Id. at 306-07.
  \item \textsuperscript{92} 312 Md. 33, 537 A.2d 1167 (1988).
  \item \textsuperscript{93} Id. at 38, 537 A.2d at 1169.
  \item \textsuperscript{94} Id. at 40, 537 A.2d at 1170. This type of analysis had not been present in Maryland cases up to this point. A 1988 Court of Special Appeals decision illustrates that court's adherence to the 1970s interpretation of the routine booking question exception; no analysis of the impact of \textit{Innis} is included in the court's consideration. Ferrell v. State, 73 Md. App. 627, 536 A.2d 99 (1988), \textit{rev'd on other grounds}, 318 Md. 235, 567 A.2d 937 (1990). Holding that police questions regarding name, address, and age were routine booking questions, the Court of Special Appeals stated that, "Until the Court of Appeals directs us otherwise, we shall adhere to the view that routine [booking] questions . . . are not proscribed by \textit{Miranda} . . . ." Id. at 640, 536 A.2d at 105 (quoting Grimes v. State, 44 Md. App. 580, 586, 409 A.2d 767, 771 (1980), \textit{rev'd on other grounds}, 290 Md. 236, 429 A.2d 228 (1981)).
  \item \textsuperscript{95} 717 F.2d 1277 (9th Cir. 1983).
  \item \textsuperscript{96} Id. at 1280.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} 805 F.2d 1340 (9th Cir. 1986).
\end{itemize}
and drug paraphernalia. Shortly thereafter, the police arrested a person matching the description of the individual who lived in the apartment. Before advising him of his Miranda rights, the police asked the man his name, age, address, and employment status. At trial, the government introduced his statement that he lived at the address as evidence that the drugs belonged to him. The Ninth Circuit held that the officer should have known that, because the drugs were found in the home, the question asking for the arrestee's address was reasonably likely to elicit an incriminating response, especially because the issue of where the arrestee lived was an element of the suspected crime.

In Pennsylvania v. Muniz, the Supreme Court recognized the routine booking question exception to Miranda. In Muniz, the Court considered whether a series of questions asked of a defendant who had not been advised of his Miranda rights, and who was suspected of driving while intoxicated, were admissible. In accordance with police procedure, Muniz was asked about his name, address, height, weight, eye color, age, and date of birth. The arresting officer also asked Muniz if he knew the date of his sixth birthday, to which Muniz answered that he did not. The entire proceeding was videotaped, and the videotape was admitted into evidence at trial. On appeal, Muniz argued that because he had not been advised of his Miranda rights, the admission of the videotape violated Miranda and his Fifth Amendment right against self-incrimination.

The Supreme Court held that the part of the tape concerning Muniz's response to the question about the date of his sixth birthday should have been excluded because of its incriminating content.

99. Id. at 1342-43.
100. Id. at 1343.
101. Id. These were part of a standard arrest form. Id.
102. Id. at 1344-45.
103. Id. at 1347. Despite this finding, the Ninth Circuit held that the trial court's admission of this statement constituted harmless error because evidence presented at trial proved "overwhelmingly" that the defendant lived in the apartment where the drugs were found. Id.
104. 496 U.S. 582 (1990).
105. Id. at 601 (plurality opinion).
106. Muniz, 496 U.S. at 584-85.
107. Id. at 586.
108. Id.
109. Id. at 585-87.
110. Id. at 587. In considering the defendant's Fifth Amendment claim, the Court revisited the concept of the cruel dilemma, whereby in answering a question, a suspect faces either self-accusation, perjury, or contempt. Id. at 596.
111. Id. at 600.
but a plurality found that the other seven questions fell within "a routine booking question" exception to Miranda. The plurality explained that the exception applied to questions intended to secure the "'biographical data necessary to complete booking or pretrial services.'" This exception did not extend, however, to questions "'that are designed to elicit incriminatory admissions.'" Justice Marshall agreed that the sixth birthday question should have been excluded, but declined to recognize an exception for routine booking questions. Justice Marshall argued that an Innis-based approach should be followed. In other words, questions that the police know or should know are reasonably likely to elicit an incriminating response should be exempted from the exception. Marshall contended that even if a routine booking exception were warranted, "the key components of the analysis are the nature of the questioning, the attendant circumstances, and the perceptions of the suspect." The standard advocated by Justice Marshall in Muniz provided the framework for the Court of Appeals's decision in Hughes v. State.

3. The Court's Reasoning.—In Hughes v. State, the Court of Appeals recognized and limited the routine booking question exception to Miranda by holding that a question on an arrest intake form asking whether the arrestee was a narcotics or drug user fell outside of the exception, and was therefore inadmissible without Miranda warnings.

In determining whether the drug question was within the exception, the court analyzed the scope and validity of the exception by considering the development of Miranda, Innis, and Muniz, and how these decisions interact with one another. Because Miranda warnings are triggered whenever there is a custodial interrogation, the

112. Id. at 601 (plurality opinion) (internal quotation marks omitted).
113. Id. (quoting Brief for United States as Amicus Curiae at 12, Pennsylvania v. Muniz, 496 U.S. 582 (1990) (No. 89-213) (quoting United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989))). The Court also described the questions as "'requested for record keeping purposes only,'" and "reasonably related to the police's administrative concerns." Id. at 601-02.
114. Id. at 602 n.14 (quoting Brief for United States as Amicus Curiae at 13, Muniz (No. 89-213)).
115. Id. at 608-09 (Marshall, J., concurring in part and dissenting in part).
116. Id. at 609.
117. Id. at 611.
118. Hughes, 346 Md. at 100-01, 695 A.2d at 142. The Court of Appeals unanimously held that admission of the defendant's answer to the question constituted reversible error. Id. at 84, 695 A.2d at 134. The court reversed the decision of the Court of Special Appeals and remanded the case for a new trial. Id. at 101, 695 A.2d at 142.
119. Id. at 87-88, 91, 695 A.2d at 136-38.
court tracked the concurrent developments of the routine booking question exception and the expanded definition of custodial interrogation.120

The court detailed the tensions between the different interpretations of the routine booking question exception. Discussing Innis,121 the Court of Appeals noted that lower courts interpreted Innis as allowing the exception only to those questions that a police officer neither intended, nor should have reasonably expected, to elicit an incriminating response.122 With regard to the different standard enunciated in Muniz, a plurality of the Supreme Court recognized that the applicability of the exception, which "exempts from Miranda's coverage questions to secure the "biographical data necessary to complete booking or pretrial services,'"123 was contingent on whether the question asked was intended to elicit an incriminating response.124

The Court of Appeals hypothesized that the distinction between the Innis and Muniz standards may not have received more attention because the Muniz plurality did not expressly reject the Innis standard.125 Alternatively, some courts may perceive the two approaches as reconcilable.126

The Hughes court acknowledged the appropriateness of applying the routine booking question exception for questions "aimed at accumulating 'basic identifying data required for booking . . . .'"127 The court rejected the interpretation and integration of the standard offered by the Court of Special Appeals, which it characterized as a dismissal of the Innis-based approach in favor of the principle "established" by Muniz.128 Rather, the Court of Appeals adopted an Innis-based standard: If a question on its face asks for innocuous information, courts should consider whether the officer asking the ques-

120. Id. at 87-94, 695 A.2d at 136-39.
121. See supra notes 76-91 and accompanying text.
122. Hughes, 346 Md. at 91, 695 A.2d at 138.
124. Id. at 602 n.14 (quoting Brief for the United States as Amicus Curiae at 13, Muniz (No. 89-213)).
125. Hughes, 346 Md. at 94, 695 A.2d at 139.
126. Id. (noting that some courts view the Innis-based formulation as merely "elaborat[ing] upon the booking [question] exception" as defined by Muniz).
127. Id. at 94-95, 695 A.2d at 139 (quoting United States ex rel. Hines v. LaVallee, 521 F.2d 1109, 1113 & n.2 (2d Cir. 1975)). The court offered examples of questions to which the exception will ordinarily apply, such as the arrestee's name, address, telephone number, age, and date of birth. Id. at 95, 695 A.2d at 139.
128. Id. at 94, 695 A.2d at 139.
tion "knew or should have known that the question was reasonably likely to elicit an incriminating response." 129 If so, then the question will not be admitted at trial without *Miranda* warnings. 130 In determining the police officer’s knowledge, the totality of the circumstances, including the context in which the question was asked, must be considered. 131 The court called attention to “routine” questions which, in fact, provide proof of some aspect of the offense for which the suspect is arrested, observing that “[t]he closer the connection between the crime in question and the information sought, the stronger the inference that the [police officer] should have known that [the] inquiry was “reasonably likely to elicit an incriminating response from the suspect.”” 132

In applying the above standard to the facts in the case, the *Hughes* court held that the “narcotics or drug use” question fell outside of the scope of the exception for several reasons. 133 First, regarding the State’s argument that the question qualified as a “routine booking question” because it was preprinted on a standard booking form, the court reasoned that the simple fact that a question was asked during booking, or from an arrest form, is not dispositive of whether the question constitutes a “routine booking question.” 134 Thus, the question did not fall under the exception merely because of the time during which it was asked.

Second, the court reasoned that the exception would not necessarily be satisfied simply because the question was asked of every arrestee. 135 Rather, the trial court must examine the totality of the circumstances. 136 The strong nexus between the contested question and the charges at hand led the court to a strong presumption that the question exceeded the scope of the exception. 137

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129. *Id.* at 95-96, 695 A.2d at 140.
130. *Id.* at 100-01, 695 A.2d at 142.
131. *Id.* at 95, 695 A.2d at 140. The court emphasized that “courts should carefully scrutinize the factual settings of each encounter of this type.” *Id.* (quoting United States v. Avery, 717 F.2d 1020, 1025 (6th Cir. 1983)).
133. *Id.* at 97, 695 A.2d at 141.
134. *Id.* at 98, 695 A.2d at 141. “The police may not use the booking process as a pretext for gathering incriminating information.” *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
Third, the court rejected the State's purported health justification for asking the question. Because there was no evidence offered that the defendant was under the influence of drugs or narcotics, and because the question was too broad to elicit the desired information, the court stated that it served no valid purpose. Additionally, the court disagreed with the Court of Special Appeals's analogy to State v. Geasley, an Ohio case. The specific question in that case differed dramatically from the issue in Hughes.

4. Analysis.—In Hughes v. State, the Court of Appeals recognized the routine booking question exception, but prevented its application to a question preprinted on a standard arrest form asking the arrestee whether he was a "narcotics or drug user." This limitation requires that administrative questions asked during the arrest process that the police officer knows or should know are reasonably likely to elicit an incriminating response are inadmissible if the suspect had not been advised of, or has refused to waive, his Miranda rights. In determining whether a question should be admitted without Miranda warnings, the totality of the circumstances must be considered, including the officer's intent, the context of the questioning, and the nexus between the question asked and the elements of the offense. In deciding Hughes, the Court of Appeals accomplished two significant tasks. First, it identified conflicts in the Supreme Court's jurisprudence that have arisen in the application of the routine booking question exception, conflicts not recognized by the Court of Special Appeals, or even by a majority of the Supreme Court. Second, the court clarified the app-
proach to be taken in Maryland with regard to the routine booking question exception. Importantly, the approach the court adopted—that advocated by Justice Marshall in his *Muniz* dissent—is consistent with the intentions of *Miranda*. This approach properly ensures that the concerns which *Miranda* was designed to remedy continue to be addressed and are not undermined by overly broad and inclusive exemptions.

As the Court of Appeals noted, the tensions between the different approaches taken by the Supreme Court with regard to the routine booking question exception have not been addressed by courts, commentators, or case book writers. The conflict, as outlined above, relates to which questions fall under the rubric of the routine booking question exception. As offered in *Innis*, and as applied by lower courts, questions that police officers know or should know are reasonably likely to elicit an incriminating response qualify as custodial interrogation. Thus, such questions, including those asked during the booking process, should be inadmissible if the defendant has not been given, or has refused to waive, his *Miranda* rights. However, the *Innis* Court confused the issue by specifically excluding from the definition of interrogation words and actions on the part of police which are “normally attendant to arrest and custody.” As the Court of Appeals noted, “[t]he notion that a question ‘normally attendant to arrest and custody’ may also be ‘reasonably likely to elicit an incriminating response’ appears not to have been contemplated by the *Innis* Court.”

The plurality decision in *Muniz* furthered the Supreme Court’s imprecise analysis by excluding from the routine booking question exception those questions which are designed to elicit an incriminating response.

The Court of Appeals is one of the first courts to identify this tension between the two different standards offered by the Supreme Court to evaluate the admissibility of statements made by defendants without the benefit of *Miranda* warnings. Similarly, commentators

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146. See *supra* notes 115-117 and accompanying text.
148. See *supra* notes 92-103 discussing how courts have interpreted *Innis* on the routine booking question exception.
149. See *supra* note 42 and accompanying text.
150. *Innis*, 446 U.S. at 301.
151. *Hughes*, 346 Md. at 91, 695 A.2d at 138.
153. See *supra* notes 125-126 and accompanying text regarding the *Hughes* court’s hypothesis as to why other courts have not identified this conflict.
writing about *Miranda* jurisprudence and custodial interrogation have failed to identify any conflict between the two decisions.\textsuperscript{154} This lack of commentary has extended to hornbooks as well.\textsuperscript{155} *Hughes* is significant for bringing this conflict to light.

The second significant aspect of the *Hughes* decision is that the standard adopted by the Court of Appeals—excluding from the routine booking question exception those questions that are either designed to elicit, or are reasonably likely to elicit, an incriminating response\textsuperscript{156}—is consistent with the intent of *Miranda*. *Miranda* created procedural safeguards that protect an individual's Fifth Amendment right against self-incrimination.\textsuperscript{157} Reflecting on the nature of this fundamental right, Chief Justice Warren stated in *Miranda* that "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."\textsuperscript{158} *Miranda*'s safeguards are designed to protect individuals from the coercive force of the government in its capacity as the enforcer of laws.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{154} See Robert A. Allison, *Custodial Interrogations*, 84 Geo. L.J. 852, 858 & n.572 (1996) (citing *Muniz* as authority for the proposition that *Miranda* does not apply to routine booking questions because they are not designed to elicit an incriminating response); Kevin Cott, *A Law Enforcement Primer on Custodial Interrogation*, 15 Whittier L. Rev. 723, 738 (1994) (citing *Muniz* for the unequivocal proposition that "routine booking questions do not need to be preceded by *Miranda* warnings"); Scott Lewis, *Miranda out on a Limb: How Much Flexibility Before Rules Are Broken?*, Crim. Just., Fall 1994, at 20, 22 (identifying *Muniz* as the source of the routine booking question exception, and stating that such questions are excepted from *Miranda* warnings, "provided that the questions are not 'designed to elicit incriminating admissions'"); see also David M. Nissman & Ed Hagen, *Law of Confessions* § 5:13, at 5-22 (2d ed. 1994) (stating, without qualification, that "[t]he [routine booking question] exception was formally adopted by the United States Supreme Court in Pennsylvania v. *Muniz*" (emphasis omitted)).
\item \textsuperscript{155} See Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.7, at 327 (2d ed. 1992) (stating that *Muniz* supports lower court decisions, based on the definition of interrogation in *Innis*, that routine booking questions do not require *Miranda* warnings, but offering no discussion of the limits of the exception).
\item \textsuperscript{156} Hughes, 346 Md. at 100, 695 A.2d at 142.
\item \textsuperscript{157} *Miranda v. Arizona*, 384 U.S. 436, 444-45, 467-79 (1966). The court noted: We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures . . . . [T]o exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. *Id.*
\item \textsuperscript{158} *Id.* at 460.
\item \textsuperscript{159} See *id.* at 439-58. The Supreme Court understood and applied this purpose in its holding involving custodial interrogation in *Rhode Island v. Innis*. The expansion of custodial interrogation in *Innis* to include any actions or words that police know or should know are reasonably likely to elicit an incriminating response, *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), reflects the Court's appreciation of the true purposes of *Miranda*—to pre-
Against this background, it is evident why the Court of Appeals decision in *Hughes* represents a return to safeguarding the liberties guaranteed by the Fifth Amendment. The court’s application of the *Innis* custodial interrogation standard to all words and actions taken by police officers means that the majority of police action will be subject to review; no longer will certain procedures be per se exempt from *Miranda* scrutiny. Because all questions asked during routine booking must be analyzed under this standard, this in effect takes away most of the bite of the exemption. The only way in which responses given to routine questions will be admissible at all during criminal trials will be if a defendant gives an incriminating response to a routine question which the police officer had no reason to know would likely elicit such an answer. Such an application is consistent with the Supreme Court’s motives in *Miranda* to protect citizens from the coercive nature of law enforcement.160 By allowing the booking process to be scrutinized, the Court of Appeals incorporated the concerns of *Miranda* into Maryland law.

The Maryland decision is also consistent with the Court’s concept of the suspect’s “trilemma,” in which he confronts a choice between truth, falsity, or silence, and the response whether based on truth or falsity contains a testimonial component.161 By advising a suspect of his right to remain silent, and by prohibiting from admission any comments related to the defendant’s choice to exercise that right, the Court ensures that the suspect’s right against self-incrimination is protected.162 The Court of Appeals was correct in holding that the question regarding “narcotics and drug use,” asked in light of the petitioner’s arrest for drug possession, placed the arrestee in the type of

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160. See supra note 159.
161. *Muniz*, 496 U.S. at 596 (“At its core, the privilege reflects our fierce ‘unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt . . . .’” (quoting Doe v. United States, 487 U.S. 201, 212 (1988))).
"trilemma" that the Supreme Court has held violates the Fifth Amendment. No matter how the petitioner answered the question, he would be incriminating himself. This point was exemplified by what happened in Hughes: The State used the defendant's denial of drug use to argue that he had only one reason for possession of crack—distribution.

The standard adopted by Maryland in Hughes represents an incorporation of the approach advocated by Justice Marshall in his dissent in Muniz. Not only is the language used to describe the two standards essentially the same—both identify the essential analysis regarding whether an officer should have known a question was reasonably likely to elicit an incriminating response as the totality of the circumstances, including the content and context of the question—but also Justice Marshall implicitly acknowledged the tension between Muniz and Innis in his opinion. While arguing that no routine booking question exception should be warranted, Justice Marshall acknowledged that even if such an exception were allowed, it should not extend to any booking question that the police should know is designed to elicit an incriminating response. He cited Innis for this proposition, indicating that, in his view, the plurality's limitation on the routine booking question exception as applying only to those questions specifically designed to elicit an incriminating response, represents a misreading of Innis. This reasoning offered by Justice Marshall served as the proper cornerstone of the Court of Appeals's decision.

5. Conclusion.—The Court of Appeals placed an important limitation on the government's ability to violate an individual's right

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163. Such an argument was raised by the defendant in his brief to the Court of Appeals. The petitioner argued that the prosecutor's closing remarks, in which he suggested that the petitioner was either a liar or a drug distributor, further illustrated the trilemma, because the petitioner's response was used against him. Brief for Petitioner at 16, Hughes v. State, 346 Md. 80, 695 A.2d 132 (1997) (No. 60).

164. Hughes, 346 Md. at 86, 695 A.2d at 135.


166. Compare id. at 611 (outlining that the "key components of the analysis are the nature of the questioning, the attendant circumstances, and the perceptions of the suspect") with Hughes, 346 Md. at 100, 695 A.2d at 142 (stating that the court must consider "the totality of the circumstances, including the context of the questioning and the content of the question").

167. Muniz, 496 U.S. at 610-11 (Marshall, J., concurring in part and dissenting in part) ("[The] exception should not extend to any booking question that the police should know is reasonably likely to elicit an incriminating response.").

168. Id. at 611.
against self-incrimination. In *Hughes v. State*, the court held that a routine booking question, even when innocuous on its face, can be admitted into testimony, absent a waiver of *Miranda* rights, only if the police officer did not know or reasonably should not have known that the question was reasonably likely to prompt an incriminating response.\(^{169}\) This holding represents a return to the protection of the guarantees established in the Fifth Amendment and enshrined in *Miranda v. Arizona*. This case marks a departure from recent Supreme Court holdings that, perhaps unintentionally, have undermined the procedural safeguards established by *Miranda*. As such, it is an important triumph for criminal suspects and supporters of civil liberties in Maryland.

ABIGAIL N. ROSS

**B. Maryland's Unfortunate Attempt to Define a Batson Remedy**

In *Jones v. State*,\(^1\) the Court of Appeals contemplated the proper remedy for a *Batson* violation.\(^2\) A *Batson* violation occurs when an attorney uses a peremptory strike to remove a prospective juror from the venire solely on the basis of the juror's race.\(^3\) The Court of Appeals held that a trial court has discretion to fashion a remedy for a *Batson* violation and that, in *Jones*, the trial judge exercised his discretion properly by reseating the improperly stricken jurors.\(^4\) The court reasoned that this remedy preserved both the equal protection rights of the improperly stricken jurors and the Sixth Amendment rights of

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169. *Hughes*, 346 Md. at 100, 695 A.2d at 142.
1. 343 Md. 584, 683 A.2d 520 (1996).
2. Id. at 591-605, 683 A.2d at 523-30.
3. *Batson* v. Kentucky, 476 U.S. 79, 89 (1986) (holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race"). Although *Batson* violations were originally limited to prosecutors, the restriction applies to defense attorneys as well. See *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (concluding that a defendant in a criminal trial is prohibited from making race-based peremptory challenges of prospective jurors). *Batson* has also been extended to civil trials. See *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (finding that the use of race-based peremptory challenges in civil trials violates the challenged jurors' equal protection rights and therefore must be proscribed). In recent years, *Batson* has been extended to proscribe peremptory challenges based on gender. See *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality").
4. *Jones*, 343 Md. at 602, 605, 683 A.2d at 529, 530.
the defendant, which the court found must be weighed equally when fashioning a *Batson* remedy.\(^5\)

Although the Court of Appeals decision is in accord with the mandates of the Supreme Court,\(^6\) the *Jones* court improperly affirmed the trial judge’s choice of remedy under the unique facts and circumstances of the case.\(^7\) By conducting the peremptory challenges in front of the potential jurors and then reseating the stricken jurors, the trial court created a situation in which the jurors may have developed a feeling of rejection or resentment toward the defendant,\(^8\) thereby endangering the defendant’s Sixth Amendment right to an impartial jury.\(^9\) The trial court, therefore, should have simply excused the jurors who were stricken improperly.\(^10\) Instead, the Court of Appeals overemphasized the rights of the stricken jurors at the expense of the defendant’s right to a fair and impartial jury.\(^11\) This is troublesome, for it was Jones, not the jury, who was facing imprisonment.\(^12\) Consequently, although *Batson* was intended to preserve a defendant’s right

5. *Id.* at 601, 683 A.2d at 528-29 (“[T]he juror’s right not to be excluded from jury service in a manner violative of his or her equal protection rights must be balanced against the potential prejudice to . . . the defendant.”).

6. The Supreme Court left open the issue of how to remedy a *Batson* violation, delegating this decision to the trial courts. *Batson*, 476 U.S. at 99-100 n.24. The Court stated that “[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how to best implement our holding today.” *Id.*

7. The Court of Appeals did recognize that different factual circumstances call for different *Batson* remedies. *Jones*, 343 Md. at 602, 683 A.2d at 529 (“[T]he Supreme Court in *Batson* . . . did suggest that the facts and circumstances of a particular case are important considerations in making th[e] determination [of the proper remedy].”).

8. Although Americans notoriously complain about jury service, it still hurts their pride to be told that their participation is not desired. See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 746 (1992) (“[N]o one likes to be rejected, even from performing an onerous task. . . . [W]hen the task in question is widely understood as a fundamental aspect of citizenship, as is jury service, then rejection amounts to a judgment of unfitness for citizenship.”).

9. In 1968, the United States Supreme Court incorporated the Sixth Amendment right to an impartial jury into the Fourteenth Amendment, which made the former applicable to every state. *Duncan v. Louisiana*, 391 U.S. 145, 148-58 (1968). The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .” U.S. CONST. amend. VI.

10. *See State v. Walker*, 453 N.W.2d 127, 135 n.12 (Wis. 1990) (concluding that a stricken juror who is aware of the identity of the challenging party “should not be reinstated because there is a substantial likelihood that he or she will have developed a bias against [that party]”).

11. *Jones*, 343 Md. at 601, 683 A.2d at 528-29 (determining that “the goal [in fashioning *Batson* remedies] must be to achieve the proper balance, to vindicate and effectuate each of the competing rights”).

12. *Id.* at 590, 683 A.2d at 523. Jones was eventually sentenced to fourteen years in prison. *Id.*
to an impartial jury, the Jones decision may potentially deprive defendants of this traditional and indispensable right.

1. The Case.—Anzelo Jones, an African-American male, was charged with various drug-related offenses, and was tried by a jury in the Circuit Court for Baltimore City. During jury selection for the case, the attorneys for both the defendant and the State exercised their peremptory strikes in the presence of the potential jurors. Specifically, the clerk called out each individual juror's number and that juror was then instructed to come forward. This separated the juror from the rest of the venire, so that the attorneys could observe her. Then, in open court and directly in front of the juror, each attorney was allowed to announce whether that juror was "acceptable." If both said yes, the juror was seated. If either said no, the juror was excused.

During this selection process, the defendant's attorney exercised five peremptory challenges, all against white venirepersons. In response, the State made a Batson objection. After considering the defense attorney's justification for his strikes, the trial judge found that he failed to provide race-neutral reasons for dismissing the five white venirepersons. Consequently, the court held that a Batson violation had occurred.

15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id. at 587-88, 683 A.2d at 521-22.
22. Id. at 588, 683 A.2d at 522.
23. Id. at 588-89, 683 A.2d at 522. Defense counsel argued that he struck the jurors because he believed that their age bracket, their profession, or the neighborhood where they lived would prevent them from relating to the defendant and his experiences. Id. at 588-89 n.2, 683 A.2d at 522 n.2. The trial judge rejected this reasoning, and declared that he did not "find the explanations given to be justified." Id. As such, the court ruled that the real reason those persons were struck was solely because of their race. Id.
24. Id. at 588-89, 683 A.2d at 522. Under Batson, the trial court must engage in a three-step process in order to determine if a peremptory strike is discriminatory. First, the trial court must ascertain whether the complaining party has made a prima facie showing of purposeful racial discrimination in the selection of the venire. Batson v. Kentucky, 476 U.S. 79, 93 (1986). Once the court finds that there has been a prima facie showing, the burden shifts to the exercising party to rebut the prima facie case by giving race-neutral explanations for the strikes. Id. at 94, 97. Finally, the court must decide whether the challenging party has established purposeful discrimination. Id. at 98.
The trial judge remedied the violation by invalidating each of the defense attorney's peremptory challenges and recalling the five jurors who had been struck improperly.25 The judge stated that his intent was to "roll the clock back to where we were" by "reconstitut[ing] the jury precisely as it was before either party exercised a [peremptory] challenge."26 After the stricken jurors had returned to the courtroom, the judge informed the venire that he had "invalidated the [peremptory] challenges which [had] been previously exercised."27 He then reseated the jurors who had been dismissed improperly by the defense attorney.28

Jones was eventually tried and convicted by that jury, and he was subsequently sentenced to fourteen years in prison.29 Jones appealed to the Court of Special Appeals, arguing that the trial court erred in ruling that his attorney violated Batson.30 Jones further contended that he offered race-neutral reasons for striking the jurors and that the trial court should have dismissed the entire venire instead of reinstating the stricken jurors.31 To start, the court upheld the trial judge's finding of a Batson violation, which it reviewed under a "clearly erroneous" standard.32 In so ruling, the court recognized its "limited role" in reviewing these violations, reflecting that

"[i]t is the trial judge who is in close touch with the racial mood, be it harmonious or be it tense, of the local community, either as a general proposition or with respect to a given trial of high local interest. The trial judge is positioned to observe the racial composition of the venire panel as a whole, a vital fact frequently not committed to the record and, therefore, unknowable to the reviewing court."33

The court also approved the remedy fashioned by the trial judge to rectify the racial challenges.34 The court emphasized its general

25. Jones, 343 Md. at 589, 683 A.2d at 522.
26. Id. at 589-90, 683 A.2d at 522-23 (internal quotation marks omitted) (second alteration in original).
27. Id. at 590, 683 A.2d at 523 (first alteration in original).
28. Id.
29. Id.
31. Id.
32. Id. at 268, 659 A.2d at 366.
33. Id. (quoting Bailey v. State, 84 Md. App. 323, 328, 579 A.2d 774, 776 (1990)).
34. Id. at 277, 659 A.2d at 370-71. The court offered many reasons to explain why reseating the improperly stricken jurors was the best means for resolving a Batson violation. Id. at 274-77, 659 A.2d at 369-71. Primarily, the court argued that reseating the stricken jurors saved judicial time and resources, and also served to protect the equal protection
preference for reseating an improperly struck juror, as opposed to quashing the entire panel and starting the jury selection anew.\textsuperscript{35} Unsuccessful in the intermediate appellate court, Jones appealed to the Court of Appeals, which granted certiorari in order to decide what action should be taken by a trial court to remedy a \textit{Batson} violation.\textsuperscript{36}

2. \textbf{Legal Background.–}

\begin{enumerate}
\item \textbf{The \textit{Batson} Violation.–} Traditionally, the peremptory challenge has been defined as the right to remove a prospective juror from the jury panel without being required to provide a reason for the challenge.\textsuperscript{37} The peremptory challenge historically has been recognized as "one of the most important rights secured to the accused,"\textsuperscript{38} and commonly has been viewed as a means to implement and maintain a criminal defendant's Sixth Amendment right to a fair and impartial jury.\textsuperscript{39} However, in recent years, the Supreme Court has redefined the scope of the peremptory challenge. In \textit{Batson v. Kentucky},\textsuperscript{40} the Court held that a prosecutor may not use peremptory strikes to discriminate purposefully against members of a venire because of their race.\textsuperscript{41} In so ruling, the Court stressed that a criminal rights of the jurors. \textit{Id.} at 275-77, 659 A.2d at 370. The court also warned that if it were to "require the trial court to strike the entire panel in every case of discrimination, then there might be those parties who would purposefully discriminate . . . for the sole purpose of getting a new panel." \textit{Id.} at 275, 659 A.2d at 370. Finally, the court held that by reseating the stricken jurors, it was protecting the plight of the community as well, because society will lose confidence in the judicial system if it willingly allows racial bias to control jury selection. \textit{Id.} at 276, 659 A.2d at 370 (quoting \textit{Georgia v. McCollum}, 505 U.S. 42, 49-50 (1992)).

35. \textit{Id.} at 274-77, 659 A.2d at 369-71.
36. \textit{Jones}, 343 Md. at 591, 683 A.2d at 523.
37. \textit{BLACK'S LAW DICTIONARY} 1136 (6th ed. 1990). This definition has been supported throughout history. \textit{See}, e.g., \textit{Batson v. Kentucky}, 476 U.S. 79, 118 (1986) (Burger, C.J., dissenting) (noting that the peremptory challenge has "very old credentials"). The peremptory challenge has been part of the common law for many centuries and a strong component of the American jury system for nearly two hundred years. \textit{Id.} at 118-19.
39. \textit{Batson}, 476 U.S. at 118-19 (Burger, C.J., dissenting) ("Long ago it was recognized that '[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.'" (alteration in original) (quoting \textit{WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY} 175 (1852))).
41. \textit{Id.} at 84. \textit{Batson}, however, was not the first case in which the Supreme Court found racially motivated peremptory challenges to be unconstitutional. \textit{Id.} at 83-86. For example, in \textit{Swain v. Alabama}, the Court recognized that the Equal Protection Clause prohibits a state from purposefully discriminating against black jurors. \textit{Swain}, 380 U.S. at 203-04. However, in \textit{Swain}, the Court held that in order to prove purposeful discrimination by a state, a defendant was required to prove that a specific prosecutor had discriminated
defendant’s constitutional right to a fair and impartial jury is violated when a prosecutor purposefully eliminates members of the defendant’s race from the jury.42 The Court underscored its duty to protect individual jurors’ equal protection rights, which are infringed when the venirepersons are denied the chance to serve on a jury because of their race.43 Although Batson addressed a prosecutor’s use of peremptory challenges, subsequent decisions of the Supreme Court have extended the Batson holding to prohibit criminal defendants from making race-based peremptories as well.44

Despite the Court’s opinions defining a Batson violation, it has refused to articulate a specific remedy that should be applied to rectify discriminatory peremptory strikes.45 The Court explained its reasons for judicial restraint in this area:

   In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.46

against black jurors in numerous trials over a period of time. Id. at 223-24. Conversely, in Batson, the Court rejected this systematic burden of proof as “crippling,” holding that a defendant could prove purposeful discrimination based solely on the prosecutor’s acts in this case. Batson, 476 U.S. at 92-93, 95.

42. Batson, 476 U.S. at 86-87. The Court explained that the purpose of the right to be tried by a jury of one’s peers is to “prevent oppression by the government.” Id. at 86-87 n.8 (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

43. Id. at 87. The Court also reasoned that the entire community is affected by the harm inflicted upon the defendant and the excluded juror, because “[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” Id.

44. See, e.g., Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that “the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges”). The Court has also expanded the Batson holding to prohibit discriminatory peremptory challenges in many other circumstances. SeeJ.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (concluding that gender-based peremptories are unconstitutional); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (holding that race-based peremptory challenges in civil cases are impermissible); Powers v. Ohio, 499 U.S. 400, 414-16 (1991) (ruling that a criminal defendant may object to race-based exclusion of jurors even though the excluded juror and defendant do not share the same race).


46. Id. (citations omitted).
As a result of the Supreme Court’s silence on this issue, state courts have been left to determine the remedy of a Batson violation.\(^4\) In an effort to resolve the issue, much confusion, division, and inconsistency has arisen among the states.\(^4\)

\textit{b. Emerging Patterns of Batson Remedies Throughout the Nation.}—Although trial courts have little difficulty in determining whether or not a Batson violation has occurred,\(^4\) they have had a difficult time determining how to create a remedy for a Batson violation once they determine that one exists. This wide-spread problem, due to the Supreme Court’s refusal to dictate a remedy for a Batson violation,\(^5\) has resulted in great diversity in the remedy selected by the trial courts.

Most state courts follow one of three remedies.\(^5\) The majority of states give the trial judge discretion to select the remedy that best fits the facts and circumstances of each case.\(^5\) Recognizing that a judge must have the authority to adjust a remedy to meet the particular needs and elements of each case, these jurisdictions have “interpreted Batson as suggesting that either remedy may be appropriate depending on the particular circumstances of the trial.”\(^5\) Thus, in most states, the trial judge has a choice between reseating the improp-

\(47.\) See, e.g., Koo v. State, 640 N.E.2d 95, 100 (Ind. Ct. App. 1994) (“Clearly, the remedy which a particular trial court employs upon a finding of particular discrimination is a matter left to the court’s discretion.”); State v. Grim, 854 S.W.2d 403, 416 (Mo. 1993) (“The proper remedy for discriminatory use of peremptories is to quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would.”).

\(48.\) See, e.g., People v. Moten, 603 N.Y.S.2d 940, 948 (Sup. Ct. 1993) (concluding that reseating improperly stricken jurors was the “appropriate relief” for the Batson violation at issue); Ezell v. State, 909 P.2d 68, 72 (Okla. Crim. App. 1995) (interpreting Batson as suggesting that “either remedy [i.e., reseating the stricken venire or seating a new panel] may be appropriate depending on the circumstances at trial”); State ex rel. Skeen v. Tunnell, 768 S.W.2d 765, 767-68 (Tex. App. 1989, no pet.) (holding that the provisions of a state statute requiring the dismissal of the entire venire whenever there is a Batson violation are mandatory rather than discretionary).

\(49.\) The ease in identifying Batson violations is due to the three-prong burden-shifting test set out by the Court. Batson, 476 U.S. at 99-98. The test is easy for lower courts to follow because it mirrors the familiar “disparate treatment” test that was created to analyze discrimination claims under Title VII of the Civil Rights Act of 1964. \textit{Id.} at 94 n.18, 96 n.19, 98 n.21.

\(50.\) See supra text accompanying notes 45-46.

\(51.\) Jones, 543 Md. at 594-95, 683 A.2d at 525.

\(52.\) \textit{Id.} at 595, 683 A.2d at 525.

\(53.\) Ezell, 909 P.2d at 72 (adopting the “flexible approach” of giving trial judges discretion in fashioning remedies as “the best solution”).
erly challenged juror or striking the venire and beginning jury selection anew. 54

Conversely, a few jurisdictions strike the entire venire and start voir dire over again with a new pool. 55 Support for this remedy is due to the "lurking danger . . . that an unsuccessfully challenged juror may now bear an animus against the challenger arising from the challenge itself," which would result in a biased jury. 56 These states focus primarily on the defendant's right to a trial by a fair and impartial jury, which they perceive as far more compelling than the equal protection rights of the stricken jurors. 57

For example, in State v. McCollum, 58 the Supreme Court of North Carolina held that striking the venire is the best remedy because it prevents a juror, who has been improperly struck, from returning to the venire offended by the strike, and thus biased against the party that struck him. 59 The trial judge found that the State had improperly dismissed three black jurors, and the trial judge rectified the violation by excusing the three jurors and ordering that jury selection should begin anew with a fresh panel of prospective jurors. 60 The Supreme Court of North Carolina upheld this remedy, even though it may infringe on the equal protection rights of the jurors. 61

Other states embrace the opposite end of the spectrum, requiring improperly struck jurors to be reseated. 62 For example, in Conerly v. State, 63 the Supreme Court of Mississippi held that trial courts have only one option when remedying a Batson violation—reseating the juror or jurors. 64 In Conerly, the court held that once the trial judge determines that the State's explanation does not provide a race-neu-

55. People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978) (holding that upon a finding of improper use of peremptory challenges, the trial court "must dismiss the jurors thus far selected. . . must quash any remaining venire. . . . [And] a different venire shall be drawn and the jury selection process may begin anew"); State v. McCollum, 433 S.E.2d 144, 159 (N.C. 1993) (holding that striking the venire is the best remedy because it prevents a juror who has been improperly struck from returning to the venire offended by the strike and potentially biased against the party who struck him).
57. McCollum, 433 S.E.2d at 159.
58. 433 S.E.2d 144 (N.C. 1993).
59. Id. at 159.
60. Id. at 158-59.
61. Id. at 159.
62. See, e.g., Conerly v. State, 544 So. 2d 1370, 1372 (Miss. 1989) (concluding that improperly dismissed jurors must be reseated).
63. 544 So. 2d 1370 (Miss. 1989).
64. Id. at 1372.
trial reason for striking a juror, "the trial court [is] obligated to seat [that juror]." These jurisdictions are equally, if not more, concerned with the equal protection rights of the juror as compared to the defendant's Sixth Amendment rights. In *United States v. Robinson*, the court emphasized its desire to protect jurors from discrimination by reseating them after they have been struck improperly. The court reflected that "when prosecutors excessively use their peremptory challenges to exclude Blacks from the process of jury trials, corrective action is warranted to make sure that the right of Blacks to participate in the citizen's role in the administration of criminal justice is not impaired." These courts further justify reseating jurors by noting that it preserves judicial time and resources, which are wasted when an entire venire must be discharged.

**c. The Evolution of the Batson Remedy in Maryland.**—Until *Jones v. State*, a Maryland court had never directly ruled on the issue of the appropriate *Batson* remedy. Nevertheless, the issue has been discussed indirectly by the Court of Appeals and the lower Maryland courts. Beginning with the 1987 case, *Chew v. State*, the Court of Special Appeals fully adopted the procedural guidelines set out in *Batson*. In doing so, the court briefly elaborated on the topic of remedy. Specifically, the court reflected that "[f]ashioning an appropriate remedy would appear to fall within the broad discretionary range necessary for the trial judge's effective management of a trial." The court suggested that the type of remedy invoked should depend upon the number of jurors stricken. The court reasoned that "[i]f a half a dozen or more of prospective jurors have been unconstitutionally challenged, it may be necessary to dismiss the entire

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65. *Id.*
67. *Id.* at 474.
68. *Id.* The court concluded that "the appropriate remedy is to disallow the challenge of the four Black veniremen and resume the jury selection process with [their] names included." *Id.*
69. *State v. Parker*, 836 S.W.2d 930, 936 (Mo. 1992) (concluding that reseating an improperly struck juror is the preferred remedy for a *Batson* violation because "[j]udicial time and resources . . . are maximized because there is no need to quash the jury and call a new venire").
70. *Jones*, 343 Md. at 586, 683 A.2d at 521.
72. *Id.* at 694-704, 527 A.2d at 338-44.
73. *Id.* at 703-04, 527 A.2d at 343-44.
74. *Id.* at 704, 527 A.2d at 343.
75. *Id.*, 527 A.2d at 343-44.
venire and to begin again with a new panel." However, the court noted that if only "a single prospective juror has been unconstitutionally challenged, it may be adequate to reinstate that juror on the venire." The Court of Appeals initiated its discussion of *Batson* in *Stanley v. State*, in which it similarly observed that "[w]hich remedy to apply may well be within the discretion of the trial court, depending on the circumstances of the particular case."

The Court of Special Appeals next discussed *Batson* remedies in *Brashear v. State*, in which the court hinted that if a trial judge "determine[s] that even a single juror was excused for racial reasons, the jury panel will be considered to be defective." However, the court abruptly stopped its discussion at that point. The court did not go on to discuss how to remedy the problem of a defective jury, because it found that under the facts of the case before it, the jury was not defective.

Four years later, the Court of Appeals continued to tiptoe around the issue of *Batson* remedies. In *Gilchrist v. State*, the court resolved a controversy involving race-based peremptory strikes without providing definite solutions to *Batson* violations. In *Gilchrist*, the court upheld the trial judge's remedy of discharging the entire panel and beginning jury selection anew. In that case, the peremptory challenges were conducted in the presence of the jurors, so that each juror knew which attorney was exercising the strike. After defense counsel was found to have violated *Batson* by striking improperly five jurors, the trial court "excused the entire jury pool, including those members . . . already chosen, and started jury selection anew with an entirely different pool of potential jurors." Although the Court of Appeals affirmed the trial court's decision, it did not endorse any particular remedy, but simply reasoned that the remedy should stand because

76. Id.
77. Id., 527 A.2d at 344.
78. 313 Md. 50, 542 A.2d 1267 (1988).
79. Id. at 62-63 n.8, 542 A.2d at 1273 n.8. The court refused to make a definite ruling on remedies, claiming that, "[t]hese cases do not require us to give the answer [as to what constitutes a proper remedy]." Id.
81. Id. at 717, 603 A.2d at 904.
82. Id. at 718, 603 A.2d at 905.
83. Id.
85. Id. at 606-28, 667 A.2d 876-87.
86. Id. at 616, 628, 667 A.2d at 880, 887.
87. Id. at 611, 667 A.2d at 878.
88. Id. at 616, 667 A.2d at 880.
the "examination of the trial court's application of Batson reveals no error."\textsuperscript{89}

The reluctance of Maryland's appellate courts to formally approve a particular Batson remedy is further exemplified in Brogden v. State.\textsuperscript{90} In Brogden, the Court of Special Appeals affirmed the trial court's decision to strike the entire venire and call in a new panel after finding that a Batson violation had occurred.\textsuperscript{91} Once again, a Maryland appellate court upheld the trial court's decision without discussing the remedy.\textsuperscript{92} Instead, the court devoted its opinion to discussing how a motion for a Batson violation is analyzed.\textsuperscript{93} Thus, Jones v. State offered the Court of Appeals yet another opportunity to determine definitively the appropriate remedy for a Batson violation.

3. The Court's Reasoning.—In Jones v. State, the Court of Appeals held that the trial court has discretion to fashion a Batson remedy.\textsuperscript{94} Specifically, the court determined that the judge's decision to reseat improperly stricken jurors was a proper exercise of the court's discretion.\textsuperscript{95} At the outset, the Court of Appeals emphasized that the issue at hand was not whether the defendant's attorney had committed a Batson violation.\textsuperscript{96} Rather, the court was only to consider "the consequences and effect of such a violation on the jury selection process."\textsuperscript{97}

The court began its analysis by recognizing that the United States Supreme Court has not established a definitive remedy for trial courts to apply when a Batson violation is committed, but has instead left the decision as to remedy to the state and federal courts.\textsuperscript{98} The court noted that, because the Supreme Court has provided little guidance in formulating a Batson remedy, it has emphasized that "the facts and circumstances of a particular case are important considerations in making that determination."\textsuperscript{99} The Court of Appeals adopted this assertion and found that the most relevant facts that must be considered in determining the appropriate remedy are the defendant's right to a fair and impartial jury and the equal protection rights of the improp-

\textsuperscript{89} Id. at 625, 667 A.2d at 885.
\textsuperscript{90} 102 Md. App. 423, 649 A.2d 1196 (1994).
\textsuperscript{91} Id. at 427-32, 649 A.2d at 1198-1201.
\textsuperscript{92} Id. at 433, 649 A.2d at 1201.
\textsuperscript{93} Id. at 432-33, 649 A.2d at 1201.
\textsuperscript{94} Jones, 343 Md. at 605, 683 A.2d at 530.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 592, 683 A.2d at 524.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 594, 683 A.2d at 525.
\textsuperscript{99} Id. at 602, 683 A.2d at 529.
The court emphasized that a trial court must equally balance these rights when creating the appropriate *Batson* remedy. The court specifically explained that “[t]he need to consider conflicting constitutional rights . . . militates in favor of permitting the trial court to tailor the remedy so as to protect the rights of all the parties concerned.” Therefore, the court concluded that a trial court must have discretion to fashion a remedy for a *Batson* violation so that it may address and resolve the specific harm caused by the violation under the particular facts of each case.

The court next turned to the particular facts of *Jones* to determine if the remedy chosen by the trial court redressed the specific harm caused by the violation. The court concluded that “[t]he guiding factor in this determination [of the appropriate remedy] should be the likelihood of the juror harboring any prejudice to the violating party as a result of being improperly excluded from the panel.” The court reasoned that a significant part of this inquiry is whether or not the strikes were conducted in the presence of the juror. However, the court noted that if the attorneys conducted the strikes at a bench conference, outside the juror’s hearing, “and the circumstances otherwise do not indicate to the juror that he was struck for improper reasons,” the likelihood that the juror will bear prejudice towards the striking party “is not present or is minimal.”

The court observed that, in *Jones*, the *Batson* inquiry was conducted outside of the hearing of the jury, and that “nothing in the record indicat[ed] that the dismissed jurors were aware of the basis for their being excluded.” Moreover, the court found that, because

100. *Id.* The court described these rights in detail: “[A] criminal defendant [has] the constitutional right to have a jury . . . selected pursuant to nondiscriminatory criteria . . . and an individual juror has the right not to be excluded from a jury on account of race.” *Id.* (quoting Ellerbee v. State, 450 S.E.2d 443, 448 (Ga. Ct. App. 1994)) (second alteration and second omission in original).
101. *Id.* at 601-02, 683 A.2d at 528-29.
102. *Id.* at 602, 683 A.2d at 529.
103. *Id.* at 602-03, 683 A.2d at 529.
104. *Id.* at 603, 683 A.2d at 529.
105. *Id.* (quoting *Jones*, 105 Md. App. at 274, 659 A.2d at 369) (second alteration in original).
106. *Id.*
107. *Id.* (quoting *Jones*, 105 Md. App. at 274, 659 A.2d at 369).
108. *Id.* (quoting *Jones*, 105 Md. App. at 274, 659 A.2d at 369).
109. *Id.*
the trial court reseated all of the stricken jurors, including those
struck by the State, neither the stricken jurors nor the rest of the ve-
wire could determine which ones were improper.\textsuperscript{110} Therefore, the
Court of Appeals found that the extent of the affected jurors' knowl-
edge of the strikes was that the trial court had simply "invalidated the
peremptory challenges which [had] been previously exercised."\textsuperscript{111}
The court further reasoned that, because the jurors did not know that
they were struck for racial reasons, they harbored no prejudice to-
wards the defendant.\textsuperscript{112} Thus, the appropriate remedy was to reseat
the improperly stricken jurors.\textsuperscript{113} The court addressed the defense
attorney's contention that the jurors' mere knowledge of which party
struck them was sufficient to cause the improperly challenged jurors
to be biased against Jones.\textsuperscript{114} The court rejected this argument, deter-
mining that more than mere knowledge of who attempted to exclude
the juror is required in order to strike the panel.\textsuperscript{115} Instead, the court
demanded a showing of prejudice, rather than speculation.\textsuperscript{116}

Finally, the court acknowledged that "[t]here may be . . . circum-
stances in which the dismissal of the entire venire will be the only via-
ble, effective remedy available."\textsuperscript{117} The court reflected that "[t]hose
instances will occur ordinarily when reseating the improperly stricken
juror will impair a party's right to a fair trial by an impartial jury."\textsuperscript{118}
The court maintained that "[i]n such instances, the court will abuse
its discretion if it does not abort the trial and begin jury selection
anew with a different panel."\textsuperscript{119} Yet, under the facts of Jones, the Court
of Appeals found that the jurors' right not to be excluded from a jury
required the same degree of protection as the defendant's right to an

\begin{itemize}
\item[\textsuperscript{110}] Id. at 603-04, 683 A.2d at 530. The court pointed out that "[the prospective jurors]
certainly were not told that the peremptories exercised by the State were proper and those
exercised by the [defendant] were not." \textit{Id.}
\item[\textsuperscript{111}] Id. at 604, 683 A.2d at 530 (internal quotation marks omitted).
\item[\textsuperscript{112}] \textit{Id.}
\item[\textsuperscript{113}] Id. at 605, 683 A.2d at 530.
\item[\textsuperscript{114}] \textit{Id.} at 604, 683 A.2d at 530. Defense counsel argued that "the mere fact of being
challenged . . . 'may create animosity toward the party exercising the peremptory strike.'"
\textit{Id.}
\item[\textsuperscript{115}] \textit{Id.}
\item[\textsuperscript{116}] \textit{Id.} The court explained that "[u]nless a party can demonstrate how he or she has
been prejudiced, that 'party cannot complain that the seating of an improperly challenged
juror violates his or her right to an impartial jury.'" \textit{Id.} (quoting \textit{Jefferson v. State}, 595 So.
2d 38, 41 (Fla. 1992)).
\item[\textsuperscript{117}] \textit{Id.} at 604-05, 683 A.2d at 530.
\item[\textsuperscript{118}] \textit{Id.} at 605, 683 A.2d at 530.
\item[\textsuperscript{119}] \textit{Id.}
\end{itemize}
impartial jury.\textsuperscript{120} The court thus concluded that the trial judge did not abuse his discretion by reseating the stricken jurors.\textsuperscript{121}

4. Analysis.—In Jones, the Court of Appeals held that a trial court has discretion to formulate a \textit{Batson} remedy, and that reseating five improperly dismissed jurors was a proper exercise of that discretion.\textsuperscript{122} The decision of the Court of Appeals is consistent with prior Maryland decisions, which have not provided a definitive \textit{Batson} remedy.\textsuperscript{123} \textit{Jones} is also in accord with the Supreme Court's ruling in \textit{Batson}, in which the Court "decline[d] . . . to formulate particular procedures to be followed" when remediying a \textit{Batson} violation, leaving this issue to the discretion of the trial courts.\textsuperscript{124} Therefore, under \textit{Batson}, the Court of Appeals could have mandated or upheld any remedy that it found to be adequate.

Nonetheless, the remedy chosen by the trial court and affirmed by the Court of Appeals—reseating the five stricken jurors—is troublesome. This remedy is at odds with the defendant's Sixth Amendment right to a fair trial because it places venirepersons on the jury who may have developed a prejudice against the defendant.\textsuperscript{125} A more just remedy would have been a "compromise remedy," in which the trial judge discharges only those jurors who were improperly struck, while maintaining the rest of the venire. This would have insured that the jurors did not harbor any resentment or prejudice towards Jones. Unfortunately, the Supreme Court of the United States and the Maryland Court of Appeals have failed to consider this option, contemplating only two remedies—reseating the improperly stricken jurors or striking the entire panel.\textsuperscript{126} Furthermore, in affirming the remedy in \textit{Jones}, the Court of Appeals overemphasized the rights of the jurors, thereby sacrificing the defendant's Sixth Amendment right to a fair trial. Thus, although \textit{Batson} was initially decided to protect a criminal defendant's right to an impartial jury, this purpose has been lost in the past decade, so that today, courts may deprive defendants of their rights in the name of \textit{Batson}.

\textit{a. The Eyes and Ears of the Jury.}—The Court of Appeals in \textit{Jones} correctly held that the trial judge has discretion to select the

\begin{footnotesize}
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 602, 605, 683 A.2d at 529, 530.
\textsuperscript{123} See supra notes 70-93 and accompanying text.
\textsuperscript{125} See Underwood, supra note 8.
\textsuperscript{126} Batson, 476 U.S. at 99-100 n.24; Jones, 343 Md. at 601, 683 A.2d at 528.
\end{footnotesize}
remedy that best fits the facts and circumstances of each case. The Court of Special Appeals explained in *Jones*:

"It is the trial judge who is in close touch with the racial mood, be it harmonious or be it tense. . . . [He] is positioned to observe the racial composition of the venire panel as a whole, a vital fact frequently not committed to the record and, therefore, unknowable to the reviewing court." However, the trial court's discretion should not be absolute. It should be conditioned on one fact—that the peremptory strikes were not committed in the presence of the jurors, or made within their hearing. In essence, the Maryland courts should adopt a per se "Eyes and Ears" rule of automatically discharging improperly struck jurors when the juror knows the identity of the challenger. This rule, by requiring the exclusion of a juror with knowledge of the striking party, would safeguard a defendant's right to a fair trial. In all other circumstances, however, when the strike is committed outside the eyes and ears of the jury, the trial court may have discretion to fashion a *Batson* remedy.

The "Eyes and Ears" rule is essential for a variety of reasons. Primarily, a juror who knows which party is responsible for striking her may become prejudiced against that party. For example, the juror may become resentful or offended as a result of her dismissal. If the party that struck the juror were the defendant, the defendant's Sixth Amendment right to a fair and impartial jury would be in-

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127. 343 Md. at 602-03, 683 A.2d at 529.
129. *See* *People v. Williams*, 31 Cal. Rptr. 2d 769, 771 (App. Dep't Super. Ct. 1994). The Appellate Department of the Superior Court of California explained the disadvantage of reseating a juror under these circumstances: "The detriment . . . [in] simply calling the juror back [who was] wrongly excused, is that it will be too much of a remedy, that it would certainly prejudice—the juror will be prejudiced in the knowledge against the person who just removed him." *Id.* (second alteration in original).
130. *See* *State v. McCollum*, 433 S.E.2d 144, 159 (N.C. 1993). The *McCollum* court explained:

To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully. As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.

*Id.*
fringed. Even if the striking party were the prosecutor, the juror should still be dismissed because the State has a right to a fair trial and an unbiased jury as well.\textsuperscript{131}

Due to the infamous reputation that jury duty has acquired in American society, it may be difficult for most people to imagine how a person could resent an attorney for relieving her from jury service. Yet, numerous Americans view jury duty as an acknowledgment of citizenship.\textsuperscript{132} In this sense, they equate jury duty with the right to vote.\textsuperscript{133} This feeling is especially strong among minority groups, particularly African Americans, who have fought throughout history to gain the formal right to citizenship, as well as the duties and obligations that come along with it.\textsuperscript{134} Therefore, when struck from the jury, regardless of whether they are aware of the racial basis of the strike, jurors may become resentful towards the person who struck them and biased against that party if they are reseated.

In \textit{Jones}, the defendant asserted the aforementioned argument and contended that the jurors' "knowledge of who attempted to strike them is enough of a basis to infer that the improperly challenged jurors were biased against [the defendant]."\textsuperscript{135} However, the Court of Appeals responded that it was not possible for the stricken jurors to become prejudiced because they did not know why defense counsel struck them.\textsuperscript{136} The court emphasized that the \textit{Batson} inquiry was conducted at the bench, outside of the jury's hearing.\textsuperscript{137} Thus, the court concluded that the jurors' mere knowledge of which attorney struck them was not enough to compel the trial judge to dismiss them.\textsuperscript{138} On the contrary, the mere knowledge of who struck them could have been enough to make the dismissed jurors prejudiced against Jones. Jurors might be even more offended, and thus biased against the defendant, if they do not know why they were struck. A

\begin{itemize}
  \item \textsuperscript{131} See State v. Walker, 453 N.W.2d 127, 135 n.12 (Wis. 1990) ("[A] challenged juror [who] is aware of the fact that he or she was challenged by the prosecutor. . . . should not be reinstated because there is a substantial likelihood that he or she will have developed a bias against the prosecutor.").
  \item \textsuperscript{132} See Underwood, supra note 8, at 746 ("[W]hen the task in question is widely understood as a fundamental aspect of citizenship, as is jury service, then rejection amounts to a judgment of unfitness for citizenship.").
  \item \textsuperscript{133} Id. Eligibility for jury service has historically been tied to eligibility for voting. Id.
  \item \textsuperscript{134} Id. "[W]hen the basis for rejection is race, the rejection becomes part of this country's history of race-based decisionmaking, and acquires additional power to injure for that reason." Id.
  \item \textsuperscript{135} Jones, 343 Md. at 604, 683 A.2d at 530.
  \item \textsuperscript{136} Id. at 603-04, 683 A.2d at 529-30.
  \item \textsuperscript{137} Id. at 603, 683 A.2d at 529.
  \item \textsuperscript{138} Id. at 604, 683 A.2d at 530.
\end{itemize}
curious juror might even begin to conjure up reasons for her dismissal in her mind. Such a juror might think that the attorney thought that she was incompetent, unintelligent, or irresponsible, or perhaps that the attorney did not like the way she dressed. If that juror were reinstated, she would likely harbor feelings of ill will toward that attorney.

Moreover, more credit must be given to the intelligence and astuteness of the common citizen juror. In Jones, the defendant was an African-American; the defense attorney struck five white jurors; and the prosecutor then went up to the bench to object to the judge. The prospective jurors observed all of this, as well as the attorneys arguing with one another at the bench. The jurors were able to examine the attorneys' facial expressions and attitude, even though they might not have been able to hear what they were saying. Soon afterwards, the judge recalled the stricken jurors. The members of the venire observed all of these events in Jones and were able to draw their own conclusions. Most likely, they accurately assessed the situation—the five white jurors were improperly struck by the defendant for racial reasons. Thus, mere knowledge of the striking party is sufficient to establish resentment and bias by the restored juror.

The simplest way of resolving the problem of jury bias against the striking party is to conduct the peremptory challenges outside the presence of the jurors. It is well established that a trial judge has discretion over the jury selection procedures in the courtroom. Maryland law upholds the judge's broad authority over jury selection procedures. Thus, it would be quite easy for a trial judge to adjust the jury selection procedures followed in his courtroom and require peremptory strikes to be conducted outside the presence of the jury.

139. Id. at 587-88, 683 A.2d at 521-22.
140. Id. at 587-89, 683 A.2d at 521-22.
141. Id. at 589-90, 683 A.2d at 522-23.
142. See Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 177 n.98 (1989) ("Although neither the prosecutor's explanation for the prospective juror's exclusion nor the court's ruling that this explanation was inadequate might have occurred within the hearing of the juror, a person excluded from a jury and then restored might well infer the situation.").
143. See Jefferson v. State, 595 So. 2d 38, 40 (Fla. 1992) ("[T]he trial court in the instant case conducted the [Batson] inquiry outside the presence of the jury, and, thus, there was no danger that the improperly challenged juror would bear animosity toward the party attempting to exercise the peremptory.").
144. United States v. Warren, 982 F.2d 287, 288 (8th Cir. 1992) ("Trial judges have broad discretion in the jury-selection procedure they use in their courtrooms.").
This procedure already has gained support in the legal community.\textsuperscript{146} For instance, the American Bar Association (ABA) strongly encourages peremptory strikes to be conducted outside the presence of the jurors.\textsuperscript{147} The ABA Standards advise that “[peremptory] challenges [should] be \textit{presented} at the bench, [or] at side-bar” in order “[t]o avoid the prejudicial effect of exercising challenges in open court.”\textsuperscript{148}

\begin{itemize}
\item[b.] \textbf{The Misordering of Priorities.}—The Jones court’s decision to allow the potentially biased jurors to be reseated was primarily motivated by its excessive concern for the rights of the jurors.\textsuperscript{149} Specifically, the court equated the rights of the jurors under the Equal Protection Clause of the Fourteenth Amendment with the defendant’s right to a fair and impartial jury under the Sixth Amendment,\textsuperscript{150} and asserted that these two rights must be “balanced” when formulating a remedy to a \textit{Batson} violation.\textsuperscript{151} Accordingly, the court rejected the remedy of discharging the improperly struck jurors because of its misplaced anxiety over the jurors’ right not to be discriminated against in jury selection.\textsuperscript{152} Unfortunately, in doing so, the court has “misordered its priorities.”\textsuperscript{153} The court should have instead focused
\end{itemize}

\textsuperscript{146.} ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY stand. 15-2.7(a) (3d ed. 1996).
\textsuperscript{147.} See id.
\textsuperscript{148.} \textit{Id.} stand. 15-2.7 commentary; \textit{see also} People v. Williams, 31 Cal. Rptr. 2d 769, 771-72 (App. Dep’t Super. Ct. 1994) (conducting peremptory challenges at the bench). Another way of conducting peremptory strikes outside the jurors’ presence would be to conduct voir dire, and then have the judge, attorneys, clerk, and court reporter leave the courtroom and go to the judge’s chambers to argue over challenges for cause and peremptory strikes in private. Once the judge has approved the challenges, the clerk or judge, both neutral figures, can inform the jury panel which jurors have been dismissed. \textit{See} Georgia v. McCollum, 505 U.S. 42, 53 n.8 (1992) (“[I]t is common practice not to reveal the identity of the challenging party to the jurors and potential jurors, thus enhancing the perception that it is the court that has rejected them.”).

Alternatively, the judge could dismiss the jurors from the courtroom after the voir dire and conduct challenges for cause and peremptory strikes in their absence. The court followed this approach in \textit{Warren}, 982 F.2d at 288. In \textit{Warren}, the court held that “[t]here is nothing improper in excusing potential jurors from the courtroom before the parties make their challenges.” \textit{Id.} The court explained that the attorneys should make seating charts and take notes during voir dire to keep track of who the jurors are and what answers they gave to voir dire questions. \textit{Id.}

\textsuperscript{149.} \textit{Jones}, 343 Md. at 601-05, 683 A.2d at 528-30.
\textsuperscript{150.} \textit{Id.} at 601-02, 683 A.2d at 528-29.
\textsuperscript{151.} \textit{Id.} at 601, 683 A.2d at 528-29. The Court of Appeals held that “the juror’s right not to be excluded from jury service in a manner violative of his or her equal protection rights must be balanced against the potential prejudice to the . . . defendant, as the striking party, that reseating the improperly stricken juror or disallowing the strike may entail.” \textit{Id.}

\textsuperscript{152.} \textit{Id.} at 605, 683 A.2d at 530.
\textsuperscript{153.} \textit{See} McCollum, 505 U.S. at 61 (Thomas, J., concurring in the judgment). Justice Thomas was concerned that the majority opinion, which extended the \textit{Batson} holding to
its attention on the defendant's right to a fair trial. This is because it is the defendant whose fate is at stake, not the jurors. As a result, the rights of the defendant must be the court's predominant concern, and the rights of the jurors should be secondary.\textsuperscript{154}

It is well accepted that the defendant's Sixth Amendment right to a fair and impartial jury is "fundamental"\textsuperscript{155} and is "essential for preventing miscarriages of justice."\textsuperscript{156} The fortitude of this right has been recognized since its inception in the common law.\textsuperscript{157} For instance, Lord Coke described the pertinence of an impartial jury when he stated: "'He that is of a jury, must be \textit{liber homo}, that is, not only a freeman and not bond, but also one that hath such freedome of mind as he stands indifferent as he stands unsworne.'\textsuperscript{158} More importantly, "the distinctive quality of that right—its very essence—is that every person put upon trial upon an issue involving his life or his liberty is entitled to have such issue tried by a jury consisting of unbiased and unprejudiced persons."\textsuperscript{159} In comparison to the explicit constitutional right to a "fair and impartial jury," there is no express constitutional right to serve on a particular jury.\textsuperscript{160} Moreover, the Supreme Court has not interpreted the Constitution to provide "a juror [the] equal protection right not to be excluded from a particular case through peremptory challenge."\textsuperscript{161} Therefore, the rights of the five jurors who were improperly struck in Jones stand on much weaker

prohibit defense attorneys from using racist strikes, "produce[d] a serious misordering of priorities." Id. Justice Thomas feared that the Court was departing from its prior holdings, in which the Court "put the rights of defendants foremost." Id. He warned that "[by] protecting [the rights of the] jurors, [the Court] leaves defendants with less means of protecting themselves." Id.

154. State v. McCollum, 433 S.E.2d 144, 159-60 (N.C. 1993). In State v. McCollum, the Supreme Court of North Carolina declared that the rights of the defendant were more important than those of the jury. Id. "We recognize and endorse the equal protection right of prospective jurors explained in detail in \textit{Powers}. However, we conclude that the primary focus in a criminal case . . . must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State." Id. at 159.

155. See Duncan v. Louisiana, 391 U.S. 145, 149, 154 (1968) (incorporating the Sixth Amendment into the Fourteenth Amendment to ensure that the right to an impartial jury is available in "serious" state criminal trials).

156. Id. at 158.


158. Id. at 754 n.3 (quoting 1 EDWARD COKE, COMMENTARY UPON LITTLETON 155a (reprint 1985) (Francis Hargrave et al. eds., 19th ed. 1832)).

159. Id. at 754 (internal quotation marks omitted).


ground than Jones's long-revered constitutional right to an impartial jury.

Furthermore, there is a second, more practical reason for placing the defendant's right to a fair and impartial jury above the equal protection rights of the jury. When a defendant is deprived of her right to a fair and impartial jury, it can result in her incarceration, the ultimate deprivation of freedom. Quite simply, "it is the defendant, not the jurors, who faces imprisonment or even death." At the conclusion of his trial, Jones went to jail. Yet, for the improperly stricken jurors, whose equal protection rights were violated, the result was their return to the comfort of their homes and communities. The repercussions of the violations of these two distinct rights demonstrate their inequality. Thus, the Court of Appeals incorrectly equated a defendant's rights with those of the improperly stricken jurors.

c. The Compromise Remedy.—In Jones, the defendant's right to a fair and impartial jury could have been easily safeguarded by discharging only those jurors who were improperly stricken, while keeping the remainder of the venire. This remedy was never considered by the Circuit Court, the Court of Special Appeals, or the Court of Appeals. All three of these courts considered just two possible solutions—either dismissing the entire venire or reseating the stricken jurors. Possible remedies, however, are not limited to these two alternatives. The Supreme Court has pronounced its desire to give the state courts much leeway in the area of fashioning a Batson remedy. Moreover, in Batson, the Supreme Court held that a remedy that strikes an entire venire is acceptable. Thus, it is highly probable that the Supreme Court would approve of a "compromise remedy," in which only a few affected jurors are discharged.

162. McCollum, 505 U.S. at 62 (Thomas, J., dissenting).
163. Jones, 343 Md. at 590, 683 A.2d at 523.
164. Id. at 593, 683 A.2d at 524; Jones, 105 Md. App. at 270-74, 659 A.2d at 367-70.
165. See Jones, 343 Md. at 594-604, 683 A.2d at 525-30; Jones, 105 Md. App. at 269-76, 659 A.2d at 367-70.
166. See Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986) (stating that the Court makes "no attempt to instruct . . . courts how to best implement [the] holding").
167. Id. The Court stated its approval of the extreme remedy of discharging the entire venire:

[W]e express no view on whether it is more appropriate in a particular case . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. (citation omitted).
Those courts that support reseating stricken jurors, including the Court of Special Appeals, reason that striking the venire is an improper remedy because it wastes judicial time and resources. However, if the trial court only dismissed those jurors affected by the improper strikes, a minimal amount of the court’s time would be wasted. The amount of judicial resources spent would be equivalent to the amount used to strike jurors for cause. Furthermore, the judicial economy argument is unpersuasive when weighed against a significant constitutional right. Even if extra judicial time and resources must be spent to dismiss prospective jurors in order to insure that a defendant receives a fair trial, those resources should not be viewed as “wasted,” but must be perceived as a necessary part of justice.

Courts also argue that discharging the improperly stricken jurors “would unfairly reward counsel for [its] improper conduct and give him exactly what he wanted, namely, a different jury panel.” Courts have worried that “if [they] were to require the trial court to strike the entire panel in every case of discrimination, then there might be those parties who would purposefully discriminate in exercising strikes for the sole purpose of getting a new panel.” This argument, however, is troublesome because it seems to assume that attorneys are dishonest and deceitful. Courts of law should refrain from asserting legal principles that are based upon the notion that attorneys are untrustworthy and will attempt to swindle or defraud a judge if permitted. Even so, it is “unlikely . . . that many [attorneys] would use [the peremptory challenge] in so calculated a fashion.” Nonetheless, this argument

168. Jones, 105 Md. App. at 277, 659 A.2d at 370. The Court of Special Appeals argued that “[s]tarting the jury selection process over every time there is a Batson violation would be both burdensome and costly.” Id.

169. Id. at 274, 659 A.2d at 369. The Court of Special Appeals was swayed into believing this mythical possibility by an academic commentator, whom it quoted in its opinion:

 “[I]n some situations, the remedy [of discharging the entire panel] might give the [striking attorney] a broader de facto peremptory challenge than any provided by law. [An attorney] dissatisfied with an initial panel of prospective jurors . . . might seek to reduce the presence of minorities through the exercise of peremptory strikes. Were these strikes upheld, the [attorney] would gain a victory; and were they declared unlawful and the jury selection begun anew, the [attorney] might regard this defeat as a great victory still.

. . . The [attorney] would in effect have been afforded a power to strike the entire panel peremptorily.”

Id. at 275, 659 A.2d at 370 (quoting Alschuler, supra note 142, at 178) (first and second alterations in original).

170. Id. at 275, 659 A.2d at 369-70.

171. Alschuler, supra note 142, at 178.

172. Id. Thus, even the creator of this theory doubts that many attorneys lack the ethical stamina to take advantage of such a remedy. Id. The Court of Special Appeals itself doubted that attorneys would actually use this tactic to trick the trial judge into ordering a
cannot apply to the compromise remedy because the trial judge would not dismiss the entire venire, but would dismiss only those jurors who were improperly struck.

Moreover, utilizing the compromise remedy would not require Maryland courts to take a huge leap from their past decisions, which approved of discharging the entire venire and beginning jury selection anew. In *Chew v. State*, the Court of Special Appeals suggested that, in future cases, "it may be necessary to dismiss the venire and to begin again with a new panel." Similarly, in *Gilchrist v. State*, the Court of Appeals upheld the trial judge’s remedy of discharging the entire venire and beginning jury selection anew. Finally, as recently as 1994, the Court of Special Appeals affirmed the remedy of striking the entire venire in *Brogden v. State*. Thus, because dismissing only the jurors affected by the strikes is a more conservative remedy than quashing the entire venire, the Maryland courts should find it to be an acceptable remedy.

5. Conclusion.—The Supreme Court has refused to mandate a single appropriate remedy for a *Batson* violation, leaving to the states the task of determining the fairest remedy. Maryland is a prime example of the many states that have tiptoed around this controversial issue, refusing to definitively approve a specific *Batson* remedy. Thus, the Court of Appeals had a great degree of leeway in deciding *Jones*, and its opinion fell within the constitutional limits created by *Batson* and Maryland precedent.

The court, however, failed to appreciate that the Supreme Court’s ruling in *Batson* was motivated by a strong desire to protect the defendant’s constitutional rights to a fair trial and an impartial jury. Yet, in the cases that have succeeded *Batson*, this original concern for

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new trial because “if the entire venire were struck, this might, under some circumstances, work to penalize the violating party, since the result might be that some of the jurors he did not strike, and very much wanted on the jury, would be dismissed.” *Jones*, 105 Md. at 275 n.5, 659 A.2d at 369 n.5.


174. 340 Md. 606, 623, 667 A.2d 876, 884 (1995). Furthermore, the jury selection procedures used in *Gilchrist* were very similar to those followed in *Jones*. As in *Jones*, the attorneys in *Gilchrist* conducted their peremptory challenges in the jurors’ presence so that the jurors knew which party had struck them. *Id.* at 611-12, 667 A.2d at 878.


177. *See supra* notes 65-93 and accompanying text.

178. *Batson*, 476 U.S. at 86-87. The Court declared that: “Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” *Id.*
the defendant's rights has been lost, even though courts, such as Jones, have purported to be following Batson. In Jones, the Court of Appeals neglected the defendant's right to a fair trial, and, instead, focused its concern on the equal protection rights of the jurors. The result was an infringement of the defendant's Sixth Amendment rights. In order to remain aligned with the Supreme Court's intent in Batson, and to guard the defendant's fundamental constitutional rights, the Court of Appeals should have dismissed only those jurors who were improperly struck. Ultimately, the Supreme Court will be forced to revisit the issue of Batson violation remedies to ensure that the proper protection is afforded to a defendant's rights. Hopefully, at that time, the Court will provide more guidance to lower courts.

MEAGEN R. SLEEPER

C. Divergent Methods of Evaluating Constructive Possession Drug Convictions May Yield Confusion and Disparate Outcomes

In Taylor v. State, the Court of Appeals considered whether a defendant's conviction for possession of a controlled dangerous substance may stand, based on the defendant's presence in a motel room filled with marijuana smoke and his knowledge that others had used the drug in that room. The court held that mere proximity to marijuana and awareness that it had been smoked did not establish that the defendant was in constructive possession of the drug. Taylor was decided correctly because there was insufficient evidence linking the defendant to the marijuana. In reaching this conclusion, however, the court failed to harmonize the divergent approaches utilized by the Court of Special Appeals and the Court of Appeals in cases involving two or more persons who share constructive possession. Although the Court of Special Appeals has consistently employed a four-prong test to evaluate whether an individual is in joint and constructive possession of contraband, the Court of Appeals has neither applied the test nor addressed the Court of Special Appeals's past usage of the test. This disparity between Maryland's two appellate courts will lead to

179. Jones, 343 Md. at 601-05, 683 A.2d at 528-30.
2. Id. at 459, 697 A.2d at 465.
3. Id. at 463, 697 A.2d at 467-68.
4. Id. The evidence presented against Taylor was that he was present in a hotel room in which marijuana was recently smoked, he was aware that the marijuana was smoked, and the marijuana was found in a concealed carrying bag belonging to another occupant of the room. Id., 697 A.2d at 468.
5. See infra text accompanying note 57.
confusion among trial courts and practitioners regarding the legal standards necessary to sustain a joint and constructive possession drug conviction. Furthermore, the different approaches of the two appellate courts will yield inconsistent reasoning and outcomes in future constructive possession cases.

1. The Case.—On the morning of June 10, 1995, Richard Jamison Taylor and four of his friends rented a motel room in Ocean City, Maryland. Soon after their arrival, Officer Scott Bernal and another officer responded to a complaint about a potential controlled substance violation in the room occupied by Taylor and his friends. As the officers and the motel manager approached the room, they detected a strong odor of marijuana in the hallway. While the officers stood outside the room for a few minutes, two individuals who were staying in the room—Kristopher Klein and a juvenile named Brandy—arrived. At the instruction of Officer Bernal, Klein knocked on the room door and Chris Myers, another occupant of the room, answered. Officer Bernal then identified himself and asked Myers if marijuana had been smoked in the room. Myers told the officers that marijuana had not been smoked in the room and, pursuant to their request, permitted the officers to search the premises. When the officers entered the room, they spotted Taylor lying on the floor with his head turned away. The officers also observed “clouds of smoke in the room that smelled like marijuana.”

Officer Bernal informed Myers that he planned to search the entire room, and again inquired whether there was marijuana in the room. Myers then opened a carrying bag and pulled out a bag of marijuana. Myers told the officers that this was the only marijuana in the room, and he was subsequently arrested. When the officers continued to search the room, Myers retracted his earlier statement.

6. Taylor, 346 Md. at 454, 697 A.2d at 463.
8. Taylor, 346 Md. at 455, 697 A.2d at 463.
9. Id. Brandy’s surname was not revealed because she was a juvenile at the time of this incident. Id. at 455 n.3, 697 A.2d at 463 n.3.
10. Id. at 455, 697 A.2d at 463.
11. Id.
12. Id., 697 A.2d at 463-64.
13. Id., 697 A.2d at 464. Officer Bernal later testified that he could not determine whether Taylor was asleep or awake. Id.
14. Id.
15. Id.
16. Id.
17. Id.
and led Officer Bernal to another bag of marijuana located in a multi-colored bag. Officer Bernal testified that Taylor and the other occupants told him that friends who were not staying in the room had visited earlier and smoked marijuana in their presence. Despite the strong odor of marijuana, Officer Bernal did not "see anyone smoking marijuana, the ashtrays were clean, and no marijuana was visible." Taylor was charged with possession of marijuana in violation of Article 27, section 287.

In a bench trial in the Circuit Court for Worcester County, Taylor was convicted of possession. The trial court based the conviction on the fact that Taylor: (1) was in close proximity to the marijuana; (2) "knew" of the marijuana because people were smoking it in his presence; and (3) had some possessory right in the premises because he was asleep in the room. The trial court concluded that the circumstances led to a reasonable inference that Taylor participated with the others in "the mutual enjoyment of the contraband." The trial court sentenced Taylor to fifteen days in the Worcester County jail, but suspended the sentence and imposed two years unsupervised probation and a fine.

The Court of Special Appeals affirmed the conviction in an unreported opinion and applied a four-part test to determine the sufficiency of the evidence. The court ruled that "discovery of marijuana in Myers’s bags allowed for the inference that appellant

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18. Id.
19. Id. at 455-56, 697 A.2d at 464.
20. Id. at 456, 697 A.2d at 464. At trial, Taylor provided a different version of the events of June 10, 1995. He testified that shortly after his arrival at the motel room, he went to sleep and was asleep when Officer Bernal entered the room. Taylor testified that, because he was asleep, he was unaware that anyone had smoked marijuana in the room. Id. at 456 n.5, 697 A.2d at 464 n.5.
21. Id. at 456, 697 A.2d at 464.
22. Id. Article 27, section 287 provides in pertinent part: "It is unlawful for any person . . . to possess or administer to another any controlled dangerous substance, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice." Md. Ann. Code art. 27, § 287(a) (1996).
23. Taylor, 346 Md. at 456, 697 A.2d at 464.
24. Id.
25. Id.
26. Id.
28. Id. at 5. The Court of Special Appeals invoked a four-part test to determine whether there was sufficient evidence to find joint possession of the contraband. This test, formulated in Folk v. State, 11 Md. App. 508, 275 A.2d 184 (1971), includes:
knew of and had shared that supply with Myers. The court further explained that Taylor's presence in a room in which marijuana was recently smoked led to an inference that he had smoked marijuana as well. As support for this inference, the court relied upon its earlier holdings that a passenger in an automobile containing contraband may be assumed to have knowledge of the contraband. The Court of Appeals granted certiorari to determine whether a defendant's presence in a room filled with marijuana smoke, coupled with his knowledge that others had smoked the drug in that room, was sufficient to uphold a conviction for possession of a controlled dangerous substance.

2. Legal Background.—Early constructive possession decisions in criminal drug cases fueled a growing debate among courts regarding the evidence necessary to sustain a constructive possession conviction. The main source of confusion surrounding the term "possession" is that "[i]t is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins."

(1) [the] proximity between the defendant and the contraband, (2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, (3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or (4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Id. at 518, 275 A.2d at 189.

29. Taylor, 346 Md. at 457, 697 A.2d at 464 (quoting the Court of Special Appeals's unreported opinion in Taylor).

30. Id.

31. See Pugh v. State, 103 Md. App. 624, 652, 654 A.2d 888, 902 (1995) (asserting that presence in a vehicle in which hidden contraband was discovered sufficiently showed that the passenger had knowledge of the contraband); Colin v. State, 101 Md. App. 395, 407, 646 A.2d 1095, 1101 (1994) (stating that the voluntary status of the defendant as a passenger in a vehicle sufficiently demonstrated that he "anticipated 'the mutual enjoyment of the contraband'").

32. Taylor, 346 Md. at 457, 697 A.2d at 464.

33. See generally Charles H. Whitebread & Ronald Stevens, Constructive Possession in Narcotics Cases: To Have and Have Not, 58 VA. L. REV. 751, 754-55 (1972) (explaining that California was the forerunner in the constructive possession doctrine due to its early encounter with the drug problem). The first reported prosecution for possession of narcotics "to raise the spectre of constructive possession" was People v. Herbert, 210 P. 276 (Cal. Dist. Ct. App. 1922). Whitebread & Stevens, supra, at 755.

34. See Whitebread & Stevens, supra note 33, at 751 (arguing that cases involving constructive possession of narcotics "have engendered such conceptual confusion and given rise to so many conflicting rulings 'that for the practitioner the problems are difficult to understand and apparently for the courts impossible to master'" (quoting United States v. Holland, 445 F.2d 701, 704 n.1 (D.C. Cir. 1971) (Tamm, J., concurring))).
gins." A person who knowingly exercises direct physical control over a thing is in actual possession of it. A person who, although not in actual possession, "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through others" is in constructive possession. Actual possession is "possession which exists as a matter of fact." Constructive possession, which is often defined as a "legal fiction," predicates liability in situations where possession does not actually exist, but where courts want an individual to have the "legal status of a possessor."

a. Development of Maryland Law.—The statutory definition of "possession" applicable to drug crimes in Maryland allows possession convictions to rest on constructive or actual grounds. Maryland courts have interpreted the word "possession," as within the intent of the statute, to mean "the act or condition of having in or taking into one's control or holding at one's disposal." The Court of Special Appeals subsequently explained that constructive possession exists when "an article is taken into a person's control or he holds it at his disposal but is not on his person so as to be immediate or direct or physical possession."

Article 27, section 287 states that it is unlawful for any person to "possess or administer to another any controlled dangerous substance, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner . . . ." Furthermore, section 287 mandates that any individual who is convicted for possession of marijuana "shall be punished by a period of imprisonment not to exceed one (1) year or by a fine not to exceed $1,000.00, or both."

Since the first reported prosecutions for constructive drug possession

35. National Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914) (discussing the ambiguity of the term "possession" as it relates to property in a safe deposit box).
37. United States v. Beverly, 750 F.2d 34, 37 (6th Cir. 1984) (per curiam) (quoting United States v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1971)).
38. Whitebread & Stevens, supra note 33, at 761.
39. Id. at 762.
40. See Md. Ann. Code art. 27, § 277(s) (1996) ("'Possession' shall mean the exercise of actual or constructive dominion or control over a thing by one or more persons.").
41. See Williams v. State, 7 Md. App. 5, 14, 252 A.2d 880, 885 (1969) (detailing the various ways in which a defendant can be found in possession of narcotics).
42. See Jason v. State, 9 Md. App. 102, 115, 262 A.2d 774, 781 (1979) (tracing the reasoning from previous decisions to formulate a definition for constructive possession).
44. Id. § 287(e).
in Maryland, courts have struggled to develop a consistent and useful framework to assess convictions under the State's statutory scheme. Many possession decisions, such as Taylor, involved joint defendants who were held to be in joint and constructive possession of contraband. Joint possession exists where two or more persons share actual or constructive possession. Under Maryland law, it is well settled that possession of marijuana or contraband drugs need not be sole possession. "[T]here may be joint possession and joint control in several persons. And the duration of the possession and the quantity possessed are not material, nor is it necessary to prove ownership in the sense of the title." For joint possession to exist, it is not necessary for a defendant to have a "full partnership" in the contraband. It is only necessary that the defendant "controlled so much of it as would be necessary to permit her to take a puff upon a marihuana cigarette." Although this definition seems simple enough, Maryland appellate courts have differed in their methods of assessing whether two or more persons exercise joint and constructive possession.

In 1971, the Court of Special Appeals articulated specific guidelines to evaluate cases involving joint and constructive possession. In Folk v. State, the court sustained a possession charge against a de-

45. In Mazer v. State, 212 Md. 60, 127 A.2d 630 (1956), one of its first decisions on constructive possession of illegal drugs, the Court of Appeals upheld a possession conviction even though the officers discovered the drug in the defendant's car, rather than on his person. Id. at 67, 127 A.2d at 634. The defendant in Mazer argued that the seized marijuana did not establish beyond a reasonable doubt that he put the drug in his car, or that it was in his possession or under his control. Id. The court explained that "[r]easonable probability of its connection with the crime alleged, under the circumstances, is the only test of admissibility." Id. As justification for the conviction, the Mazer court relied on previous cases in which defendants were found to be in constructive possession of unlawful lottery slips. Id.; see Hayette v. State, 199 Md. 140, 144, 85 A.2d 790, 792 (1952) (finding a grocery store owner in possession of lottery slips discovered on the premises); Shelton v. State, 198 Md. 405, 412-13, 84 A.2d 76, 80 (1951) (upholding a possession conviction for the owner and operator of a bar and grill in which lottery slips were found). Although the court never explicitly mentioned the doctrine of constructive possession, the Mazer decision paved the way for many subsequent decisions involving constructive possession in the drug area.

46. See infra notes 52-88 and accompanying text for a discussion of defendants who faced charges of this nature.

47. BLACK'S LAW DICTIONARY, supra note 36, at 839.

48. See Folk v. State, 11 Md. App. 508, 511, 275 A.2d 184, 185-86 (1973) (describing the circumstances under which joint possession exists); see also MD. ANN. CODE art. 27, § 277(c) (1996) (explaining that actual or constructive possession can be exercised by more than one person).


50. Folk, 11 Md. App. at 512, 275 A.2d at 186.

51. Id.

defendant who was one of six occupants in an automobile clouded with marijuana smoke. Although there was no evidence that the accused was in direct physical control of the contraband, the court upheld the conviction because it was clear "that some person or persons in that automobile were in possession of the contraband marihuana." In so concluding, the court reviewed previous decisions of both the Court of Special Appeals and the Court of Appeals that considered joint possession convictions, and found a "common thread" running through these decisions. The court then developed the following four-part test to assess when a defendant jointly possesses contraband:

1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

In applying these four prongs to the facts of Folk, the court found sufficient evidence to sustain the conviction. The court ruled that the proximity prong was fulfilled because the marijuana was "within arm's length of every other occupant of that automobile." The court then drew a "reasonable inference" that the marijuana was within the knowledge of the defendant because "the peculiar pungent

53. Id. at 511, 275 A.2d at 185. In Folk, an officer approached a vehicle that was parked in a secluded baseball field. As he walked toward the driver's side, one of the passengers rolled down the left front window, emitting strong fumes of what the officer detected to be marijuana. The officer then ordered all of the occupants out of the vehicle and placed them under arrest. Upon exiting the vehicle, one of the occupants threw an object to the ground, and a chemical analysis proved the object to be marijuana. Id.

54. Id.

55. See generally Henson v. State, 236 Md. 518, 204 A.2d 516 (1964) (sustaining a conviction for possession and control of narcotics even though no narcotics were found on the defendant's person but were found on the premises); Anderson v. State, 9 Md. App. 639, 267 A.2d 302 (1970) (holding that the evidence was legally sufficient to sustain a conviction for possession of heroin when the defendant was found in an upstairs bedroom but no contraband was discovered on his person or in that bedroom); Haley v. State, 7 Md. App. 18, 253 A.2d 424 (1969) (proclaiming that there was insufficient evidence to sustain a conviction for possession of marijuana because the defendants, who were arrested in the living room, had no proprietary interest in the premises); Wimberly v. State, 7 Md. App. 302, 254 A.2d 711 (1969) (reversing a conviction for possession because no prohibited drugs were found in the defendant's physical possession).


57. Id.

58. Id.

59. Id.
odor filled the interior of a tightly-closed automobile.\^60 For the "mutual enjoyment" prong, the court concluded that "[e]very item of additional evidentiary data" indicated that the defendant participated with the other occupants in the mutual use and enjoyment of the marijuana.\^61 Since the Folk decision, the Court of Special Appeals has consistently applied the four-prong test enunciated in Folk to evaluate the evidentiary sufficiency in joint and constructive drug possession convictions.\^62 The Court of Appeals, however, in its many joint and constructive drug possession cases, has embarked on a separate path.

One year after the Court of Special Appeals pronounced its four-prong test in Folk, the Court of Appeals, in Garrison v. State,\^63 ruled that the standard to sustain a constructive possession conviction is whether the evidence "show[s] directly or support[s] a rational inference that the accused did in fact exercise some dominion and control [solely or jointly] over the prohibited narcotics in the sense contemplated by statute, i.e., that she exercised some restraining or directing influence over it."\^64 The court reversed Mrs. Garrison’s conviction because there was no evidence that she was selling narcotics,\^65 there were no "fresh needle marks" on her arms,\^66 she made

\^60. Id.
\^61. Id. at 519, 275 A.2d at 189.
\^62. See Pugh v. State, 103 Md. App. 624, 652, 654 A.2d 888, 902 (1995) (using the Folk test to find that presence in a vehicle containing hidden contraband sufficiently showed that the passenger had knowledge of the contraband); Colin v. State, 101 Md. App. 395, 407, 646 A.2d 1095, 1101 (1994) (using the Folk test to hold that the defendant’s status as a passenger in a vehicle was sufficient to establish that he was in constructive possession of the drugs); Ford v. State, 37 Md. App. 373, 377 A.2d 577 (1977) (applying the Folk test to hold a passenger in a vehicle in constructive possession of marijuana based on an officer’s testimony that the driver reached for marijuana where the passenger sat); Everhart v. State, 20 Md. App. 71, 315 A.2d 80 (1974) (examining the Folk factors to sustain the defendant’s possession conviction of marijuana when the defendant, one of several tenants, had knowledge of the 78 marijuana plants discovered outside the house), rev’d, 274 Md. 459, 337 A.2d 100 (1975); Peterson v. State, 15 Md. App. 478, 292 A.2d 714 (1972) (applying the Folk prongs to sustain the defendant’s conviction for drug possession when he was one of four persons inside a narcotics distribution plant).
\^63. 272 Md. 123, 321 A.2d 767 (1974). In Garrison, police officers searched the premises of Ernest Garrison and his wife, Shirley Garrison, based on probable cause that they were selling heroin from their home. Id. at 126, 321 A.2d at 769. Upon entering, an officer saw Mr. Garrison flush a plastic bag down the toilet. Id. The officer, after recovering the bag, learned that it contained heroin. Id. Another officer found Mrs. Garrison in the rear bedroom, but failed to locate any contraband in that room. Id. at 126-27, 321 A.2d at 769.
\^64. Id. at 142, 321 A.2d at 777.
\^65. Id. at 130, 321 A.2d at 771.
\^66. Id. The needle marks on Shirley Garrison’s arms were ten days to two weeks old. Id. at 127, 321 A.2d at 769.
no inculpatory remarks, and the seized heroin was not in plain view.

In its review of previous decisions involving constructive possession, the Garrison court examined many of the same cases that the Court of Special Appeals examined one year earlier when it announced its four-prong test in Folk. In doing so, the court somewhat implied that the Folk test was legitimate when it invoked several factors from the test, such as whether the drugs were in plain view, and whether the defendant had a possessory interest in the premises. However, the Garrison court's failure to acknowledge specifically whether the Folk factors must be used, or whether they are four factors to consider, created a division in the manner in which Maryland appellate courts evaluate joint and constructive possession cases.

In State v. Leach, the next joint possession case reviewed by the Court of Appeals, the issue was whether a defendant constructively possessed the phencyclidine (PCP) found in a closed container in his brother's one-bedroom apartment. In reversing the conviction, the court invoked the Garrison court's reasoning to reiterate that evidence must support a rational inference that the accused "exercise[d] some dominion or control" over the prohibited drug. Although scales and a magnifier were found in plain view, the court dismissed those items as "intrinsically innocuous" until they are associated with drugs. The court also refused to infer that the defendant had joint dominion and control over the entire apartment and "exercised [a] restraining or directing influence" over the PCP merely because he had ready access to his brother's apartment.

In Dawkins v. State, the Court of Appeals determined that knowledge is a necessary element to sustain a conviction, and the defendant

67. Id. at 130, 321 A.2d at 771.
68. Id. at 131, 321 A.2d at 771. The court also believed that there was no "juxtaposition between her (in the front bedroom) and the contraband being jettisoned by her husband in the bathroom." Id. (citations omitted).
69. Id.
70. Id.
72. Id. at 592-93, 463 A.2d at 872-73. After their booking by the police, each brother gave 3712 Erdman Avenue as his address. Id. at 595, 463 A.2d at 874. At their appearance before a commissioner, they both provided that same address. Id. The Department of Motor Vehicles also listed the defendant's address as 3712 Erdman Avenue. Id. Another individual provided testimony, however, that the defendant lived with her and her daughter at a different address. Id.
73. Id. at 596, 463 A.2d at 874 (quoting Garrison, 272 Md. at 142, 321 A.2d at 777).
74. Id.
75. Id.
76. 313 Md. 638, 547 A.2d 1041 (1988).
must know of "both the presence and the general character or illicit nature of the substance." The court examined the statutory language and found a strong intention on the part of the General Assembly to require scienter as an element to a possession offense. As support for the new element, the court recognized that an individual could not exercise dominion and control over an object of which he was unaware. The court also stated that "such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom."

One year later, in Livingston v. State, the Court of Appeals, in reversing a possession conviction, applied the newly created knowledge component to decide whether a defendant jointly and constructively possessed contraband. The court held that a passenger in the back seat of a car did not possess two marijuana seeds discovered on the floor of the front of the car. The court invoked Dawkins to explain that knowledge is a "prerequisite" to exercising dominion and control. The mere fact that the defendant sat in the back seat of a vehicle did not convince the court that the defendant had knowledge of or exercised "any restraining or directing influence over" the marijuana seeds in the front of the car. The court also stated that "relying solely on their proximity, an officer does not possess sufficient cause to believe that a backseat passenger" possesses the contraband drugs. Although it discussed the defendant's proximity to the drugs, one of the four factors listed in the Folk test, the Livingston court failed to address the Folk test. Instead, the Livingston court applied the Garrison principle requiring evidence to show a rational inference that control and dominion were exercised. According to the court, the facts of the Livingston case permitted no such inference.

Most recently, the Court of Special Appeals reviewed constructive possession convictions in Colin v. State and in Pugh v. State. Both defendants in these cases molded their arguments to satisfy the four-
factor *Folk* test. In *Colin*, an officer searched the interior of an automobile and recovered cocaine from underneath the ashtray on the left rear door. Colin, who was a passenger in the front seat, argued that he was not in close proximity to the cocaine because it was found in the left rear door interior. He also contended that he did not have knowledge of the cocaine, and, therefore, never "exercised dominion or control over the substance." The court held that there was a sufficient amount of circumstantial evidence to conclude that Colin constructively possessed the drugs. For example, Colin gave the officer a false name. Additionally, Colin acted nervously when the officers searched the door where the cocaine was found. Although the cocaine was not in plain view, the court dismissed this factor as not determinative. The court also found that because Colin was a voluntary passenger, he "anticipated the mutual enjoyment of the contraband."  

The court in *Pugh* faced a factual scenario similar to that in *Colin*. In fact, the *Pugh* court essentially invoked the reasoning from *Colin* to uphold a possession conviction. A notable distinction, however, lies in the fact that the officers in *Pugh* discovered the contraband drug in a tire in the vehicle’s trunk, rather than in the ashtray. On appeal from his possession conviction, the passenger in *Pugh* argued that he had no knowledge of the concealed cocaine. Based on Pugh’s ner-

90. See *Pugh*, 103 Md. App. at 652-53, 654 A.2d at 902 (invoking the reasoning of *Colin* to explain why the defendant possessed the contraband drugs); *Colin*, 101 Md. App. at 406, 646 A.2d at 1100 (discussing whether the drugs were in close proximity, whether the defendant anticipated the mutual enjoyment of the contraband, and whether the drugs were in plain view).

91. *Colin*, 101 Md. App. at 399, 646 A.2d at 1097. The rental car in which Colin was a passenger was stopped by police for pulling in front of the police car and causing the officer to slam on his brakes. *Id.* at 398, 646 A.2d at 1096. The rental agreement for the car listed neither the driver nor the passenger as authorized drivers. *Id.* Due to the strong suspicion that this created, the officer decided to search the car. *Id.*

92. *Id.* at 407, 646 A.2d at 1100-01.

93. *Id.*, 646 A.2d at 1101 (internal quotation marks omitted).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* The court found that without this factor, the “circumstantial evidence adds up to a revealing picture.” *Id.*

98. *Id.*


100. *Id.* at 634, 654 A.2d at 893. After stopping the vehicle for crossing the center line of the road, the officer removed the tire from the trunk and noticed that it was “unusually heavy.” *Id.* He then cut open the tire and discovered “eleven large duct tape packages” filled with cocaine. *Id.*

101. *Id.*
uousness and the fact that he voluntarily was a passenger in the car, the court affirmed the jury's conclusion that Pugh knew of the concealed cocaine.\textsuperscript{102}

3. \textit{The Court's Reasoning}.—In \textit{Taylor}, the Court of Appeals held that proximity to a controlled dangerous substance and knowledge that others had used it were insufficient to establish that the defendant constructively possessed the drugs.\textsuperscript{103} Judge Raker, writing for the majority, began the analysis by discussing the role of circumstantial evidence in constructive possession cases.\textsuperscript{104} While noting that a conviction may rest on circumstantial evidence of joint or constructive possession, the court explained that a conviction based on circumstantial evidence alone "cannot be sustained on proof amounting only to strong suspicion or mere probability."\textsuperscript{105}

The court applied established legal precedents on constructive possession to evaluate the sufficiency of the evidence pertaining to the conviction.\textsuperscript{106} The majority devoted most of its analysis to a determination of whether Taylor exercised control over, or had knowledge of, the concealed marijuana.\textsuperscript{107} The court emphasized that Taylor was not in exclusive possession of the premises\textsuperscript{108} and that the marijuana was not in plain view.\textsuperscript{109} In light of these facts, the court relied on \textit{Livingston}, \textit{Garrison}, and \textit{Leach} to conclude that a "rational inference cannot be drawn that he possessed the controlled dangerous substance."\textsuperscript{110} The court then explained that Taylor's presence in a marijuana-smoke-filled room did not show that he exercised dominion or

\textsuperscript{102} \textit{Id.} at 653, 654 A.2d at 902.
\textsuperscript{103} \textit{Taylor}, 346 Md. at 463, 697 A.2d at 467-68.
\textsuperscript{104} \textit{Id.} at 458-59, 697 A.2d at 465.
\textsuperscript{105} \textit{Id.} at 458, 697 A.2d at 465.
\textsuperscript{106} \textit{Id.} at 459-60, 697 A.2d at 465-66 (citing Livingston v. State, 317 Md. 408, 564 A.2d 414 (1989) (holding that the presence of two marijuana seeds in the front of a car was insufficient to support a possession conviction for a back-seat passenger); Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988) (establishing that the defendant must have knowledge of the drug for a possession conviction); State v. Leach, 296 Md. 591, 463 A.2d 872 (1983) (holding that PCP found in a closed container in the apartment of the defendant's brother insufficient to support a possession conviction, even though the defendant had ready access to the premises); Garrison v. State, 272 Md. 123, 321 A.2d 767 (1974) (holding that the defendant did not exercise sufficient control to support a possession conviction when she resided in the same house with her husband, who was found flushing heroin down the toilet)).
\textsuperscript{107} \textit{Id.} at 459-61, 697 A.2d at 465-66.
\textsuperscript{108} \textit{Id.} at 459, 697 A.2d at 465.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}, 697 A.2d at 465-66.
control over the drug, nor did it indicate that he was "engaged in the mutual use or enjoyment of the contraband." The Taylor court next invoked the reasoning from Dawkins to consider whether the knowledge element of a possession charge was fulfilled. Based on the evidence presented, the majority believed that Taylor did not have knowledge of the concealed marijuana. Although the evidence elicited strong suspicion of Taylor's guilt, the court asserted that there "must be additional proof of knowledge and control to sustain a conviction for possession." The majority emphasized that while evidence that a person recently smoked marijuana may establish control over the substance, the smoke-filled room offered inadequate proof to sustain the constructive possession conviction. The court explained further that the record clearly shows that "someone smoked marijuana in the room, not that Petitioner, one of five occupants of the room, smoked marijuana."

The court continued its discussion of the control element by reviewing previous decisions of the Court of Appeals and the Court of Special Appeals involving constructive possession of drugs. The Taylor court traced Judge O'Donnell's discussion of constructive possession decisions in Garrison and then highlighted the main theme in these cases—that "convictions for possession cannot stand when the evidence does not establish, nor provides any reasonable inference to establish, that the accused exercised dominion or control over the contraband." The court next discussed Leach to demonstrate that ready access to the premises where drugs are found does not automatically imply an exercise of dominion and control over the contraband. The court also recounted the situation in Livingston, in which the court held that the defendant's presence in the back seat of a vehicle was insufficient to demonstrate knowledge of and control over two mari-

111. Id., 697 A.2d at 466.
112. Id.
113. Id. at 460, 697 A.2d at 466. "As clearly indicated by Dawkins, without knowledge of the presence of marijuana in the room, it is not possible for Petitioner to have exercised dominion or control over the marijuana, another required ingredient of the crime of possession." Id.
114. Id.
115. Id.
116. Id.
117. Id. at 460-61, 697 A.2d at 466.
118. Id. at 461-62, 697 A.2d at 466-67.
119. Id. at 461, 697 A.2d at 467.
120. Id. at 462-63, 697 A.2d at 467.
nuana seeds found in the front seat.\textsuperscript{121} Taylor was like the defendants in \textit{Leach} and \textit{Livingston} insofar as he had access to the hotel premises and maintained no knowledge of the concealed marijuana. Accordingly, the court concluded that Taylor’s joint possession of the premises, his proximity to the concealed marijuana, and his awareness that it was smoked were insufficient to support his conviction.\textsuperscript{122} The majority asserted that the evidence could not convince a rational trier of fact that Taylor exercised a “restraining or directing influence” over the marijuana.\textsuperscript{123}

Lastly, the court emphasized that “[t]he conjectures of the trial judge might be entirely correct. . . . Nevertheless, a conviction without proof cannot be sustained.”\textsuperscript{124} In so concluding, the Court of Appeals failed to enunciate new standards for future decisions involving constructive possession in the drug area.

4. \textit{Analysis}.—In \textit{Taylor}, the Court of Appeals held that mere proximity to drugs and knowledge of their use were insufficient to sustain a constructive possession charge absent other indicators of guilt.\textsuperscript{125} \textit{Taylor} presented a relatively straightforward case that was properly decided by adhering to established legal principles on possession: the exercise of dominion and control over the contraband drug and knowledge of the illicit nature of the drug. In correctly deciding the case, however, the court failed to bridge the longstanding discrepancy in the treatment of constructive possession cases by the Court of Appeals and the Court of Special Appeals. Although the Court of Special Appeals has consistently applied the \textit{Folk} test\textsuperscript{126} to determine whether an individual jointly possesses contraband, the Court of Appeals failed to acknowledge the test or rule on its validity.

The determination of whether an individual is in joint and constructive possession of contraband often hinges on the facts of a particular case.\textsuperscript{127} Thus, although the Court of Special Appeals relies on the \textit{Folk} test to determine whether a defendant is in joint and constructive possession, its inquiry often extends beyond these four

\begin{enumerate}
\item \textsuperscript{121} \textit{Id.} at 463, 697 A.2d at 467.
\item \textsuperscript{122} \textit{Id.}, 697 A.2d at 467-68.
\item \textsuperscript{123} \textit{Id.}, 697 A.2d at 468.
\item \textsuperscript{124} \textit{Id.} (alteration and ellipsis in original).
\item \textsuperscript{125} \textit{Id.}, 697 A.2d at 467-68.
\item \textsuperscript{126} See supra note 62 and accompanying text.
\item \textsuperscript{127} See Whitebread & Stevens, \textit{supra} note 33, at 766 (asserting that the outcome in possession cases will continue to “turn on their facts”).
\end{enumerate}
prongs. Many circumstantial factors, such as the nervous behavior of the defendant, often play a role in assessing whether a possession conviction should stand. Because no one evidentiary fact or standard is conclusive, the Court of Appeals is correct not to confine itself to the *Folk* test in reviewing joint and constructive possession case. It remains unclear, however, why the Court of Appeals did not seize on an ideal opportunity to vacate the *Folk* test when it decided *Taylor*.

a. Required Elements of Possession.—By recognizing that a rational inference must establish that the defendant exercised dominion and control over the contraband, the Court of Appeals, in *Taylor*, aligned itself with its previous decisions on constructive possession. In *Garrison, Livingston, and Leach*, the court applied this rationale to determine whether defendants, convicted of possession of a controlled dangerous substance, exercised dominion and control over the drugs. The *Taylor* court rightly recognized that the facts amounted to mere "speculation or conjecture" as to whether Taylor exercised dominion and control over the marijuana. The officer did not observe Taylor smoking the marijuana; there was no marijuana found on Taylor or his personal belongings; and he was not in exclusive possession of the premises. Accordingly, the court dismissed the control element because a possession conviction requires more than presence in a room where marijuana was recently smoked.

In addition, the court correctly applied the *Dawkins* reasoning to find that Taylor did not have knowledge of the concealed marijuana. The *Taylor* court's reasoning is also consistent with *Livingston*, where the court found that sitting in the back seat of a vehicle did not show that the passengers had knowledge of the two marijuana seeds in the front seat. The *Taylor* court's conclusion suggests that the court would have undertaken a different examination of the

130. *Id.* at 461-63, 697 A.2d at 466-67.
131. *Id.* at 458, 697 A.2d at 465.
132. *Id.* at 456, 697 A.2d at 464.
133. *Id.* at 459, 697 A.2d at 465.
134. *Id.*
135. *Id.*, 697 A.2d at 466.
136. *Id.* at 460, 697 A.2d at 466.
knowledge element if the officers failed to discover the concealed marijuana.\footnote{138} Other grounds would be required to establish the guilt of at least one person in the room, and the court may have directed its inquiry more towards whether Taylor had knowledge of the recently smoked marijuana.\footnote{139}

b. Differences Between the Court of Special Appeals and the Court of Appeals.—The Taylor court echoed the Garrison principle when it required that the evidence “support a rational inference” that the accused exercised dominion and control over the contraband.\footnote{140} Judge O’Donnell first asserted this requirement in Garrison after reviewing previous decisions regarding evidentiary sufficiency to support a constructive possession conviction.\footnote{141} Although Judge O’Donnell examined many of the same decisions reviewed by the Folk court one year earlier,\footnote{142} the Garrison court did not elaborate on the legitimacy of the Folk test.\footnote{143} By failing to acknowledge the Folk test, the Garrison court contributed to the lack of clarity that surrounds constructive drug possession in Maryland today. Following the Garrison decision, the Court of Appeals focused on the totality of the circumstances to review joint and constructive possession convictions in the drug area,

\footnote{138. See Chan v. State, 78 Md. App. 275, 315, 552 A.2d 1351, 1365 (1989) (asserting that Folk addressed the problem of establishing the guilt of at least one person out of a group of possible culprits). In Taylor, however, after the concealed marijuana was discovered and Myers confessed, the need to select a guilty possessor out of the crowd appears to have lessened.}

\footnote{139. See Folk v. State, 11 Md. App. 508, 511, 275 A.2d 184, 185 (1971) (upholding a possession conviction because “some person or persons in that automobile” possessed contraband).

140. Taylor, 346 Md. at 458, 697 A.2d at 465.


142. See supra note 55. See generally Henson v. State, 236 Md. 518, 204 A.2d 516 (1964) (sustaining a conviction for possession and control of narcotics even though no narcotics were found on the defendant’s person but were found on the premises); Tucker v. State, 19 Md. App. 39, 308 A.2d 696 (1973) (holding evidence insufficient to establish physical or constructive possession of heroin when no drugs were found on the defendant and drugs were secreted); Anderson v. State, 9 Md. App. 639, 267 A.2d 302 (1970) (holding evidence was legally sufficient to uphold a conviction for possession of heroin when the defendant was found in an upstairs bedroom but no contraband was discovered on his person or in that bedroom); Haley v. State, 7 Md. App. 18, 253 A.2d 424 (1969) (holding evidence insufficient to sustain a possession conviction when none of the defendants had a proprietary interest or prior association with the premises); Wimberly v. State, 7 Md. App. 302, 254 A.2d 711 (1969) (reversing a possession conviction for the defendant, who was one of 12 youths found in a house, because no prohibited drugs were found in his physical possession).

143. Although the Garrison court did not elaborate on Folk, it did cite the case when discussing past decisions involving constructive possession of drugs. See supra text accompanying notes 69-70.
while invoking the standard announced by the Garrison court. After Garrison, in contrast, the Court of Special Appeals continued to apply the Folk test to assess whether a defendant constructively and jointly possessed contraband drugs. Garrison, therefore, marked the point at which the Court of Appeals and the Court of Special Appeals diverged in their methods of evaluating constructive possession convictions.

Because the facts in Taylor resemble those in Folk, Taylor presented an ideal opportunity for the Court of Appeals to pronounce its views on the Folk test, thereby bridging the gap in reasoning that currently exists between the Court of Appeals and the Court of Special Appeals. Although the Taylor court chose not to address the validity of Folk, it did explore many of the factors included in that test. The court examined whether Taylor was in proximity to the contraband, whether the marijuana was within his plain view, whether he had a possessory right in the premises, and whether he participated in the mutual use and enjoyment of the contraband. In doing so, the court examined all of the factors of the Folk test. Nevertheless, the court failed to recognize explicitly whether trial courts must apply these factors, or whether they are merely four factors to consider, in deciding whether a defendant has possession of a controlled dangerous substance.

The Court of Appeals’s failure to legitimize the Folk test may indicate the court’s unwillingness to confine itself to established criteria. This goal is certainly legitimate, as many of the decisions in joint and

144. The Garrison court pronounced that to uphold a possession conviction the “evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited . . . drug in the sense contemplated by the statute, i.e., that [the accused] exercised some restraining or directing influence over [the contraband].” Garrison, 272 Md. at 142, 321 A.2d at 777. Since this standard was articulated in Garrison, the Court of Appeals has applied it to the facts of cases involving joint and constructive possession. See generally Taylor, 346 Md. at 468, 697 A.2d at 463 (holding that Taylor’s presence in a room where marijuana was recently smoked, and his knowledge that others had smoked marijuana earlier, did not show that he “exercised a restraining or directly influence” over the drug found in a carrying bag); Livingston v. State, 317 Md. 408, 415-16, 564 A.2d 414, 418 (1989) (invoking Garrison to hold that the defendant did not exercise “any restraining or directing influence over” the marijuana seeds in the front of the car); State v. Leach, 296 Md. 591, 596, 463 A.2d 872, 874 (1983) (reversing a possession conviction because, although the defendant had ready access to the apartment, he did not “exhibit a restraining or directing influence over contraband” found in a closed container in the bedroom dresser and bedroom closet).

145. See supra note 62 and accompanying text.

146. Taylor, 346 Md. at 459, 697 A.2d at 465.

147. Id.

148. Id.

149. Id., 697 A.2d at 466.
constructive possession cases stretch beyond the four factors in *Folk*.\textsuperscript{150} The determination of whether an individual is in joint and constructive possession involves a multitude of intangible factors that are often ambiguous.\textsuperscript{151} By confining itself to set criteria to evaluate whether a defendant is in joint and constructive possession, the Court of Special Appeals is apt to overlook other pivotal factors.\textsuperscript{152} Furthermore, if practitioners gear their arguments to pass the *Folk* test in joint and constructive possession cases, they too may overlook certain controlling factors. Some commentators have even suggested that the standards articulated by courts to determine whether or not a defendant constructively possessed contraband often lack objective criteria and give rise to ad hoc decisionmaking.\textsuperscript{153} One judge went so far as to comment:

> Judicial decisions have at best established ill-defined guidelines as to the evidentiary requirements necessary to prove constructive possession. Especially in reported cases growing out of narcotics prosecutions the opinions are usually built upon involved and obscure reasoning which certainly suggests judicial subjectivity. . . . Successive cases enumerate a continuing re-interpretation which can only be described as judicial whimsy.\textsuperscript{154}

While the *Folk* test provides guidance to assess whether an individual jointly and constructively possesses contraband, it certainly does not encompass all of the technicalities that may arise in a particular case. This is perhaps why, in prior decisions involving constructive possession of drugs, the Court of Appeals focused on the particular facts of the case while applying the *Garrison* standard. The court also examined other relevant factors, some of which are listed in the *Folk* test, to determine whether a defendant constructively possessed contraband. In *Livingston*, the court looked to whether the defendant was in close proximity to the contraband.\textsuperscript{155} The *Leach* court contemplated the significance of the scales and magnifier that were found in

\textsuperscript{150} See, e.g., supra note 128 and accompanying text.

\textsuperscript{151} See supra note 34 and accompanying text.

\textsuperscript{152} See Whitebread & Stevens, supra note 33, at 766 (stressing that the risk of adhering to set rules in deciding possession cases is that the factual inquiry is overlooked).

\textsuperscript{153} Id. at 752 (arguing that the various tests formulated by the courts to assess whether a defendant constructively possesses drugs "have failed to provide meaningful response, clouded judicial decision-making with conclusory labels, and created a morass of confusion and inconsistency").


\textsuperscript{155} See supra note 84 and accompanying text.
Additionally, the Garrison court grounded its holding partly on the fact that the drugs were not in the plain view of the defendant. Perhaps, in Taylor, the Court of Appeals applied all of the Folk factors simply because the facts of Taylor were closely analogous to those in Folk. Absent any guidance from the Court of Appeals on its motives, however, trial courts and practitioners remain uncertain as to the standards that the Maryland appellate courts will use to review a constructive possession conviction.

c. Implications of Declining to Adopt or Vacate the Folk Test.—Although the Taylor court correctly found that the evidence was insufficient to uphold the defendant's possession conviction, the court failed to reconcile the case with past divergent decisions of the Court of Special Appeals. These discrepancies may stem from the inherent vagueness of the constructive possession doctrine. Nevertheless, the variant approaches of the two courts also contribute to illogical distinctions. By failing to clarify the amount of evidence needed to sustain a conviction, the Court of Appeals further muddied the constructive possession doctrine in the area of illegal drugs.

As evidenced by the Folk and Taylor cases, the disparate logic used by the Court of Appeals and the Court of Special Appeals may lead to contrary conclusions in cases with similar facts. In Folk, the Court of Special Appeals upheld the defendant's conviction because "[t]he evidence was clear, however, that some person or persons in that automobile were in possession of the contraband marihuana." Although knowledge was not yet required for a possession offense, the Folk court found that the defendant was aware of the marijuana because smoke "filled the interior of a tightly-closed automobile." In contrast, the Taylor court believed, even though one of the five occupants in the room had smoked marijuana, that there was insuffi-

156. See supra note 74 and accompanying text.
157. See supra note 68 and accompanying text.
158. See Brief of Respondent at 7, Taylor v. State, 346 Md. 452, 697 A.2d 462 (1997) (No. 101) (urging the Court of Appeals to adopt a "list of pertinent factors for evidentiary rulings concerning constructive possession of drugs... [to] provide a stable foundation from which judges at the trial and appellate levels" can rule on evidentiary sufficiency).
159. See Whitebread & Stevens, supra note 33, at 751 ("The word 'possession,' though frequently used in both ordinary speech and at law, remains one of the most elusive and ambiguous of legal constructs.").
161. See Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988) (holding that the defendant must have knowledge of the prohibited drug in order for a possession conviction to stand under section 287); see also supra notes 76-80 and accompanying text.
162. Folk, 11 Md. App. at 518, 275 A.2d at 189.
cient evidence to suggest that Taylor was that person. The Taylor court also side-stepped the issue of Taylor’s knowledge that others smoked marijuana earlier, and instead focused on whether he had knowledge of the marijuana that was secreted in the carrying bag. Although the Taylor court may have invoked the criteria articulated in Folk, it nevertheless differed from that case in how it applied these criteria.

Furthermore, while Colin and Pugh are distinguishable in that the officers discovered the contraband in an automobile, the facts in those cases are analogous to the facts in Taylor. As in Taylor, the drugs in those cases were concealed, and the defendants argued that they had no knowledge of the contraband. The Court of Special Appeals upheld the convictions in Colin and Pugh because the defendants acted nervously, and the fact that they were voluntary passengers showed a participation in the mutual use and enjoyment of the contraband. The Court of Special Appeals also stressed that the defendants were in close proximity to the contraband. In accord with its previous reasoning, the Court of Special Appeals invoked these cases to uphold the possession conviction in Taylor.

Based on these irreconcilable distinctions, the Taylor decision may signify that the standards for constructive possession convictions are becoming more rigid. The Court of Appeals also may have reversed the conviction in Taylor because of where the drugs were found or how the defendant acted. Nevertheless, by not distinguishing past cases decided by the Court of Special Appeals, the Taylor court left practitioners and courts to speculate as to the underlying intentions of the Court of Appeals.

5. Conclusion.—In Taylor, the Court of Appeals missed an ideal opportunity to resolve the discrepancy between how the Court of Appeals and the Court of Special Appeals evaluate constructive possession cases in the drug area. By listing the prongs of the Folk test without acknowledging or vacating the test, the Court of Appeals con-

163. Taylor, 346 Md. at 460-61, 697 A.2d at 466.
164. Id.
165. See supra text accompanying notes 88-102.
166. See supra text accompanying notes 88-102.
167. See supra text accompanying notes 88-102.
tributed to the uncertainty surrounding the constructive possession doctrine in Maryland. Furthermore, the Court of Appeals’s failure to recognize the Folk test may lead to inconsistent reasoning and outcomes in decisions involving constructive possession convictions. Because no one evidentiary fact or standard is conclusive, the Court of Appeals should not confine itself to the Folk test to review joint and constructive possession cases. The Court of Appeals, however, missed an ideal opportunity to vacate the Folk test when it decided Taylor. The Taylor decision essentially left the standard for constructive possession in the drug area unchanged. In all likelihood, the Court of Special Appeals will continue to apply the Folk test, while the Court of Appeals invokes whatever criteria it deems appropriate to evaluate a constructive possession conviction. The inconsistencies that result from this disparity will persist.

DANA L. WEINSTEIN
VI. ENVIRONMENTAL LAW

A. Third-Party Liability for Illegal Releases of Pollutants from Underground Storage Tanks

In JBG/Twinbrook Metro Ltd. Partnership v. Wheeler, the Court of Appeals restricted the scope of section 4-409(a) of the Environment Article in a way that limits its application to releases of oil from vessels, ships, or boats. By interpreting the phrase "oil spillage" differently, the court could have reached a conclusion that would not have restricted the scope of section 4-409(a). The court also declined to find that assumption of risk is a defense to the tort of trespass. In so finding, the court held that an unintentional, non-negligent act could form the basis for an action sounding in trespass. The court refused, however, to adopt assumption of risk as a defense where an individual purchases property though aware of the possibility of contamination from the underground migration of gasoline from a leaking storage tank. Nonetheless, the court's holding served the policy goal of attaching third-party liability for damage caused by releases of oil and other petroleum products.

1. The Case.—On February 8, 1991, after undertaking a preliminary investigation, JBG/Twinbrook Metro Limited Partnership (JBG) entered into a contract with Equitable Life Assurance Society (Equitable) to purchase a portfolio of investment properties in the Twinbrook Metró area of Montgomery County, including 1901 Chapman Avenue in Rockville, Maryland. The western boundary of the 1901 Chapman Avenue property abuts the eastern boundary of 1901 Rockville Pike. At some time prior to 1976, Chevron U.S.A. Inc. (Chevron) developed the 1901 Rockville Pike property as a gasoline service station. In 1976, Chevron leased the property to Bobby Joe Wheeler and, in 1978, sold the station, including the already-existing gasoline underground storage tanks (USTs), to him.
Chevron supplied Wheeler with gasoline until 1981.\textsuperscript{10} Between 1982 and 1990, Wheeler operated the station independently of any single supplier, purchasing gasoline from independent distributors.\textsuperscript{11} In September 1990, Wheeler entered an agreement with Exxon Co., U.S.A. (Exxon) under which he agreed to sell exclusively Exxon products in exchange for Exxon’s remodeling the station and installing new USTs and gas pumps.\textsuperscript{12}

Two months later, the old USTs were unearthed and removed under the supervision of the Maryland Department of the Environment (MDE).\textsuperscript{13} When the tanks were removed, it was discovered that two of them contained holes.\textsuperscript{14} The MDE ordered Wheeler to remove approximately 1600 tons of contaminated soil from his property and install monitoring wells to determine the extent of any underground migration of gasoline.\textsuperscript{15} In January 1991, readings from the monitoring wells indicated that gasoline had spread throughout the station property.\textsuperscript{16} The MDE directed Wheeler to install additional monitoring wells on his property as well as on the adjoining property at 1901 Chapman Avenue, which was then owned by Equitable.\textsuperscript{17}

When JBG entered into the contract with Equitable in February 1991, JBG was given sixty days to complete a due diligence analysis of the 1901 Chapman Avenue property.\textsuperscript{18} Hygienetics Inc. (Hygienetics) was hired by JBG to perform the analysis and submitted an initial report on March 27, 1991, which identified 1901 Chapman Avenue as having the potential for on-site contamination from off-site sources.\textsuperscript{19} On April 5, Hygienetics reported the discovery of a minimum of 6.5 feet of gasoline in a monitoring well located in the northwest corner of 1901 Chapman Avenue and surmised that the contamination was the result of a release of gasoline from a UST at Wheeler’s service station.\textsuperscript{20} On April 10, the third and final report prepared by

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\textsuperscript{10} Id. at 606, 697 A.2d at 901.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id. See generally Md. Code Ann., Envir. §§ 1-401 to -407 (1996) (establishing the Maryland Department of the Environment and defining the duties of the Department Secretary).
\textsuperscript{14} Wheeler, 346 Md. at 606, 697 A.2d at 901.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id. Wheeler also began removing free phase gasoline from the subsurface of the service station property. Id. Free phase gasoline can float on water, including underground water, and can be carried in the general direction of the water flow. Id. at 605, 697 A.2d at 901.
\textsuperscript{18} Id. at 606, 697 A.2d at 901.
\textsuperscript{19} Id. at 607, 697 A.2d at 901.
\textsuperscript{20} Id. at 607 & n.4, 697 A.2d at 901 & n.4.
Hygienetics confirmed the existence of two feet of free phase gasoline at another monitoring well located on the 1901 Chapman Avenue property.\textsuperscript{21}

Equitable obtained from the MDE an estimate of $150,000 as the total cost to clean up both the service station and the Chapman Avenue sites; Equitable offered to indemnify JBG for $150,000 in the event that Wheeler failed to pay and the MDE went after JBG for the cost of the cleanup.\textsuperscript{22} JBG accepted the indemnity agreement and took title to the 1901 Chapman Avenue property by a deed dated April 16, 1991.\textsuperscript{23} At the time of the closing, JBG believed that the contamination was confined to the northwest corner of the Chapman Avenue lot, and that the contamination would be removed.\textsuperscript{24}

Although the monitoring wells on the Chapman Avenue property were relatively free of contamination after JBG took title, the amount of free phase gasoline increased in the spring of 1992, elevating the risk that the contamination would spread further on JBG’s property.\textsuperscript{25} Subsequently, twelve additional monitoring wells were installed on the Chapman Avenue property, and by the first quarter of 1993, evidence existed that the plume of underground gasoline had spread throughout most of the Wheeler service station and approximately one-half of the parking lot on 1901 Chapman Avenue.\textsuperscript{26}

In August 1992, JBG filed suit against Wheeler, Exxon, and Chevron, alleging liability under section 4-409(a) of the Environment Article\textsuperscript{27} and on common law claims of trespass, negligence, and nuisance.\textsuperscript{28} Following a jury trial in the Circuit Court for Montgomery County, Judge Paul A. McGuckian submitted the case to the jury on special interrogatories that allowed the jury to consider each of the

\textsuperscript{21} Id. at 607 & n.5, 697 A.2d at 901 & n.5.

\textsuperscript{22} Id. at 608, 697 A.2d at 902.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.

\textsuperscript{26} Id. at 608-09, 697 A.2d at 902. Due to the odor of gasoline on the parking lot, JBG was forced to install a vapor alarm in the basement of the office building and impose a no smoking rule on the parking lots. Id. at 609, 697 A.2d at 902.

\textsuperscript{27} Section 4-409(a) provides: "(a) Liability Generally.—The person responsible for the oil spillage shall be liable to any other person for any damage to his real or personal property directly caused by the spillage.” Md. Code Ann., Envr. § 4-409(a) (1996).

\textsuperscript{28} Wheeler, 346 Md. at 609, 697 A.2d at 902-03. JBG also alleged liability based on common law strict liability. Id., 697 A.2d at 903. Judge McGuckian of the Montgomery County Circuit Court granted summary judgment in favor of the defendants on the strict liability claim. Id. There are three other gasoline service stations in close proximity to the Chapman Avenue property. Id. at 609 n.6, 697 A.2d at 903 n.6. On appeal JBG did not contest the strict liability claim. Id. at 609, 697 A.2d at 903.
four counts separately.\textsuperscript{29} Over JBG's objection, the court also submitted to the jury the question of whether the plaintiff had assumed the risk of loss as to all the theories of liability other than nuisance.\textsuperscript{30} The jury found that all of the defendants had violated section 4-409(a) and had trespassed on JBG's property, but that no defendant had been negligent or committed a nuisance.\textsuperscript{31} Most importantly, the jury found that JBG had "voluntarily assumed the risk of contamination with full knowledge and understanding at the time it purchased the 1901 Chapman [Avenue] property."\textsuperscript{32} The circuit court entered judgment in favor of the defendants, in effect recognizing assumption of risk as an affirmative defense to the section 4-409(a) and trespass claims.\textsuperscript{33} JBG appealed to the Court of Special Appeals.\textsuperscript{34}

The Court of Appeals granted certiorari, sua sponte, prior to consideration of the case by the Court of Special Appeals.\textsuperscript{35} On appeal, JBG contended that the circuit court erred in submitting the assumption of risk defense to the jury on the statutory and trespass claims, while Wheeler, Exxon, and Chevron maintained that the submission of the defense to the jury was proper.\textsuperscript{36} Additionally, Exxon and Chevron argued that the evidence against them was legally insufficient to support JBG's claims.\textsuperscript{37}

2. Legal Background.—

a. Assumption of Risk Is a Defense to Negligence.—Assumption of risk is a defense to a negligence action in Maryland.\textsuperscript{38} "The defense . . . rests upon the plaintiff's consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk. . . . [A]ssumption of risk requires knowledge

\begin{itemize}
  \item \textsuperscript{29} Id. at 609, 697 A.2d at 903.
  \item \textsuperscript{30} Id.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id. at 610, 697 A.2d at 903 (internal quotation marks omitted).
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Gibson v. Beaver, 245 Md. 418, 226 A.2d 273 (1967). In Gibson, plaintiff suffered a heart attack when dragging a fuel oil hose through the snow at the request of the defendant oil delivery truck driver. Id. at 419-20, 226 A.2d at 275. The plaintiff alleged that the oil company and driver were negligent in not "providing sufficient employees" to accomplish the delivery. Id. at 421, 226 A.2d at 275. The Court of Appeals held that the plaintiff had assumed the risk of injury by agreeing to assist in the delivery, thereby exposing himself to what should have been an obvious risk. Id.; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480-98 (5th ed. 1984) (discussing the assumption of risk defense).
and appreciation of the risk, and a voluntary choice to encounter it." An objective standard is employed to determine if an individual understands the risk involved in an activity.

Generally, assumption of risk is not a defense to intentional torts. In *Janselins v. Button*, the Court of Special Appeals determined that assumption of risk is not a defense to civil battery. In so deciding, the court stated:

"Historically, the doctrine of assumption of risk has provided a defense only to actions for negligence. It has little or no application in the case of intentional or reckless conduct. The reason is this: While a potential plaintiff who engages in dangerous activity is ‘held to have consented to the injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation . . . participants do not consent to acts [by others] which are reckless or intentional.’"

After collecting a lengthy list of authorities on the subject, the Court of Special Appeals stated that the “cases plainly establish that the doctrine of assumption of risk does not bar recovery for intentional torts.”

**b. Intentional Conduct Is Required for Trespass, but the Trespass Itself May Be Unintended.**—In *Baltimore Gas & Electric Co. v. Flippo*, the Court of Special Appeals considered whether trespass requires some intentional act. The plaintiff in *Flippo*, a ten-year-old boy, was severely


40. *Id.*


43. *Id.* at 39, 648 A.2d at 1044. In *Janselins*, the defendant became intoxicated while drinking at the bar where the plaintiff worked. *Id.* at 34, 648 A.2d at 1041. The plaintiff voluntarily attempted to assist other bar patrons in placing the defendant in his car to be driven home. *Id.* During the attempt, the defendant resisted and kicked the plaintiff in the mouth, causing him to lose a tooth. *Id.* The defendant argued that the plaintiff had assumed the risk of injury by trying to force him into his car. *Id.* at 35, 648 A.2d at 1042.

44. *Id.* at 42-43, 648 A.2d at 1045 (ellipses and alteration in original) (quoting *Ordway v. Superior Court*, 243 Cal. Rptr. 536, 542 (Ct. App. 1988)).

45. *Id.* at 42, 648 A.2d at 1045.

injured when he grabbed high voltage power lines belonging to Baltimore Gas & Electric (BGE) to steady himself as he began to slip from a tree he had climbed.\textsuperscript{47} BGE asserted that the plaintiff was a trespasser to whom it owed no duty of care other than to refrain from wantonly and willfully injuring him.\textsuperscript{48} In discussing the duty owed to the plaintiff, the court determined that

one can commit a trespass by entering, intruding, or encroaching on personal property, and no tortious intent, \textit{i.e.}, intent to trespass, is required in order for one to be a trespasser. What is required, however, is volition, \textit{i.e.}, a conscious intent to do the act that constitutes the entry onto someone else's real or personal property. An involuntary entry onto another's property is not a trespass.\textsuperscript{49}

The court determined that the plaintiff's grabbing of the electrical wire was not an intentional act and could not be classified as a trespass.\textsuperscript{50}

Other courts have found that "liability for trespass will not be imposed for an unintentional trespass unless it arises out of defendant's negligence or the carrying on of an extrahazardous activity."\textsuperscript{51} In \textit{Hudson v. Peavey Oil Co.},\textsuperscript{52} a case with facts similar to \textit{Wheeler}, the defendants owned a service station and a UST containing gasoline.\textsuperscript{53} Due to the strong odor of gasoline coming from their own property,

\textsuperscript{47} \textit{Id.} at 81, 684 A.2d at 459.
\textsuperscript{48} \textit{Id.} BGE argued that the plaintiff was a trespasser not on its real property but on its personal property, the high voltage wire. \textit{Id.} at 83, 684 A.2d at 460. The plaintiff was not trespassing on real property because the tree he had climbed was on the property of a friend with whom he was playing. \textit{Id.} at 82, 684 A.2d at 459. Moreover, BGE owned only an easement to maintain its wires near the tree and had no possessory interest on which to base a claim for trespass to real property. \textit{Id.} at 83, 684 A.2d at 459.
\textsuperscript{49} \textit{Id.} at 85, 684 A.2d at 461. The court also analyzed case law supporting the proposition that an intentional act is required for a trespass. \textit{See id.} at 85-86, 684 A.2d at 461 (citing, among other cases, Gallin v. Poulou, 295 P.2d 958, 960-62 (Cal. Dist. Ct. App. 1956) (finding no liability for trespass unless the trespass is intentional); Edgarton v. H.P. Welch Co., 74 N.E.2d 674, 679 (Mass. 1947) (stating that unintended intrusion upon land does not constitute trespass); Baker v. Newcomb, 621 S.W.2d 535, 537 (Mo. Ct. App. 1981) (assigning liability for trespass only if intent exists to commit the act); Socony-Vacuum Oil Co. v. Bailey, 109 N.Y.S.2d 799, 801 (Sup. Ct. 1952) (finding that trespass requires an intentional act); Hudson v. Peavey Oil Co., 566 P.2d 175, 177 (Or. 1977) (refusing to assign liability for an unintentional trespass unless it arises out of defendant's negligence or an ultrahazardous activity); General Tel. Co. v. Bi-Co Pavers, Inc., 514 S.W.2d 168, 170 (Tex. Civ. App. 1974, no writ) (stating that trespass requires an intentional act)).
\textsuperscript{50} \textit{Id.} at 86-87, 684 A.2d at 461.
\textsuperscript{51} \textit{Hudson}, 566 P.2d at 177; see also \textit{Edgarton}, 74 N.E.2d at 679-80 (stating the rule that, except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on the land of another is not a trespass).
\textsuperscript{52} 566 P.2d 175 (Or. 1977).
\textsuperscript{53} \textit{Id.} at 176.
the defendant's neighbors inquired repeatedly concerning the reliability of the tanks. Because the defendants assured their neighbors that the tanks were not leaking any gasoline, the plaintiffs dug a hole on their own property to see if they could ascertain the source of the odor. The plaintiffs discovered free phase gasoline flowing underground from the neighboring service station into the subsurface of their own property. The Oregon Supreme Court ruled that the defendants neither intentionally trespassed on the plaintiff's property nor acted negligently. Furthermore, because the court did not consider the storage of gasoline in that particular location to be an ultrahazardous activity, the plaintiffs could not recover in an action for trespass.

As the Oregon Supreme Court stated in Hudson, most courts require the existence of an intentional or negligent act or an ultrahazardous activity to support trespass liability. In Yommer v. McKenzie, the Maryland Court of Appeals stated that the most crucial factor in determining whether an activity is ultrahazardous is the "appropriateness of the activity in the particular place where it is being carried on." The activity at issue in Yommer was also the underground storage of gasoline. The court found the gasoline storage in that case to be ultrahazardous because of the proximity to the well from which the plaintiffs were drawing their drinking and bathing water.

More recently, the Court of Appeals declined to extend the holding in Yommer. Rosenblatt v. Exxon Co., U.S.A. likewise involved the storage of gasoline. In 1986, the plaintiff had leased property from Earl Wenger. Wenger's previous tenant, Exxon, had installed gasoline storage tanks in 1951 and removed the tanks in 1985 when its lease was terminated. It was subsequently discovered that the property's subsurface was contaminated with various petroleum products.

54. Id.
55. Id.
56. Id.
57. Id. at 177.
58. Id. at 178.
60. Id. at 225, 257 A.2d at 140.
61. Id. at 221, 257 A.2d at 138.
62. Id. at 225, 257 A.2d at 140.
64. 335 Md. 58, 642 A.2d 180 (1994).
65. Id. at 63, 642 A.2d at 182.
66. Id.
67. Id.
that leaked from Exxon's tanks. The court stated that, historically, strict liability for ultrahazardous activities was limited to concurrent owners of neighboring land. The court refused to expand the doctrine to include subsequent owners of the same land. However, in Blaen Avon Coal Co. v. McCulloh, the Court of Appeals mentioned in dicta that "[i]t is well settled that a trespasser, though misled by a *bona fide* mistake as to his title, or who has taken every precaution to keep within his own lines, cannot escape liability for the injury done, being bound in law to know the limits of his possessions." Blaen Avon Coal Company had mined the land of the plaintiff under the mistaken belief that it owned the land. This mistaken belief was based on a plat of the company's land that indicated incorrectly that the land it was mining was its own. The court held that although the defendants unintentionally entered the plaintiff's land, the defendants were still liable for trespass. In dicta, the court noted that even if a defendant had "taken every precaution to keep within his own lines," the defendant could be held liable for trespass.

c. *Interpretation of the Scope of the Statute.*—Section 4-409(a) of the Environment Article, referred to by the Court of Appeals as the "Private Remedy Section," provides that "[t]he person responsible for the oil spillage shall be liable to any other person for any damage to his real or personal property directly caused by the spillage." Section 4-410(a) of the Environment Article, referred to by the Court of Appeals as the "Prohibition," prohibits the release of oil into Maryland's waters. The Prohibition provides:

Except in case of emergency imperiling life or property, unavoidable accident, collision, or stranding, or as authorized by a permit issued under § 9-323 of this article, it is unlawful for

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68. *Id.* at 64, 642 A.2d at 182-83.
69. *Id.* at 72, 642 A.2d at 186.
70. *Id.* at 73, 642 A.2d at 187.
71. 59 Md. 403 (1883).
72. *Id.* at 417.
73. *Id.* at 414.
74. *Id.*
75. *Id.* at 417-18.
76. *Id.* at 417.
77. *Wheeler,* 346 Md. at 611, 697 A.2d at 904 ("In our review we shall refer to § 4-409(a) and its antecedents as the 'Private Remedy Section' . . . .").
79. *Wheeler,* 346 Md. at 611, 697 A.2d at 904 ("In our review we shall refer to . . . § 4-410(a) and its antecedents as the 'Prohibition.'").
any person to discharge or permit the discharge of oil in any manner into or on waters of this State.\textsuperscript{81}

The Prohibition was first enacted in 1949.\textsuperscript{82} As originally enacted, the language in the Prohibition was substantially similar to the language presently used, except that the Prohibition was expressly limited to releases from vessels, boats, or ships.\textsuperscript{83}

Chapter 243 of the Acts of 1970 recodified the Prohibition without change as Article 96A, section 29(a).\textsuperscript{84} Chapter 243 also enacted two new sections, sections 29A and 29B. Section 29A delegated to the Department of Natural Resources (DNR) and the Maryland Port Authority (MPA) the responsibility for developing a program to enable the State to respond to emergency oil spills in “other waters of the State.”\textsuperscript{85} For the purposes of Article 96A, “waters of the State” was defined to include “both surface and underground waters within the boundaries of the State.”\textsuperscript{86} Section 29B directed those agencies to “charge and collect a compensatory fee from the person responsible for the oil spillage” in order to cover cleanup costs.\textsuperscript{87}

The predecessor to the Private Remedy Section was enacted in Chapter 504 of the Acts of 1971.\textsuperscript{88} Chapter 504 added section 29BC, which used identical language to the present Private Remedy Section. According to Section 29BC, “The person responsible for the oil spillage shall be liable to any other person for any damages to his real or personal property directly caused by the spillage.”\textsuperscript{89} Chapter 504 also added section 29AB, which required vessels entering the waters of the state carrying or receiving any bulk cargo of oil to post a bond that would be forfeited in the event that an oil spill or discharge occurred.\textsuperscript{90}

\textsuperscript{81} Id.
\textsuperscript{82} 1949 Md. Laws 239 (codified at Md. Ann. Code art. 66C, § 40(a) (1951)).
\textsuperscript{83} The original statute provided:
Except in case of emergency imperiling life or property, or unavoidable accident, collision, or stranding, it shall be unlawful for any person to discharge or permit the discharge of oil in any manner into or upon the waters within the jurisdiction of the State of Maryland from any vessel, ship or boat of any kind.
\textsuperscript{84} Id. (emphasis added).
\textsuperscript{85} Id. § 29A.
\textsuperscript{86} Id. § 2(e).
\textsuperscript{87} Id. § 29B.
The limitation in the Prohibition to releases from vessels, ships, or boats was removed in 1984. However, the language in the Private Remedy Section remained the same. Both the Private Remedy Section and the Prohibition were transferred to the new Environment Article in 1987 as sections 4-409 and 4-410, respectively.

Section 4-409(b) was not added until 1990. Section 4-409(b) added a definition of "underground storage tank" to the subtitle and required the "owner" of a UST to furnish evidence of financial responsibility for cleanup, corrective action, and "third party liability" to insure against a release from a UST. The MDE was to adopt regulations for the owners of USTs to exhibit such financial responsibility. In adopting these regulations, the MDE incorporated by reference the Corrective Action Requirements for Owners and Operators of Underground Storage Tanks contained in the Code of Federal Regulations (CFR).

The requirements in the CFR included certain compliance dates for owners of USTs. All petroleum marketing firms either owning 1000 or more USTs or reporting a tangible net worth of $20 million or more were required to demonstrate financial responsibility by January 24, 1989. Firms owning between 100 and 999 USTs had to demonstrate financial responsibility by October 26, 1989, while those owning between thirteen and ninety-nine had to comply by April 26, 1991. All other owners of USTs were given a compliance deadline of December 31, 1993.

3. The Court's Reasoning.—

   a. Assumption of Risk Is Not a Defense to Trespass.—The Court of Appeals found that assumption of risk is not a defense to trespass. In reaching this conclusion, the Court of Appeals referred to the Court of Special Appeals's decision in Janelsins v. Button, which

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91. See 1984 Md. Laws 182.
92. Wheeler, 346 Md. at 615, 697 A.2d at 905.
96. Id. § 4-409(b) (2).
98. 40 C.F.R. § 280.91.
99. Id. § 280.91(a).
100. Id. § 280.91(b) & (c).
101. Id. § 280.91(d).
102. Wheeler, 346 Md. at 621-22, 697 A.2d at 909.
collected numerous authorities for the proposition that assumption of risk is not a defense to an intentional tort. The court concluded summarily, by quoting Janelsins, "[t]hese cases plainly establish that the doctrine of assumption of risk does not bar recovery for intentional torts." 

Although the court found that assumption of risk is not a defense to an intentional tort such as trespass, the court still needed to answer the defendants' claim that the trespass in this case was not intentional, but was instead "nonpurposeful." The court dismissed this argument by stating that the jury had found that none of the defendants were negligent. The court stated that "[t]he special verdict on trespass can be reconciled with the special verdict on negligence by interpreting the former as a finding that the entry of the gasoline onto the plaintiff's land was unintentional and non-negligent." The court cited Blaen Avon Coal Co. v. McCulloh for the proposition that a trespass can be both unintended and non-negligent.

b. Section 4-409(a) Limited to Releases from Boats, Ships, and Vessels.—In Wheeler, the Court of Appeals ruled that section 4-409(a) of the Environment Article could not be used to impose financial liability on the owner of a UST that had leaked gasoline into the subsurface. Because Wheeler did not meet the regulatory requirements in the CFR, Wheeler was not required to demonstrate financial responsibility until December 31, 1993. Because the gasoline leakage and JBG's action to recover for the damages caused by the contamination both occurred prior to December 31, 1993, section 4-409(b) did not apply to Wheeler. Therefore, the court surmised that JBG's cause of action rested on section 4-409(a) and not 4-409(b).

103. Id. at 621, 697 A.2d at 908.
104. Id. (alteration in original) (quoting Janelsins v. Button, 102 Md. App. 30, 42, 648 A.2d 1039, 1045 (1994)).
105. Id.; see Joint Brief of Appellees on Common Issues at 29-30, JBG/Twinbrook Metro Ltd. Partnership v. Wheeler, 346 Md. 601, 697 A.2d 898 (1997) (No. 80) (arguing that if a trespass occurred in this case, it was not intentional).
106. Wheeler, 346 Md. at 621, 697 A.2d at 908.
107. Id.
108. Id. at 621, 697 A.2d at 909.
109. Id. at 618, 697 A.2d at 907.
110. See supra notes 98-101 and accompanying text.
111. See 40 C.F.R. § 280.91(d) (1993) (requiring all owners of USTs not fitting into one of three classifications to demonstrate financial responsibility by December 31, 1993); see also supra notes 99-101 and accompanying text.
112. Wheeler, 346 Md. at 618, 697 A.2d at 907.
113. Id.
Because the court found that JBG could have relied only upon section 4-409(a), the court conducted a lengthy historical analysis of that section. The court held that section 4-409(a) is applicable only to releases from vessels, ships, or boats and does not include USTs. The court reasoned that "the spillage" referred to in the original enactment of the Private Remedy Section was limited to the spillage from a vessel, boat, or ship. The court reached this conclusion by noting that such a limited class of spills was the object of the Prohibition when the Private Remedy Section was first enacted as section 29(a) of Article 96A.

The court further reasoned that even though the Prohibition's limitation to vessels, boats, or ships was abrogated in 1984, the expansion in the Prohibition (section 4-410) could not expand the coverage of the Private Remedy Section. The court stated that in order to expand the coverage of the Private Remedy Section, the legislature would have had to have used express language when it revised the Prohibition. The Private Remedy Section continued to refer to "the spillage," which the court explained was limited originally to releases from vessels, ships and boats.

The court concluded, therefore, that because section 4-409(b) was not available to the plaintiff and section 4-409(a) was limited to releases from vessels, ships, or boats, JBG's statutory cause of action could not stand. Because the statutory action could not stand, the court did not reach the question of assumption of risk as a defense to section 4-409.

114. Id. at 611-18, 697 A.2d at 904-07.
115. Id. at 618, 697 A.2d at 907.
116. Id. at 613, 697 A.2d at 905.
117. Id.
118. Id. at 615, 697 A.2d at 905. The court stated that the expansion in the Prohibition had the effect of enlarging those acts subject to criminal and administrative sanctions, but it did not affect the Private Remedy Section. Id.; see Md. Code Ann., Envir. § 4-410 (1996) (stating that except in case of emergency or by permit, "it is unlawful for any person to discharge... oil... into or on waters of [Maryland]" (emphasis added)).
119. Wheeler, 346 Md. at 615, 697 A.2d at 905.
120. Id.
121. Id. at 618, 697 A.2d at 907. The court's analysis and holding on this point will not affect third-party liability in future cases. All of the compliance deadlines have passed, and section 4-409(b) can be used to impose third-party liability on all UST owners. See Md. Regs. Code tit. 26, § 10.11.01A (1996) (incorporating 40 C.F.R. § 280.91 (1996) (setting compliance deadlines)).
122. Wheeler, 346 Md. at 618, 697 A.2d at 907.
c. Sufficiency of the Evidence.—The court dismissed Chevron's argument that the evidence was insufficient to establish its liability.\footnote{Id. at 626-28, 697 A.2d at 911-12.} The court summarized Chevron's argument, stating that it was based upon three legally and factually erroneous contentions: "JBG's purchase price reflected the market value of the property on the date of acquisition, that JBG seeks as damages only the post-acquisition diminution in value, and that there is no evidence that Chevron gasoline crossed the boundary onto 1901 Chapman Avenue after JBG took possession."\footnote{Id. at 627, 697 A.2d at 911.} The court dealt with each of these arguments in turn, finding that JBG was not contending that there was no diminution in value at the time it purchased the property but instead simply that it did not appreciate the extent of the contamination and diminution.\footnote{Id., 697 A.2d at 912.} Second, the court stated that JBG was seeking not just the post-acquisition diminution in value, but also the $114,000 cost of investigating the underground contamination.\footnote{Id. at 627-28, 697 A.2d at 912.} Third, the court stated that Chevron's argument failed to recognize the continuing nature of the trespass.\footnote{Id. at 628, 697 A.2d at 912.} Even if the gasoline had entered the property before April 16, 1991, its "continued presence could be a trespass under the theory of trespass on which [the] case was tried."\footnote{Id. at 628, 697 A.2d at 912.}

Conversely, the court found that Exxon had not exhibited sufficient control over the tanks or the gasoline to support liability on the part of Exxon.\footnote{Id.} Essentially, JBG argued that the agreements between Exxon and Wheeler were ambiguous with respect to whether the USTs were owned by Exxon and leased to Wheeler or were owned solely by Wheeler.\footnote{Id. at 625-26, 697 A.2d at 911.} The court ruled that the interpretation of contracts is a matter of law for the court and found that the tanks were owned by Wheeler from the time they were installed.\footnote{Id. at 621-22, 697 A.2d at 909.}

4. Analysis.—

a. The Trespass Claim.—The Court of Appeals held that assumption of risk is not a defense to trespass.\footnote{See supra notes 102-104 and accompanying text. The court primarily relied on \textit{Janelsins v. Button} for this holding.\footnote{Id.} However, the cases}
cited by the court to support its reasoning uniformly involved some sort of intentional conduct, an element that was missing in the present case. The court should have addressed this apparent inconsistency. The court stated that although the trespass in this case was both unintentional and non-negligent, liability for trespass could still attach based on the court’s previous holding in Blaen Avon Coal.

The court classified the trespass in Wheeler as unintentional and non-negligent. This classification was based on the jury’s special verdict that the defendants were not negligent. Although the question of intent was not specifically submitted to the jury, the court stated that the trespass in this case was not intentional. Therefore, the combination of the court’s conclusion and the jury’s answer to the interrogatory made this trespass unintentional and non-negligent. However, the court had already ruled out strict liability.

The court cited Blaen Avon Coal for the proposition that a trespass can be both unintentional and non-negligent. However, the court’s reliance on that case was misplaced. The defendant in Blaen Avon Coal mistakenly mined coal from the land of another. Although the coal company did not intend to commit a trespass in mining the land of another, it did act intentionally in committing the actual mining. In other words, it intended its machines and workers to dig coal and load it into containers. Therefore, the trespass in Blaen Avon Coal included the “intentional” act as required by the case law. Wheeler, conversely, did not involve this level of “intention.”

The court’s reasoning is scant concerning how to justify and explain the special verdict finding Wheeler liable for an unintentional, non-negligent trespass. In order for Blaen Avon Coal to be applicable to the facts of the present case, the Wheeler defendants would have had to have engaged in some type of intentional behavior. The court failed to address this point. Although Wheeler presumably did not intend for his gasoline to encroach on his neighbor’s property, the
court may have found that another of the station owner’s acts was intentional with respect to the trespass. For instance, the court could have found that placing the gasoline in the UST was sufficiently intentional to support trespass liability. In order to remain consistent with the existing case law in Maryland, the court should have addressed the lack of intentional conduct in the present case or tried to find some act on the part of the defendants that could be considered intentional with respect to the trespass. It is possible that the court was faced with a situation in which it knew that Wheeler or Chevron or both should compensate JBG for the harm caused when the USTs leaked, but was faced with inconsistent jury verdicts that made it very difficult to achieve this goal.

Because the court determined that the trespass in this case was unintentional, the only other possibilities to support trespass liability, according to the cases cited, would have been negligence and ultrahazardous activity. Because the jury found that no defendant was negligent, the only alternative to support trespass liability was ultrahazardous activity. It is unclear, however, whether the court would have found the storing of gasoline an ultrahazardous activity even if it had considered the factors for such a determination.

In Yommer v. McKenzie, the Court of Appeals held that the underground storage of gasoline in that case constituted an abnormally dangerous activity as described in Rylands v. Fletcher. The applicability of that holding to the present case is not clear. The court in Yommer stated that perhaps the “most crucial factor [in determining whether an activity is abnormally dangerous] . . . is the appropriateness of the activity in the particular place where it is being carried on.” In Yommer, the gasoline was being stored in close proximity to “a well from which a family must draw its water for drinking, bathing and laundry . . . .” Although the Wheeler court did not discuss the properties surrounding the USTs in detail, it is unclear if the court would consider USTs containing gasoline to be an appropriate activity in this particular location.

Moreover, the Court of Appeals recently declined to extend the doctrine of Rylands v. Fletcher or the holding in Yommer. In Rosen-
blatt v. Exxon Co., U.S.A., the court reaffirmed that the most important consideration when determining whether an activity is abnormally dangerous is the appropriateness of the activity in the place where it is being conducted, but refused to find strict liability based on a theory of abnormally dangerous activity. The plaintiff in Rosenblatt was not an owner of adjacent land, but rather was a subsequent owner of the same land where gasoline had been stored. Although the court refused to base recovery on the theory of strict liability, the dispositive factor seemed to be that the plaintiff was a subsequent owner of the same land. The court stated that "[s]ubsequent users are able to avoid the harm completely by inspecting the property prior to purchasing or leasing it." In light of these cases, it is difficult to determine whether the court would have deemed the storage of gasoline in the present case an abnormally dangerous activity given the surrounding locale.

In order to be consistent with the case law concerning trespass, the trespass needed to be based on an intentional or negligent act or an extrahazardous activity. The way in which the special interrogatories were submitted to the jury allowed the finding of trespass without any theory to support such a finding. Perhaps the trial court could have submitted special interrogatories to the jury that would not have allowed an unintentional, non-negligent trespass. The court could have asked the jury if a trespass had occurred. If the jury answered that a trespass had occurred, the court could have asked whether it was based upon negligent or intentional conduct, thus avoiding the necessity of reconciling nearly irreconcilable interrogatories. Instead, the court was faced with a situation in which it knew that someone other than JBG should pay for the clean up of the contamination but had no theory upon which to base such a holding. The answers to interrogatories, combined with the lower court's decision, ruled out negligence, strict liability, and intentional trespass.

b. Section 4-409(a) Could Have Been Interpreted More Broadly.— In Wheeler, the Court of Appeals held that section 4-409(a) of the Environment Article applied only to releases of pollutants from boats,

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149. Id. at 70, 642 A.2d at 186.
150. Id. at 73, 642 A.2d at 187.
151. Id. at 65, 642 A.2d at 183.
152. Id. at 74, 642 A.2d at 188.
153. Moreover, summary judgment was granted in favor of the defendants on a strict liability claim in this case. Wheeler, 346 Md. at 609, 697 A.2d at 903. Summary judgment on the strict liability claim was not contested by the plaintiffs. Id.
154. See supra notes 51-71 and accompanying text.
ships, and vessels. In conducting its historical analysis of the applicability of section 4-409(a), the court could have determined that section 4-409(a) was not limited to releases from boats, ships, and vessels, but rather that it was broad enough to include releases from USTs. Because the court found that section 4-409(a) was limited to releases from boats, ships, and vessels, the court turned its analysis to section 4-409(b), dealing with releases from USTs. The court found that section 4-409(b) did not apply to Wheeler because the compliance deadlines for the federal regulations requiring financial responsibility had not passed at the time of the spill or trial. The court failed to address whether Chevron should be considered an "owner" of the USTs for the purposes of third-party liability.

The court's holding in Wheeler concerning the statutory cause of action is nearly limited to the facts presented in that case. Because the court held that the private remedies of section 4-409(a) are limited to releases from vessels, ships, or boats, and this was not a release from a vessel, ship, or boat, section 4-409(a) did not apply to Wheeler. Furthermore, because the court found that Wheeler was not subject to the provisions of section 4-409(b) until after December 31, 1993, JBG could not recover for damages under that section. Therefore, under the court's interpretation of section 4-409, had this spill occurred after December 31, 1993, or had the responsible party fallen into one of the other CFR classifications requiring an earlier demonstration of financial responsibility, the court would have applied section 4-409(b) against the responsible party.

The definition of "the spillage" in section 4-409(a) of the Environment Article was crucial to the determination of this case. The court limited the definition of "the spillage" to releases from vessels, ships, or boats based on a historical analysis concerning the meaning

155. Wheeler, 346 Md. at 618, 697 A.2d at 907.
156. Id.
157. Id.
158. As mentioned, the discussion of the applicability of section 4-409(a) is moot. See supra note 121. At the time of trial, only some of the compliance deadlines in the CFR had passed and the court was faced with deciding only if section 4-409(a) could be used to impose responsibility for USTs leaks. See 40 C.F.R. § 280.91 (1993). Now, however, all of the CFR deadlines for demonstrating financial responsibility have expired, and section 4-409(b) can be used to recover damages from owners of USTs that leak. Id. However, the court left unanswered the question whether assumption of risk is a defense to a section 4-409 cause of action. Wheeler, 346 Md. at 621-22, 697 A.2d at 909.
159. Wheeler, 346 Md. at 615, 697 A.2d at 905.
160. See 40 C.F.R. § 280.91(d) (requiring owners of fewer than 13 USTs to demonstrate financial responsibility for a release from a UST by December 31, 1993).
161. Wheeler, 346 Md. at 618, 697 A.2d at 907.
of that phrase. In making its determination, the court neglected to consider the legislature's intent in enacting the Maryland Oil Pollution Control Laws. The legislature had provided for administrative, criminal, and third-party ramifications for the discharge of oil into state waters. Given this broad protection for the State as well as for victims of such spills, it seems clear that the legislature intended to discourage discharge of oil into state waters without regard to the party responsible or the original container of the oil. This is even more plausible because no matter what definition of oil spillage is adopted, the spillage can occur in any of the "waters of the State." "Waters of the State" is defined to include underground as well as surface waters. It is unlikely that "waters of the State" would be defined to include underground water if liability were intended to be limited to releases from ships or boats.

Even if the court was unwilling to recognize the legislature's intention to prevent releases of oil no matter where or how they happen, a different interpretation of section 4-409(a) that would not limit its coverage to releases from boats can be made using its predecessor statutes. When originally enacted as section 29BC of then Article 96A in 1971, the language of the Private Remedy Section was precisely the same as it is now. The Private Remedy Section was preceded by section 29 entitled "Vessels Discharging Oil." Subsection (a) of that section prohibited the discharge of oil into the waters of the state from any vessel, ship or boat. Immediately after subsection (a) appeared subsection (a-i), which created a duty for "any person either actively or passively participating in the discharge or spilling of oil into the waters of the state either from a land-based installation..."
or from any vessel, ship or boat . . ." to report the incident to the appropriate federal authority. Section 29A, among other things, delegated responsibility to the DNR to develop a program to enable the State to respond to an oil spill in Maryland waters. This section referred to "oil spillage" and was not limited to releases from ships or boats. Moreover, "waters of the State" was defined to include underground waters for the purposes of the section. Again, it would have been nonsensical for the legislature to authorize the DNR to develop a program to deal with spills in underground waters but limit the source of the spill to boats and ships.

Section 29BC, the Private Remedy Section, then followed with the same language that exists today. "The person responsible for the oil spillage shall be liable to any other person for any damages to his real or personal property directly caused by the spillage." The "oil spillage" in this section refers to the same oil spillage as section 29. Because section 29 refers to spillage from a land-based installation and also refers to underground water, it is not necessarily limited to releases from ships or boats.

Even if one accepts the court's interpretation of "oil spillage" in section 4-409(a), Chevron could still have been held liable for JBG's damage under section 4-409(b). Subsection 4-409(b)(2) requires "owners" of USTs to demonstrate financial responsibility for the costs of cleanup, corrective action, and third-party liability in the event of a discharge. "Owner" is defined in section 4-409(b)(1)(i) to include "any person who causes an underground oil storage tank to be installed." In summarizing the facts of the case, the Court of Appeals stated that Chevron "originally developed the [service station] prop-

172. Id. § 29(a-1) (emphasis added).
173. Id. § 29A.
174. Id.
175. Id. § 2.
176. Two sections intervened between the language in section 29A and 29BC. Section 29AB required ships entering the waters of Maryland to post a bond to cover the costs of cleanup and other fees in the event of a release of oil. Id. § 29AB(a). Although referring to the bond required for vessels, this section contained no language limiting the phrase "oil spillage" to a release from boats or ships. The following section, entitled "Compensatory Fee for Oil Spillage," permitted the Maryland Port Authority and the Department of Natural Resources to collect a compensatory fee from the person responsible for the "oil spillage." Id. § 29BC. The language in this section did not change the meaning of "oil spillage."
177. Id. § 29BC.
178. Id.
179. Id. § 29.
181. Id. § 4-409(b)(1)(i).
property.” Presumably, Chevron installed the tank and was an “owner” of it for the purposes of liability under section 4-409(b). In that case, Chevron also would have had to have demonstrated financial responsibility in preparation for a spill. Chevron may, therefore, have been subject to an earlier compliance date if it owned the requisite number of USTs or reported sufficient net wealth. If Chevron owned more than 1000 USTs or reported a tangible net worth in excess of $20 million, it would have had to have demonstrated financial responsibility by January 24, 1989. If Chevron owned between 100 and 999 USTs, it would have had to have complied with the financial responsibility regulations by October 26, 1989. Both of these compliance dates preceded JBG’s action and the removal of the USTs. Therefore, if subject to either of the first two CFR sections, Chevron could have been held liable as an owner of the tanks under section 4-409(b) and the CFR provisions. Even if Chevron owned only between thirteen and ninety-nine USTs, it would have been subject to the financial responsibility and third-party liability provisions on April 26, 1991, a full sixteen months prior to JBG’s action.

c. Policy Implications of the Outcome.—Even though the court’s decision in this case provides scant analytical framework, the final disposition serves the environmental policy goals at issue. Applying the defense of assumption of risk would have thwarted the policy goal of many environmental statutes as well as tort law in general. If the policy of tort law is to “make a fair adjustment of the conflicting claims

182. Wheeler, 346 Md. at 605, 697 A.2d at 901.
184. 40 C.F.R. § 280.91(a)-(c) (1993).
185. Id. § 280.91(a).
186. Id. § 280.91(b).
187. The court’s discussion of the relevance of the compliance dates does not indicate what conditions must be present before liability would attach under section 4-409(b). Wheeler, 346 Md. at 617-18, 697 A.2d at 907. Presumably, the court would require at least that the action for damages not be instituted before the compliance deadline. Alternatively, the court might require that the spill have occurred after the compliance deadline.
188. Exxon never owned the USTs. Wheeler, 346 Md. at 626, 697 A.2d at 911. First, the court explained that Exxon did not own or have sufficient control over the tanks for trespass liability to attach. Id. at 622-27, 697 A.2d at 909-11. Second, although Chevron presented a causation argument that is beyond the scope of this Note, there was no evidence that the tanks had leaked after Exxon installed the new tanks. Id. at 626-28, 697 A.2d at 911-12.
189. 40 C.F.R. § 280.91(c) (1993).
190. The assumption of risk defense has been rejected in a number of states by either case law or statute. See Donahue v. S.J. Fish & Sons, Inc., No. 539920, 1995 WL 562216, at *2 (Conn. Super. Ct. Sept. 18, 1995) (explaining the repudiation of the defense in negligence law).
of the litigating parties,"191 the cost of righting wrongs should be placed on the individual who caused the harm.192 Similarly, section 4-402 of the Environment Article, entitled "Declaration of Public Policy," states that it is Maryland public policy to "improve, conserve, and manage the quality of the waters of the State and protect, maintain, and improve the quality of [the] water."193 This policy can be served by at least three methods, all of which are incorporated into Maryland law: criminal sanctions, administrative regulations, and third-party liability for those responsible for discharging oil into the waters of the state.194

Allowing owners of contaminated property to use assumption of risk as a defense to third-party liability claims would circumvent the policy goal of "improving and managing" the quality of water in the state. Holding purchasers of property responsible for the cleanup cost for environmental hazards of which they have knowledge would discourage purchasers from conducting thorough due diligence analyses or other investigations aimed at discovering environmental contamination. For instance, if the court had found assumption of risk to be a competent defense to the trespass committed by Wheeler in the present case, JBG would have been better off not discovering the gasoline contamination, thereby avoiding the possibility that such knowledge would defeat a claim for cleanup costs or diminution in property value. Such a result would not promote remediation of properties where contamination has occurred. Under such a system, Maryland's goal of "improving" the quality of waters of the state would be thwarted. Individuals would be discouraged from discovering hazards, and thus from cleaning them up or from buying the property.

In addition, the waters of the state will not be "maintained" under a system where parties may not be held liable for damage caused by dangerous substances emanating from their properties if they are discovered. In order to at least "maintain" the purity of Maryland's water, discharges of pollutants must be discouraged. In order to discourage the discharge of pollutants, liability should be assigned to the party responsible for the damage. Normally, if two or more parties are responsible or the responsible party cannot be ascertained, the party in the best position to prevent the specific harm should be held

192. Id. § 1, at 6.
194. See supra notes 163-165 and accompanying text.
liable. In this case, Wheeler and Chevron were both in a better position than JBG or Equitable to prevent gasoline from leaking from the tanks and damaging the service station as well as the Chapman Avenue property. Such prevention could have been accomplished either by groundwater and soil sampling or by frequent audits of gasoline inventory to account for all of the gasoline put into the tanks. Alternatively, Wheeler and Chevron could have independently obtained insurance in the event damage occurred from gasoline migration. Both Wheeler and Chevron were in a better position than JBG or Equitable to assess the amount of insurance that would have been sufficient.

5. Conclusion.—The court’s holding concerning the availability of section 4-409(a) has no prospective application, because the expiration of the compliance deadlines in the CFR has made section 4-409(b) available for recovery for damage caused by underground storage tanks. Still, the court should have read section 4-409(a) more broadly.

The court should have addressed more clearly how trespass liability attached in this case, as presumably no intentional act was involved. Attaching trespass liability in cases like Wheeler would make it easier for innocent property owners to recover for damage caused by the migration of subsurface petroleum products. The court’s holding that assumption of risk is not a defense to trespasses like the one in this case advances Maryland’s public policy. A contrary holding allowing polluters to escape liability under an assumption of risk defense would discourage parties from investigating and discovering potential environmental hazards, and it would shift the burden of cleanup and reduced property value to innocent third parties. Still, the court should have clearly stated whether it was rejecting assumption of risk as an affirmative defense to any sort of trespass.

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195. See Leatherman v. Riverside Village, 676 So. 2d 1180, 1183-84 (La. Ct. App. 1996) (increasing the share of liability of the party in the best position to prevent the harm); M-T Petroleum, Inc. v. Burris, 926 S.W.2d 814, 816-17 (Tex. App. 1996, no writ) (considering which party was in the best position to prevent the harm when analyzing liability).
VII. Evidence

A. Maryland Narrowly Limits the Statements Against Interest Exception to the Hearsay Rule

In *State v. Matusky*, the Court of Appeals held that a trial court judge should analyze statements against interest on a statement-by-statement basis and exclude collateral portions of the declaration that are not directly self-incriminating. The court rooted its conclusion in the rationale behind the statement against interest exception to the hearsay rule, which is "that the declarant would not make a statement adverse to his or her penal interest unless that declarant believed it to be true." However, whether this rationale applies to those portions of the hearsay declaration that may not be directly self-incriminating has been the subject of debate for courts and commentators alike. The Court of Appeals concluded that neutral, collateral statements do not exhibit the same qualities of reliability and trustworthiness exhibited by directly self-inculpatory statements and are therefore inadmissible. In adopting this rationale, the court limited the role of trial court judges to that of breaking down declarations into separate parts and determining whether each individual declaration is against interest. In so holding, the Court of Appeals virtually eliminated the fundamental evidentiary purpose of the statement against interest exception to the hearsay rule, and severely limited the discretion of trial court judges regarding the admissibility of such statements.

1. 343 Md. 467, 682 A.2d 694 (1996).
2. *Id.* at 485, 682 A.2d at 702-03. The declaration against interest exception is governed by Maryland Rule of Evidence 5-804(b)(3), which states, in pertinent part:
   
   (b) Hearsay Exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

   
   (3) Statement Against Interest.—A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

   Md. R. 5-804(b)(3) (emphasis added).


4. See *id.* at 477-78, 682 A.2d at 699.

5. *Id.* at 485, 682 A.2d at 703.

6. See *id.* at 492, 682 A.2d at 706 ("[W]hen ruling upon the admission of a narrative under this rule, a trial court must break down the narrative and determine the separate admissibility of each single declaration or remark." (internal quotation marks omitted)).
1. The Case.—In May 1993, Michael Stewart Matusky was indicted in the Circuit Court for Baltimore County on two counts of first-degree murder in connection with the deaths of Gertrude and Pamela Poffel. During the initial investigation by the police, Richard Dean White, Pamela Poffel’s estranged husband, and Rebecca Marchewka, White’s fiancée, were questioned. Marchewka corroborated White’s account that White spent the day of the murders with her. However, she eventually came forward to the police with new information told to her by White; these statements implicated Matusky as the murderer. Marchewka gave the following testimony regarding the statements made to her by White:

[MARCHEWKA]: [White] laid down in the bed and told me that he had something that he wanted to tell me but he couldn’t and I asked him why and he said because it would hurt me. And I asked him to tell me any way.

[STATE’S ATTORNEY]: When you asked him to tell you did he, in fact, tell you something?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Objection noted for the record and overruled.

[MARCHEWKA]: Yes, he did.

[STATE’S ATTORNEY]: What did he tell you, tell the ladies and gentlemen of the jury.

[MARCHEWKA]: He told me that he knew who killed Pam and Trudy [Gertrude] Poffel and I asked him who and he said Michael Matusky and I asked him how he knew and he said because he was in the car.

[STATE’S ATTORNEY]: Did he indicate whose car he was in?

[MARCHEWKA]: Michael’s.

[STATE’S ATTORNEY]: Did he indicate to you how he got to Pam and Trudy’s residence in Michael’s car?

[MARCHEWKA]: He said he drove.

7. Id. at 470, 682 A.2d at 695.
8. Id. at 470-71, 682 A.2d at 695.
9. Id. at 471, 682 A.2d at 695. When White and Marchewka were questioned by the police a few days after the murders, White told the police he knew nothing about the murders. Matusky v. State, 105 Md. App. 389, 391, 660 A.2d 935, 936 (1995), aff’d, 343 Md. 467, 682 A.2d 694 (1996). White also told the police that, on the day of the murders, he and Marchewka had spent the entire day together. Id. White had asked Marchewka to corroborate this story, explaining to her that he had been drinking on the day in question and his “probation would be violated if the [police] found out what he was really doing on that day.” Id. at 391-92, 660 A.2d at 936 (internal quotation marks omitted).
10. Matusky, 343 Md. at 471, 682 A.2d at 695.
[STATE'S ATTORNEY]: Did he tell you where he had been prior to going to Pam and Trudy’s?
[MARCHEWKA]: Yes, they had been at The Pit and at Wargo’s [local bars].

[STATE'S ATTORNEY]: Did he tell you what occurred at Wargo’s?
[MARCHEWKA]: Yes, he said that he and Michael had a discussion, that Michael wants to kill Pam and Trudy because of what he did, what they did to Ted and he said he tried to talk Michael out of it.

[STATE'S ATTORNEY]: This conversation occurred prior to going to the Poffels?
[MARCHEWKA]: Yes.

[STATE'S ATTORNEY]: Did Richard say whether or not he went inside the house?
[MARCHEWKA]: He said no, he sat in the car.

[STATE'S ATTORNEY]: Did he tell you what he did after that?
[MARCHEWKA]: Said they drove away.

[STATE'S ATTORNEY]: When he told you that what was your reaction?
[MARCHEWKA]: I was very upset, it’s hard for me to believe.

[STATE'S ATTORNEY]: When Richard saw how upset you were what did he say or do?
[MARCHEWKA]: He was concerned about who I was going to tell, what I was going to do with the information.

[STATE'S ATTORNEY]: . . . [D]id you discuss with Richard his involvement and what happened?
[MARCHEWKA]: Yes, but he said that he didn’t—he didn’t do anything wrong, that he was just in the car and I tried to tell him that he was considered an accomplice and he said no.11

Both the State and defense counsel sought a pre-trial ruling on the admissibility of Marchewka’s testimony regarding what White had told her.12 The court denied the defense’s motion to exclude White’s declaration.13

11. Id. at 472-74, 682 A.2d at 696-97.
12. Id. at 471, 682 A.2d at 696.
13. Id. At this hearing, the court did not receive Marchewka’s testimony for its consideration. The court did inform the State that the declaration might later be excluded depending on Marchewka’s live testimony. Id.
Immediately before trial, the court again considered the potential admissibility of Marchewka’s testimony regarding White’s statement.\textsuperscript{14} After hearing Marchewka’s testimony outside the jury’s presence, as well as arguments from counsel, the court again concluded that the declaration would be admissible at trial.\textsuperscript{15}

In January 1994, Michael Stewart Matusky was tried for murder.\textsuperscript{16} White refused to testify at Matusky’s trial, citing his Fifth Amendment privilege against self-incrimination.\textsuperscript{17} The invocation of this privilege deemed White an “unavailable” declarant.\textsuperscript{18} Absent White’s testimony, the State’s key witness was Marchewka,\textsuperscript{19} who testified as to the statements made by White after the murders.\textsuperscript{20} The jury convicted Matusky of first-degree murder, and the court sentenced him to two life terms, without the possibility of parole.

The Court of Special Appeals reversed the trial court’s ruling that Marchewka’s testimony was admissible, finding that the trial judge should have excluded the statements in White’s declaration identifying Matusky as the killer and supplying Matusky’s motive for the murders.\textsuperscript{21} During its review, the Court of Special Appeals was confronted with several recent judicial decisions interpreting various aspects of the statement against interest exception.\textsuperscript{22} In its ruling, the

\textsuperscript{14} Id.
\textsuperscript{15} Id. In concluding that the declaration was admissible, the court stated: I find, from a reasonable person standard, as [the State’s Attorney] articulated, would know that there is something against your pecuniary, proprietary or penal interests by discussing a homicide or violent act and then driving someone to the place where that act was to be carried out and driving them away, then giving a statement to the police which was a truthful statement . . .
\textsuperscript{16} Id. at 471-72, 682 A.2d at 696.
\textsuperscript{17} Matusky, 105 Md. App. at 393, 660 A.2d at 937.
\textsuperscript{18} Id.; see also Md. R. 5-804(a)(1) (including in the definition of “unavailability” those situations in which the declarant “is exempted by ruling of the court on the ground of privilege”).
\textsuperscript{19} Matusky, 343 Md. at 472, 682 A.2d at 696.
\textsuperscript{20} Id.; see supra text accompanying note 11.
\textsuperscript{21} Matusky, 105 Md. App. at 402-03, 660 A.2d at 941.
\textsuperscript{22} Id. at 398, 660 A.2d at 939. “Eighteen days after . . . [the] ruling [by the trial judge], the Court of Appeals filed Simmons v. State, 333 Md. 547, 636 A.2d 463 (1994), holding that the declaration against penal interest is not—as a matter of Maryland evidence law—a ‘firmly rooted’ exception to the rule against hearsay.” Matusky, 105 Md. App. at 398, 660 A.2d at 939 (citing Simmons, 333 Md. at 558-59, 636 A.2d at 469). Seventy-seven days after the ruling, in Wilson v. State, 334 Md. 313, 639 A.2d 125 (1994), the Court of Appeals held that a declaration against penal interest is “presumptively unreliable.” Matusky, 105 Md. App. at 398, 660 A.2d at 939 (quoting Wilson, 334 Md. at 335, 639 A.2d at 136). One hundred sixty-eight days after the ruling, the United States Supreme Court decided Williamson v. United States, 512 U.S. 594 (1994), holding that “trial judges must exclude whatever non-self-inculpatory statements are contained in an otherwise admissible
court considered whether there were sufficient indicia of reliability to admit any of the statements White made to Marchewka. In order to make this determination, the court stated that the trial judge was required to examine the declaration as a whole, as well as the totality of circumstances under which the declarant made his statements. According to the court, the trial court should consider the declarant's "expectation of confidentiality," as well as whether "[a]ny reasonable person would appreciate the disserving nature of such a declaration."

Applying these criteria to the present case, the Court of Special Appeals acknowledged that certain portions of White's statements to Marchewka had a disserving quality and were, therefore, admissible under the statement against interest exception. However, as to those portions of White's statement in which Matusky was identified as the killer and his motive for the murders was identified, the court found that these should have been excluded from the proffered declaration. The court reasoned that these statements were "simply not self-inculpatory as to White."

The Court of Appeals granted certiorari to answer the question, "Under the hearsay exception for a declaration against penal interest, is the admissible statement the extended declaration or only those remarks that are individually self-inculpatory?"

2. **Legal Background.**—The rules of evidence concerning hearsay are premised on the theory that "out-of-court statements are subject to particular hazards." Some of these out-of-court statements, however,
are less susceptible to hearsay dangers and therefore are excepted from the general rule against hearsay. Originally, defining and determining the scope of an exception to the hearsay rule simply required discovering a case that had deemed such evidence admissible. The scope of a newly noted exception was "more likely to be determined by some casual, arbitrary, or accidental circumstance involved in an early case than by an inquiry into a theory of distinguishing some hearsay from that generally excluded." 

**a. The Common Law Inception of the Statement Against Interest Exception.**—The rule against hearsay evolved in England during the eighteenth century. At that time, courts developed an exception to the hearsay rule for declarations against interest in cases where the declarant had since died or otherwise become unavailable as a witness. The exception was based upon the grounds (1) that the hearsay rule might exclude the only available evidence, and result in great injustice unless exception were made, and (2) that no person would be likely to make such a statement unless true, and hence the statement would be free enough from the risk of untrustworthiness to make the requirement of cross-examination a work of supererogation.

In the early nineteenth century, however, the exception was limited. Upon consideration of certain cases involving the declarations of deceased clergymen, a rule was established that in order for an out-of-court declaration to be deemed admissible, that declaration

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example, upon cross-examination of hearsay testimony, "the opponent cannot challenge the veracity of the facts asserted because the witness can only report what the declarant said." Jay L. Hack, Note, Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 B.U. L. Rev. 148, 150 (1976). In addition, the jury can only observe the witness's demeanor and perhaps assess whether the witness seems to be telling the truth, when in fact what is most crucial is the truthfulness of the declarant's statements being recounted by the witness. The safeguards of the oath and an awareness of the gravity of the proceedings are wholly lost on the out-of-court declarant.

32. Williamson, 512 U.S. at 598.
34. Id.
36. Id. at 448-49, 47 A.2d at 45.
37. Id. at 449, 47 A.2d at 45.
38. See id.
39. See id. (citing the Berkeley Peirage Case and the Sussex Peerage Case to illustrate the development of the declarations against interest exception to the hearsay rule). In the Berkeley Peirage Case, 171 Eng. Rep. 128 (H.L. 1811), the court held that a witness could not testify as to a declaration made by a clergyman who died before trial. In the Sussex Peerage
must be against the declarant's pecuniary or proprietary interest.40 However, a confession of guilt was not considered to fall within the technical declarations against interest exception to the hearsay rule.41 The theory supporting an exception to the hearsay rule for statements against pecuniary interest is that one is unlikely to admit something that is against his "pecuniary or proprietary interest" unless it is true.42

Many courts in the early development of the statement against interest exception required four factors to be present:

(1) the declarant must be dead; (2) the declaration must be against the pecuniary or proprietary interest of the declarant; (3) the declaration must be of a fact or facts which were immediately cognizable by the declarant personally; and (4) the declarant must not have had a probable motive to falsify the fact declared.43

These four requirements still exist, in some form, in modern applications of the exception.44

Whether the declarant is in fact aware that his statements are against his interest is the key inquiry for this exception to the rule against hearsay.45 There are two ways to establish the existence of such awareness. A subjective determination could be made of the declarant's state of mind: did that particular declarant know the statement was against his interest at the time it was made?46 An alternate method is to measure awareness by an objective test: would a reasonable man in the declarant's shoes believe his statement to be against his own interest?47 Between the objective and subjective methods of assessment, one view holds that, because the circumstances surround-

Case, 8 Eng. Rep. 1034 (H.L. 1844), the court held that the son of a deceased clergyman could not testify as to his father's statements.

40. Thomas, 186 Md. at 449, 47 A.2d at 45.
41. Id.
42. Jefferson, supra note 33, at 8.
43. Id. at 1.
44. See, e.g., State v. Standifur, 310 Md. 3, 14, 526 A.2d 955, 960 (1987) (examining the implications of the declarant's motive to falsify on the potential admissibility of a statement against interest); McCormick on Evidence §§ 279-280, at 824-27 (Edward W. Cleary ed., 3d ed. 1984) (discussing the requirement that there should not be any indication of a motive to falsify by the declarant, as well as the now standardized requirement of unavailability of the declarant).
45. See Jefferson, supra note 33, at 17 (explaining that "it is not the fact that the declaration is against interest but the awareness of that fact by the declarant which gives the statement significance"). This makes logical sense, for the reliability inherent in the concept that one would not say anything against one's own interest unless it were true depends on the declarant's knowledge that said statement is against his interest.
46. Id. at 22.
47. Id.
ing the making of the declaration may not give any indication of the actual knowledge of the declarant, an objective inquiry may be a more practical tool with which to categorize a statement as one that is against interest.\textsuperscript{48} Of course, if it could be shown that the particular declarant did not believe the declaration to be against his interest, the declaration lacks the probability of trustworthiness required in order to be admissible.\textsuperscript{49}

\textit{b. The Maryland Tradition.}—For almost two decades, Maryland has recognized the declaration against interest exception to the rule against hearsay.\textsuperscript{50} Traditionally, the exception "was limited to declarations against pecuniary or proprietary interest."\textsuperscript{51} However, in \textit{Harris v. State},\textsuperscript{52} the court expanded the exception for statements against interest to include those statements that rendered one liable to criminal punishment.\textsuperscript{53} The declaration at issue in \textit{Harris} took place in a prison recreation yard, where the declarant bragged about forcing the defendant to commit the crime for which the defendant had been convicted.\textsuperscript{54} Although the State argued that such a declaration was not admissible under the statement against interest exception because it was not against the declarant's pecuniary interest,\textsuperscript{55} the Court of Special Appeals reasoned:

The distinction between statements relating to penal matters and those relating to material ones lies in the belief that the admission of an acknowledgment of facts rendering one liable to criminal punishment would, unlike an acknowledgment of a debt, open the "door to a flood of perjured witnesses falsely testifying to confessions that were never made."\textsuperscript{56}

The court justified this expansion by referring to the "inherent indicium of trustworthiness" that accompanies a declaration against one's

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 23.

\textsuperscript{50} See Agnew v. State, 51 Md. App. 614, 625-26, 446 A.2d 425, 432-33 (1982) ("The death blow to the former judicial policy of prohibiting the admission of such declarations [against interest] was efficiently administered by this Court in \textit{Harris v. State}, 40 Md. App. 58, 387 A.2d 1152 (1978), which held that exclusion of a declaration against penal interest was reversible error.") (footnote omitted)).

\textsuperscript{51} \textit{Harris}, 40 Md. App. at 62, 387 A.2d at 1154.

\textsuperscript{52} 40 Md. App. 58, 387 A.2d 1152 (1978).

\textsuperscript{53} Id. at 62-63, 65, 387 A.2d at 1154-55, 1156.

\textsuperscript{54} Id. at 61, 387 A.2d at 1154.

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 62, 387 A.2d at 1154 (quoting McCormick’s Handbook of the Law of Evidence § 278, at 674 (Edward W. Cleary ed., 2d ed. 1972) [hereinafter McCormick’s Handbook]).
penal interest. As emphasized in Agnew v. State, the task of determining the probability of trustworthiness of the statement is the province of the trial judge. In Agnew, the declarations were made by persons allegedly involved in a bribery scheme with former Vice President of the United States Spiro T. Agnew. The court held that it is the duty of the trier of fact to determine the weight accorded any admitted statement, but this duty is to be performed only after the judge determines any proffered statement's probability of trustworthiness.

In concluding that the statements at issue were properly admitted, the Court of Special Appeals analyzed them using six factors: (1) whether the statement's potential of actually jeopardizing a penal interest; (2) whether the statement was against a penal interest at the time it was made; (3) the declarant's perception of the disserving quality of the statement; (4) the relation between the relevant portion of the declaration and its disserving character; (5) the lack of probable motive to falsify the declaration; and (6) whether the declarant was acting as a reasonable person. In considering the third factor, the court decided that "there was no need to separate the disserving portions of the declarations from neutral or self-serving portions." The court reasoned that the declarants' implicating themselves with the defendant in one criminal scheme carrying the same penalty for all involved was enough to allow the entire statement to be admitted.

57. Id. at 65, 387 A.2d at 1156.
58. Id. As the court stated, "[t]o hold otherwise would serve to usurp the traditional role of the jury as the trier-of-fact and . . . deprive an accused of his right to due process under the law." Id.
60. Id. at 628, 446 A.2d at 434.
61. See id. at 616-17, 446 A.2d at 427-28 (listing as one of the issues on appeal whether the sworn statements of Agnew's co-conspirators were properly admitted into evidence). Superficially, the statements were somewhat in furtherance of the declarants' interest, for they were made to the authorities in hopes of gaining favor for their own cases. Id. at 630, 446 A.2d at 434-35. As the court explained, "the penal interests of the declarants are somewhat clouded by the self-serving patina of their admissions and allegations, inferences and innuendoes." Id. at 629-30, 446 A.2d at 434.
62. Id. at 628-29, 446 A.2d at 434.
63. Id. at 630, 446 A.2d at 435.
64. Id. at 628, 446 A.2d at 433-34 (citing Hack, supra note 31, at 154-55).
65. Id. at 641, 446 A.2d at 440.
66. Id. at 641-42, 446 A.2d at 440. The court acknowledged that "the problem of statements that are both self-serving and disserving to [the] declarant has divided treatise
The Maryland courts next addressed the issue of admissibility of statements against interest in *State v. Standifur*. *Standifur* was a landmark decision in Maryland because it was the first reported case dealing with the statement against penal interest exception as it applied to the admissibility of *inculpatory* hearsay introduced by the State against a criminal defendant. In *Standifur*, the Court of Appeals held that the statement in question was not sufficiently reliable to be admitted for the purpose of inculpating an accused in a criminal case. In so holding, the court established that "[t]he circumstances surrounding the making of [a] statement must be carefully analyzed to determine the likelihood that the statement was truthful." Because of the problems of proof, the court stated that the party urging [the] exception is not required to prove the actual state of mind of the declarant but must prove sufficient surrounding facts from which the trial judge may inferentially determine what the state of mind of a reasonable person would have been under the same or similar circumstances.

writers." *Id.* at 641 n.24, 446 A.2d at 440 n.24. One view is to admit the entire statement. *Id.* (citing 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1465, at 271 (3d ed. 1940)). Another view supports admitting disserving and collateral portions, but not those parts that are expressly self-serving. *Id.* (citing MCCORMICK'S HANDBOOK, supra note 56, § 279, at 675-77).

67. 310 Md. 3, 526 A.2d 955 (1987). In *Standifur*, the declaration in question was made to a state trooper concerning the declarant's purchase of a shotgun from the defendants, who were charged with housebreaking and theft of the gun. *Id.* at 6-7, 526 A.2d at 956. The declaration was found to be against interest because the declarant believed the gun was stolen at the time he made the statement, thereby exposing himself to potential criminal liability. *Id.* at 8, 526 A.2d at 957. According to the trial judge, the statement was also corroborated by other evidence, and therefore was sufficiently trustworthy and important as to be admissible. *Id.* at 8-9, 526 A.2d at 957. The Court of Special Appeals reversed, applying the six factors analyzed in *Agnew*. *Standifur v. State*, 64 Md. App. 570, 583-88, 497 A.2d 1164, 1171-73 (1985), aff'd, 310 Md. 3, 526 A.2d 955 (1987); see *supra* text accompanying note 64.

68. *Standifur*, 64 Md. App. at 582, 497 A.2d at 1170. Although the statements made in *Agnew* also inculpated the defendant, they were different because they inculpated both the declarants and the defendant in a common scheme of criminal behavior. See *supra* text accompanying notes 61, 66. In *Standifur*, the declarant may have implicated himself in receiving stolen property, but the defendants were being charged with housebreaking and theft. See *supra* note 67. Therefore, they were not involved in the same criminal behavior.

69. *Standifur*, 310 Md. at 20, 526 A.2d at 963.

70. *Id.* at 12, 526 A.2d at 959. In the case at hand, the court noted that the declarant "obviously feared the possibility of violation of his parole, and apparently wished to curry favor with the authorities." *Id.* at 20, 526 A.2d at 963. This "motive of personal gain" was not the death knell for the declaration at issue, but was "an important fact to be considered" when examining the totality of the circumstances. *Id.*

71. *Id.* at 12, 526 A.2d at 959. The court conceded "this test is essentially objective," and the "reasonable" standard encompasses a "non-aberrant reaction by one in the [declarant's] circumstances." *Id.*
In issuing its decision, the *Standifur* court defined the two forms that an inculpatory statement may take: collateral statements and noncollateral statements. The court concluded that collateral statements so closely connected with the statements against interest as to be equally trustworthy are admissible as declarations against interest.

In *Brown v. State*, the Court of Appeals applied the test developed in *Standifur*. The statements in question were made by the declarant at his own probation violation hearing, and then were used against Brown, the declarant's co-defendant.

72. See id. at 16, 526 A.2d at 961 ("A collateral inculpatory declaration is one in which the inculpatory material is not found in the portion of the statement directly against the declarant's interest, but instead appears in another portion of the statement.").

73. See id. at 15-16, 526 A.2d at 961 ("A noncollateral statement is one in which the facts incriminating the defendant are found in the portion of the statement directly against the declarant's interest.").

74. Id. at 17, 526 A.2d at 962. According to the court, "the nexus required between the collateral statement and the material incriminatory to the declarant is subject to more exacting scrutiny in criminal than in civil cases." Id. at 16, 526 A.2d at 961.

The court also enunciated a specific test for the admissibility of statements against interest:

[A] trial judge . . . must carefully consider the content of the statement in the light of all known and relevant circumstances surrounding the making of the statement and all relevant information concerning the declarant, and determine whether the statement was in fact against the declarant's penal interest and whether a reasonable person in the situation of the declarant would have perceived that it was against his penal interest at the time it was made. The trial judge should then consider whether there are present any other facts or circumstances, including those indicating a motive to falsify on the part of the declarant, that so cut against the presumption of reliability normally attending a declaration against interest that the statements should not be admitted. A statement against interest that survives this analysis, and those related statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest.

Id. at 17, 526 A.2d at 962. In applying this test to the facts of *Standifur*, the court concluded that the statement should not have been admitted as a declaration against penal interest. Id. The court specifically found "the evidence insufficient to prove that a reasonable person in [the declarant's] position would have understood the disserving nature of the statement when he made it." Id.

75. 317 Md. 417, 564 A.2d 772 (1989).

76. See supra note 74 and accompanying text.

77. *Brown*, 317 Md. at 419-21, 564 A.2d at 773. The declarant testified at his own hearing and at the trial of his accomplice; this testimony implicated Brown, the defendant in the current case. Id. When the State tried to force the declarant to testify against Brown, he did not cooperate. Id. at 420, 564 A.2d at 773. The State instead offered transcripts of the testimony given earlier by the declarant, which the trial judge admitted. Id. at 420-21, 564 A.2d at 773. Brown maintained that this earlier testimony was inadmissible as hearsay because it did not qualify under the statement against interest exception. Id. at 421, 564 A.2d at 774.
The Brown court found certain portions of these statements to be obviously self-serving, and thus unreliable. The court, therefore, declared the statements "collateral" and held that they were inadmissible as statements against interest. According to the court, the circumstances implied that the declarant might "have been motivated by the desire to curry favor with the authorities, and by the desire to reduce his own culpability." The presumed reliability required by the Standifur inquiry was lacking in the declaration in Brown.

c. The Federal Rule Concerning Statements Against Interest.—Maryland's appellate courts have accorded some deference to the federal cases ruling on the admissibility of statements against interest under the Federal Rules of Evidence. In fact, Maryland Rule 5-804 itself is derived from Federal Rule of Evidence 804.

The principal federal case dealing with the statement against interest exception is Williamson v. United States. In Williamson, the Supreme Court held that the federal exception to the hearsay rule for statements against penal interest does not allow admission of non-self-inculpatory statements, even if they are made within a broader narra-

78. Id. at 425, 564 A.2d at 776.
79. Id.
80. Id. at 424, 564 A.2d at 775. The court explained that these are motives that "we have identified as frequently present in these situations, and which combine to make 'inevitably suspect' statements of this type." Id. (quoting State v. Standifur, 310 Md. 3, 13, 526 A.2d 955, 960 (1987)).
81. See id. at 425, 564 A.2d at 776 ("The presumed reliability that would surround such a statement if it were given as an inextricable part of a true declaration against penal interest is lacking.").
82. See, e.g., Wilson v. State, 334 Md. 313, 322-28, 639 A.2d 125, 129-32 (1994) (using Supreme Court cases to determine when incriminating statements are admissible under exceptions to the hearsay rule); Simmons v. State, 333 Md. 547, 556, 636 A.2d 463, 467 (1994) ("[The Supreme] Court [has] held that cross-examination of a hearsay declarant can be dispensed with when a party demonstrates: (1) the necessity of introducing the out-of-court statement, and (2) the out-of-court statement bears adequate indicia of reliability." (internal quotation marks omitted)); Standifur, 310 Md. at 15, 526 A.2d at 961 (determining that "[t]he message to be gleaned from the [federal] cases and from the history of the federal rule is clear—inculpatory statements of an accomplice no longer involved in the criminal enterprise are inherently suspect and the particular circumstances surrounding the making of such statements must be carefully examined" (footnote omitted)).

Federal Rule of Evidence 804(b)(3) defines statements against interest as:
Statement[s] which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true.

FED. R. EVID. 804(b)(3).
83. See Md. R. 5-804 ("This rule is derived from [Federal Rule of Evidence] 804.").
tive that is generally self-inculpatory. The court reasoned that “[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory parts.”

Like the Court of Appeals in Brown, the majority in Williamson acknowledged that a declarant who is in custody may make a statement admitting guilt for a crime and implicating another person in order to curry favor with the authorities. Such a statement could fail to qualify as a statement against interest because it would in fact be more promotional of the declarant’s interest, under the circumstances, than against. The Williamson Court found it necessary to remand to the Court of Appeals for the Eleventh Circuit so that just such an inquiry could be made into the motivation behind certain statements made by the declarant.

In his concurring opinion, Justice Scalia noted that “a declarant’s statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible co-defendant.” However, Justice Scalia did acknowledge that the declarant’s finger-pointing, in effect shifting the focus of blame off himself, would be a consideration in assessing whether his statements qualify as sufficiently against interest.

85. Id. at 600. In Williamson, the declarant, Harris, made statements to a Drug Enforcement Administration special agent implicating himself and the defendant in the transport of illegal drugs. Id. at 596. The district court ruled that the agent could testify as to what the declarant had said to him. Id. at 597-98. The district court reasoned:

First, defendant Harris’ statements clearly implicated himself, and therefore, are against his penal interest.
Second, defendant Harris, the declarant, is unavailable.
And third . . . there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony.

Id. at 598 (internal quotation marks omitted).

86. Id. at 599. The court continued, “[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.” Id. at 599-600.

87. See supra notes 75-81 and accompanying text.

88. Williamson, 512 U.S. at 601 (quoting Fed. R. Evid. 804(b)(3) advisory committee’s note). The court also stated that, “[o]n the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.” Id. at 601-02 (quoting Fed. R. Evid. 804(b)(3) advisory committee’s note).

89. Cf. id. at 603 (stating that confessions of arrested accomplices, if truly self-inculpatory rather than merely an attempt to shift blame or curry favor, may be admissible).

90. See id. at 604 (noting that the record did not indicate that the necessary inquiry had been conducted into whether each of the statements in the declarant’s confession were truly self-inculpatory).

91. Id. at 606 (Scalia, J., concurring).

92. Id. at 607.
Justice Ginsburg also recognized the untrustworthiness of statements implicating other persons. In her concurring opinion, Justice Ginsburg concluded that none of the declarant's statements fit within the exception for statements against interest. She explained that the declarant's arguably inculpatory statements were "too closely intertwined" with his self-serving declarations to be considered trustworthy.

Justice Kennedy's concurring opinion examined the various approaches to the admissibility of collateral statements. Justice Kennedy conducted an extensive analysis that concluded that there should not be "a rule excluding all statements collateral or related to the specific words against penal interest." Justice Kennedy reasoned that Congress would not have intended the penal interest exception to have "so little effect with respect to statements that inculpate the accused."

Despite the strong opinions on both the state and federal level concerning the admissibility of statements against interest, the stage was set for a resolution of the different schools of thought into a more definitive approach to the hearsay rule exception.

3. The Court's Reasoning.—In State v. Matusky, the Court of Appeals held that, under Maryland Rule 5-804(b)(3), a trial court should admit only those portions of a hearsay declaration that truly

93. Id. at 607-08 (Ginsburg, J., concurring).
94. Id. at 608.
95. Id. Justice Ginsburg explained that Harris's declaration "admitted involvement, but did so in a way that minimized his own role and shifted blame to [the co-defendant]."
96. Id. at 611-12 (Kennedy, J., concurring in the judgment). Justice Kennedy discussed the theories of Wigmore, McCormick, and Jefferson. According to Wigmore, the entire statement should be admitted because "the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement." Id. at 612 (quoting 5 WIGMORE, supra note 66, § 1465, at 271). McCormick, on the other hand, argued for the admissibility of collateral statements of a neutral character, but the exclusion of collateral statements of a self-serving character. Id. (citing CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 256, at 552-53 (1954)). Under Jefferson's approach, "neither collateral neutral nor collateral self-serving statements would be admissible." Id. (citing Jefferson, supra note 33, at 62-63). Jefferson maintained that "the reliability of a statement against interest stems only from the disservice fact stated," and therefore, "should be confined to the proof of the [specific] fact which is against interest." Id. (quoting Jefferson, supra note 33, at 62-63).
97. Id. at 615 (emphasis added).
98. Id. at 617. Justice Kennedy concluded that the statement against interest exception allows admission of statements collateral to the precise words against interest. Id.
99. For the text of this rule, see supra note 2.
The court began its analysis by identifying the key issue—whether the rationale underlying the statement against interest exception applies to other portions of a hearsay declaration that do not directly implicate the declarant. The court then proceeded by describing the different viewpoints regarding the admissibility of collateral statements. The remainder of the court's reasoning can be divided into three major areas: (1) the court's previous decision in Standifur; (2) the application of that decision to the Brown case; and (3) the Supreme Court's analysis of the federal statement against interest exception as applied in Williamson.

The court noted its holding in Standifur, whereby a statement against interest that survives the threshold analysis conducted by the trial judge, and those related statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest. Applying the Standifur analysis to the instant case, the Court of Appeals found that the trial court had failed to parse the hearsay declaration to admit only those individual statements that were contrary to the declarant's penal interests. The court explained that those portions of the declaration that did not directly incriminate the declarant were not as trustworthy as the self-incriminating statements, and therefore, should not have been admitted. The court emphasized that the principal consideration on which the trial court should focus is whether there was any indication of a motive to falsify on the part of the declarant.

The Court of Appeals next addressed the effect of Maryland Rule 5-804(b)(3) on the scope of the declaration against penal interest exception. The court began this discussion by introducing the recent Supreme Court decision in Williamson v. United States, which did not rely on Maryland Rule 5-804(b)(3), but instead on its federal counter-

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100. Matusky, 343 Md. at 492, 682 A.2d at 706.
101. Id. at 477-78, 682 A.2d at 699.
102. See id. at 478-79, 682 A.2d at 699 (discussing the views of Wigmore, Jefferson, and McCormick). For details of these commentators' views on the admissibility of collateral statements, see supra note 96.
103. Matusky, 343 Md. at 479-82, 682 A.2d at 699-701 (citing State v. Standifur, 310 Md. 3, 17, 526 A.2d 955, 962 (1987)).
104. Id. at 484-85, 682 A.2d at 702. The court "agree[d] with the Court of Special Appeals that the trial court erroneously admitted Marchewka's testimony in toto rather than analyzing the declaration statement by statement to determine whether collateral portions of [the declaration] should [have been] redacted." Id. at 485, 682 A.2d at 702-03.
105. Id. at 485, 682 A.2d at 703.
106. Id. at 486, 682 A.2d at 703 (quoting Standifur, 310 Md. at 17, 526 A.2d at 962).
107. Id. For the full text of Maryland Rule 5-804(b)(3), see supra note 2.
108. See supra notes 84-98 and accompanying text.
part, Federal Rule of Evidence 804(b)(3).109 The Court of Appeals conceded that Williamson was "not binding," for "it does not rely on federal constitutional principles."110 The court, however, adopted Williamson as Maryland law,111 and discussed the ways in which that decision was consistent with Standifur. The court found that the distinction between Williamson and Standifur was that, with the advent of Williamson, the connection or proximity between the purely self-inculpatory statements in a declaration and those statements collateral to them no longer factored into consideration for admissibility.112 The Matusky court then declared the rule for trial courts to follow when determining whether to admit the declaration as a statement against interest:

"[W]hen ruling upon the admission of a narrative under this rule, a trial court must break down the narrative and determine the separate admissibility of each 'single declaration or remark.'" The test for admissibility to be applied to each statement within a declaration is whether a reasonable person in the declarant's circumstances would have believed the statement was adverse to his or her penal interest at the time it was made.113

109. Matusky, 343 Md. at 486, 682 A.2d at 703. The Court of Appeals did acknowledge that Federal Rule of Evidence 804(b)(3) closely corresponds to Maryland Rule 5-804(b)(3). Id. In fact, Federal Rule of Evidence 804(b)(3) and Maryland Rule 5-804(b)(3) are virtually identical, the only differences being a matter of a word here or there, or the tense of a verb.

To illustrate how minor the differences are between the two rules, the following is the text of Maryland Rule 5-804(b)(3); any differences in wording of its federal counterpart, Federal Rule of Evidence 804(b)(3), are noted in brackets:

Statement Against Interest.—A statement which was at the time of its making so [far] contrary to the declarant's pecuniary or proprietary interest, [or] so [far] tended to subject the declarant to civil or criminal liability, or so tended to render invalid [or to render invalid] a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true [unless believing it to be true]. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

See Md. R. 5-804(b)(3); FED. R. EVID. 804(b)(3).

110. Matusky, 343 Md. at 490, 682 A.2d at 705.

111. Id. Other states have adopted the analysis in Williamson. Id.; see, e.g., Smith v. State, 647 A.2d 1083, 1088 (Del. 1994) ("Although not bound by the Supreme Court's interpretation of [Federal Rule of Evidence] 804(b)(3) in construing our identical [rule], . . . we find Justice O'Connor's reasoning to be persuasive and we therefore adopt it in construing the Delaware rule.").

112. Matusky, 343 Md. at 491, 682 A.2d at 705-06.

The court concluded by explaining that "the trial court erroneously permitted Marchewka to testify to the entire conversation she had with White."114 Although the trial court may have determined correctly that White's declaration was adverse to his penal interest,115 the court held that those portions of the declaration that did not directly incriminate White, such as the identification of Matusky as the murderer and the indication of Matusky's motive, were "not as trustworthy as self-incriminating statements, because they serve[d] to shift blame from White to Matusky."116 Therefore, the Court of Appeals decided that those portions of the declaration should have been redacted.117

4. Analysis.—In State v. Matusky, the Court of Appeals held that, under the statement against interest exception to the hearsay rule, trial courts may admit only those parts of a declaration that a reasonable person in the declarant's circumstances would have believed were adverse to his or her penal interest at the time they were made.118 The court reached this conclusion by reconciling Standifur and Williamson, cases interpreting the exception on two different levels.119 By requiring the trial judge to parse the declaration into separate categories of self-serving and disserving statements,120 the Court of Appeals limited the discretion of the trial court to determine whether to apply the statement against interest exception to the hearsay rule. In addition, collateral statements usually embody those portions of a declaration that directly implicate the defendant in a particular case.121 Excluding collateral statements results in the exclusion of almost all pertinent inculpatory statements, statements that hold the same indicia of reliability as the rest of the declaration.122 In adopting the Williamson approach, the Court of Appeals has virtually

114. Id.
115. Id. at 485, 682 A.2d at 702.
116. Id., 682 A.2d at 703.
117. Id.
118. Id. at 492, 682 A.2d at 706.
119. See supra text accompanying notes 67-74 and 84-98.
120. See Matusky, 343 Md. at 492, 682 A.2d at 706.
121. See Williamson v. United States, 512 U.S. 594, 616 (1994) (Kennedy, J., concurring in the judgment) ("[M]ost statements inculpating a defendant are only collateral to the portion of the declarant's statement that is against his own penal interest." (alteration in original) (quoting Andrew R. Keller, Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Colum. L. Rev. 159, 165 (1983))).
122. See id. ("As commentators have recognized, 'the exclusion of collateral statements would cause the exclusion of almost all inculpatory statements.'" (quoting Michael D. Bergeisen, Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Cal. L. Rev. 1189, 1207 (1978)).
eliminated the fundamental evidentiary purpose of the statement against interest exception to the hearsay rule, which is to admit reliable hearsay evidence.

a. Reconciling Standifur and Williamson.—The Court of Appeals's decision in Matusky embodied the interpretation and reconciliation of precedents from two different courts. The court first considered its own 1987 decision in State v. Standifur. The court also chose to rely on the Supreme Court case of Williamson v. United States, which interpreted the federal counterpart to Maryland's statement against interest exception. The Maryland Rule of Evidence and the Federal Rule of Evidence concerning the statement against interest exception are virtually identical in language and form. However, the two cases interpreting these respective rules came to different conclusions. How then did the Court of Appeals, in Matusky, reconcile Standifur and Williamson to come to what it considered a logical conclusion?

The statement against interest exception, as articulated in Standifur, involved the inquiry into many factors, especially all of the circumstances surrounding the making of the statement. Part of the determination to be made by the trial judge was whether a reasonable person would appreciate the disserving nature of such a declaration. This was to be determined by the totality of circumstances. The Standifur court held that "a statement against interest that survives this [multi-factor analysis by the trial judge], and those related statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest."
However, the Court of Appeals's decision in *Standifur* did not provide the only framework for the court's subsequent decision in *Matusky*. The Supreme Court's opinion in *Williamson* also provided a backdrop for the Court of Appeals's current interpretation of the exception.\(^{130}\) In *Williamson*, the Supreme Court took a completely different view of the trial judge's role, as well as the potential admissibility of collateral statements "connected" with the statements against interest. First, the trial court judge must admit only those parts of the declaration which are sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.\(^{131}\) This is a fact-intensive inquiry, according to the Supreme Court; it requires careful consideration of all the circumstances surrounding the criminal activity involved.\(^{132}\)

Although the Court of Appeals, in *Standifur*, also declared that the statement against interest must be evaluated in light of all the surrounding circumstances,\(^ {133}\) there is a difference in how the Court of Appeals and the Supreme Court view the admissibility of collateral statements. The Supreme Court explained, "The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability."\(^ {134}\) In other words, although the Court of Appeals found that collateral statements so closely connected to the statements against interest were admissible, the Supreme Court found otherwise.

In *Matusky*, the Court of Appeals attempted to reconcile the tests for admissibility under *Standifur* and *Williamson* by stating that the central distinction between the approaches of the two cases is that "'proximity' between the self-inculpatory and 'collateral' portions of one declaration no longer guarantees admissibility."\(^ {135}\) This misleading

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\(^{130}\) See *Matusky*, 343 Md. at 486-91, 682 A.2d at 703-05 (noting that the court "shall adopt [the analysis in *Williamson*] as part of Maryland law").


\(^{132}\) *Id.* at 604.

\(^{133}\) *See supra* note 74.

\(^{134}\) *Williamson*, 512 U.S. at 600. The court explained that other parts of the declarant's confession, especially parts that implicated Williamson, did little to subject the declarant himself to criminal liability. *Id.* at 604. Whether or not these portions were truly self-inculpatory is for the trial judge to decide. *Id.*

\(^{135}\) *Matusky*, 343 Md. at 491, 682 A.2d at 705-06.
statement minimizes the distinction between *Standifur* and *Williamson*. In fact, the difference between the two precedents in their approach to the admissibility, or non-admissibility, of collateral statements embodies one of the critical issues that has surrounded the statement against interest exception since its inception in Maryland. In both *Williamson* and *Standifur*, a truly self-inculpatory statement would open the door of admissibility as a declaration against interest. The difference between them, however, centers around what happens once this door is open. With the *Standifur* approach, once a self-inculpatory statement opens the door, those related statements "so closely connected with it as to be equally trustworthy" are allowed through the door as well. 136 The *Williamson* approach is markedly different. The *Williamson* majority would open the door only for those statements which are truly self-inculpatory, and shut the door to anything else. 137 With the *Williamson* view, no matter how closely connected any other statement is to the self-inculpatory statement, whether by some substantial connection or merely by temporal proximity, nothing else will get through the door of admissibility besides the sole self-inculpatory statement.

There is some confusion as to the *Matusky* court's reconciliation of these distinct views on collateral statements. The Court of Appeals explained in *Matusky* that its prior decision in *Standifur* adopted the federal rule as Maryland common law, prior to adoption of the Maryland Rules of Evidence. 138 The *Matusky* court also acknowledged that "*Standifur* was decided without the benefit of the *Williamson* decision." 139 However, if *Standifur* adopted the federal rule, the *Standifur* court should have come to the same conclusion as the Supreme Court in *Williamson* and declared that all non-self-inculpatory statements are inadmissible. 140 Instead, the *Standifur* court found that non-self-inculpatory statements are admissible if they are so closely connected with the statement against interest as to be equally trustworthy. 141

The question remains why the *Matusky* court deferred to the Supreme Court's position on collateral statements rather than its own

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137. See Williamson, 512 U.S. at 600 ("We see no reason why collateral statements ... should be treated any differently from other hearsay statements that are generally excluded.").
138. *Matusky*, 343 Md. at 491, 682 A.2d at 705.
139. *Id*.
140. See Williamson, 512 U.S. at 594 (holding that the exception to the hearsay rule for statements against penal interest does not allow admission of non-self-inculpatory statements).
141. *Standifur*, 310 Md. at 17, 526 A.2d at 962.
previous approach taken in Standifur. The court does not give a clear answer to this question, but instead invokes a quote from a decision of the Delaware Supreme Court explaining that neutral collateral statements do not enjoy the guarantees of reliability and trustworthiness required for hearsay statements to be admissible. The court concluded that, "when ruling upon the admission of a narrative under this rule, a trial court must break down the narrative and determine the separate admissibility of each "single declaration or remark.""

Because Standifur was decided without the benefit of Williamson, would Standifur itself have been decided differently had it reached the Court of Appeals just seven years later? The court indicated that it would. However, the Matusky court did not identify the catalyst for its switch in approach, aside from indicating its deference to Williamson.

Matusky strips a trial judge of the discretion to determine the surrounding circumstances of collateral statements, and whether they are so intertwined as to be trustworthy enough for admissibility. By considering each phrase of the declaration in a vacuum to determine its self-inculpatory nature, the trial judge, at the direction of the Court of Appeals, is doing a disservice to the statement against interest exception.

b. Elimination of the Evidentiary Purposes of the Statement Against Interest Exception.—Both the Supreme Court, in Williamson, and the Court of Appeals, in Matusky, imply that an "open-door" policy on collateral statements defeats the underlying rationale of the hearsay exception for statements against interest. Reliability and trustworthiness, as the principal bases for the exception, must be found in all admitted statements. Because of the inherent dangers of hearsay, it is critical that these factors be present in every admitted

142. Matusky, 343 Md. at 491, 682 A.2d at 706 (quoting Smith v. State, 647 A.2d 1083, 1088 (Del. 1994) (citing Williamson, 512 U.S. at 600)).
143. Id. at 492, 682 A.2d at 706 (quoting State v. Mason, 460 S.E.2d 36, 45 (W. Va. 1995) (quoting Williamson, 512 U.S. at 599)).
144. See supra text accompanying note 139.
145. See Matusky, 343 Md. at 492 n.16, 682 A.2d at 706 n.16. The court explained its interpretation of Williamson as follows: "[A] finding that an inculpatory portion is closely related to an against-interest portion will not itself warrant ... admissibility. Each admitted statement or portion of statements must be found to be against the penal interests of the declarant." Id. (internal quotation marks omitted).
146. See Williamson, 512 U.S. at 600 (noting that "the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability"); Matusky, 343 Md. at 491, 682 A.2d at 706 (explaining that there needs to be "some special indicia of reliability and trustworthiness" for a statement to be admissible).
147. Matusky, 343 Md. at 491, 682 A.2d at 706.
statement. Furthermore, the presence of these factors cannot be determined by simple temporal proximity to statements that are sufficiently against interest to be declared reliable and admissible.  

In the development of the statement against interest exception, as well as in prior examinations of the admissibility of collateral statements, no court has issued an airtight declaration that all collateral statements are admissible. Collateral statements have never been admitted freely or without scrutiny. In fact, reliability and trustworthiness have been adamantly required of collateral statements.

It is ironic that, with respect to the threshold requirements of reliability and trustworthiness for admission of declarations against interest, Standifur and Williamson are alike. Both opinions declared that reliability is to be determined by careful consideration of all known facts and circumstances. Both opinions also establish that matter that is self-serving must be excluded. Lastly, both opinions rely on the objective "reasonable person" test to determine whether the declarant's statement was indeed against interest, and whether she appreciated its self-inculpatory nature. Yet, the results of the two cases are markedly different: While Standifur allows the admission of collateral statements, Williamson does not.

In his concurring opinion in Williamson, Justice Kennedy identified three sources that demonstrate that Federal Rule of Evidence 804(b)(3), upon which the Maryland Rule of Evidence is based, allows the admission of certain collateral statements. First, the Advisory Committee's Note to Federal Rule of Evidence 804(b)(3) indicates that collateral statements should be admissible. The Advisory Committee's Note explicitly states, "Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include state-

148. See id. at 495, 682 A.2d at 707 (Rodowsky, J., dissenting) ("Proximity is not the test for admissibility under Standifur. . . .")
149. See supra note 74 (quoting the Standifur test for admissibility of collateral statements, which emphasizes reliability and trustworthiness). Collateral statements, too, could be approached with the reasonable person test and pass. If a reasonable man would consider an entire declaration to be against interest, would not this include the collateral statements contained within the declaration?
150. Matusky, 343 Md. at 493-94, 682 A.2d at 707 (Rodowsky, J., dissenting).
151. Id. at 494, 682 A.2d at 707.
152. Id.
153. See supra text accompanying notes 74 and 85.
154. See supra note 83 and accompanying text.
156. Id. (quoting Fed. R. Evid. 804(b)(3) advisory committee's note).
ments implicating him, and under the general theory of declarations against interest they would be admissible as related statements.”

If the text of the rule itself does not make clear whether collateral statements are admissible, the Advisory Committee’s Note is the next logical place to turn for guidance. The majority in Williamson believed that the Advisory Committee’s Note to Federal Rule of Evidence 804(b)(3) provided no guidance. However, the language of the Advisory Committee’s Note directly addresses the factual situation of Williamson, as well as Matusky: the declarant’s confession included statements implicating the accused. The Advisory Committee’s Note is unambiguous in concluding that those portions implicating the accused, “under the general theory of declarations against interest,” should be admissible as related statements.

The second source Justice Kennedy cited as support for the admissibility of collateral statements was the common law application of the exception. Justice Kennedy noted, “Absent contrary indications, we can presume that Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law.” According to common law tradition, “[f]rom the very beginning of [the statement against interest] exception, it has been held that a declaration against interest is admissible, not only to prove the dissembling fact stated, but also to prove other facts contained in collateral statements connected with the dissembling statement.” There is no indication that Congress intended to bury the common law rule when it enacted Federal Rule of Evidence 804(b)(3). Therefore, the common law remains a guiding force in the interpretatio-

157. Fed. R. Evid. 804(b)(3) advisory committee’s note. But see Williamson, 512 U.S. at 602 (reasoning that “the policy expressed in the Rule’s text points clearly enough in one direction that it outweighs whatever force the Notes may have”).
158. See Williamson, 512 U.S. at 614 (Kennedy, J., concurring in the judgment) (“When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee’s Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee’s Note.”).
159. See Williamson, 512 U.S. at 602 (explaining that the language of the Advisory Committee’s Note “is not particularly clear”).
160. See supra text accompanying notes 10-11 (detailing the declarations at issue in Matusky); supra note 85 (describing the declarations at issue in Williamson).
161. Fed. R. Evid. 804(b)(3) advisory committee’s note.
163. Id. at 615.
164. Id. (quoting Jefferson, supra note 33, at 57).
165. Id. (noting that “Congress legislated against the common-law background allowing admission of some collateral statements, and I would not assume that Congress gave the common-law rule a silent burial in Rule 804(b)(3)”.

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tion and application of the statement against interest exception in Maryland.

Justice Kennedy further argued that Rule 804(b)(3) must allow the admission of some collateral statements because, if not, almost all incriminatory statements sought to be admitted would be excluded.\textsuperscript{166} Assuming arguendo that Rule 804(b)(3) did not allow collateral statements: Would Congress enact a statute with virtually no practical use?\textsuperscript{167} Justice Kennedy explained:

[I]t is likely to be the rare case where the precise self-inculpatory words of the declarant, without more, also incriminate the defendant. I would not presume that Congress intended the penal interest exception to the Rule to have so little effect with respect to statements that incriminate the accused.\textsuperscript{168}

Establishing a bright-line rule excluding all collateral statements, no matter what their role was in the particular declaration in question, would certainly result in an "arbitrary rejection of valuable evidence."\textsuperscript{169} In the case at hand, for example, excluding the statements implicating Matusky and giving his motives for the murders would greatly diminish the State's case. The only other evidence against Matusky was a bloody shoeprint found at the crime scene that was consistent with the size and style of a pair of shoes belonging to Matusky.\textsuperscript{170} Although the sufficiency of the evidence against the defendant should not be one of the considerations in determining the admissibility of a statement against interest, the evidentiary purpose of the exception should not be disregarded if the collateral statements include the same indicia of reliability as the self-inculpatory portions of the declaration.

The statement against interest exception to the hearsay rule "provide[s] for the admission of certain hearsay statements that display indicia of reliability sufficient to overcome the normal dangers of admitting hearsay evidence."\textsuperscript{171} The two main cases relied upon by the Matusky court, Williamson and Standifur, have reiterated this purpose.\textsuperscript{172} So the question remains why, in light of that purpose, collat-

\textsuperscript{166} Id. at 616 (quoting Bergeisen, supra note 122, at 1207).
\textsuperscript{167} See id. at 614 (noting "the general presumption that Congress does not enact statutes that have almost no effect").
\textsuperscript{168} Id. at 617.
\textsuperscript{169} Id. (quoting Hack, supra note 31, at 166).
\textsuperscript{170} Matusky, 343 Md. at 475, 682 A.2d at 697.
\textsuperscript{171} Hack, supra note 31, at 148.
\textsuperscript{172} See Williamson, 512 U.S. at 598 (noting that hearsay exceptions exist for certain out-of-court statements that are less subject to the hazards of unreliability); State v. Standifur, 310 Md. 3, 17, 526 A.2d 955, 962 (1987) (explaining that a statement should be examined
eral statements with sufficient "indicia of reliability" may not enjoy admission as well as truly self-inculpatory statements.

The admissibility of collateral statements also brings up the issue of whether the declaration against interest exception was meant to implicate a set of rules for the declaration as a whole to be admissible, or whether those rules were to be required of each separate statement within the proffered declaration. The word "statement" as applied in the statement against interest exception must be defined before any determination can be made as to whether a statement should be parsed. In Williamson, the Court examined this very issue. Defining statement as "a report or narrative" versus "a single declaration or remark" results in two very different views of the statements against interest exception. If the term "statement" is considered a report, the exception would seem to apply to the entire proffered declaration, including those portions not directly self-inculpatory. On the other hand, if the term is considered to encompass simply a single remark, then parsing a declaration for specific self-inculpatory parts and admitting only those makes sense in keeping with the principle behind the "statements" against interest exception.

In Matusky, defining the term "statement" as either an extended declaration or a single remark should yield the same result: the admissibility of the identification of Matusky and his motive for the murders as told to Marchewka by White. Judge Rodowsky explained, in his dissent, that these portions "are important, integrated parts of White's declaration against penal interest." The subsequent incriminating portions of the conversation between White and Matusky would not be incriminating but for the portions that the majority of the court would consider non-self-incriminating. While a
statement does not necessarily require reading in the entirety in order to make sense, collateral portions not directly self-inculpatory would provide the context necessary in order to appreciate the inculpatory nature of the whole.

In Williamson, Justice O'Connor, writing for the majority, took the perspective that the connection between those remarks that are truly self-inculpatory and those that are not should be viewed with a suspicious eye. Justice O'Connor stated in plain language, "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." "One of the most effective ways to lie," Justice O'Connor acknowledged, "is to mix falsehood with truth . . . ." This is the reason, however, that the statement against interest exception has required an inquiry into the totality of circumstances surrounding the making of the declaration, as well as the intricacies of the declaration itself.

The collateral statements at issue in Matusky are critical to White's declaration against interest. In dissent, Judge Rodowsky illustrated an effective way to test whether the statements deemed collateral and inadmissible were actually integral parts of White's declaration against interest:

In that analytical framework a prosecutor would be seeking to convict White of being a principal in the second degree to murder based on White's admission as a party opponent that White met someone in a bar whom White did not know, that that person said that he wanted to murder Trudy and Pam [Poffel] for reasons that were not expressed, and that White...[derer that appears at the beginning of White's conversation with Marchewka. . . .]

If White's conversation with Marchewka had stopped at that point, the conclusory statement would not be admissible because White had not yet made any declarations against penal interest. Later incriminating portions of the conversation support the conclusion expressed earlier.

Id. 180. Williamson, 512 U.S. at 599.

181. Id. Justice O'Connor also explained, "[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." Id. at 600; see also Jefferson, supra note 33, at 62 (explaining that "the presence of the declaration against interest does not add to the trustworthiness of neutral and self-serving statements").

182. Williamson, 512 U.S. at 599-600.

183. Matusky, 343 Md. at 496, 682 A.2d at 708 (Rodowsky, J., dissenting).
drove the stranger to the [Poffel] home in the stranger's car.\textsuperscript{184}

Dismissing the collateral statements from the declaration takes away its inherently incriminating aspect.\textsuperscript{185} When a self-inculpatory "statement is made under circumstances fairly indicating the declarant's sincerity and accuracy," the entire statement should be admitted.\textsuperscript{186}

In fact, frequently the portion of a declaration that is self-inculpatory to the declarant, if considered by itself, has no relevance to any issue in the case against the defendant.\textsuperscript{187} For example, in \textit{Matusky}, the fact that White listened as some person explained his motive for killing the Poffels, and then drove this person to the Poffels' home and waited in the car, would have no relevance to the case against Matusky if Matusky were not the unidentified person.

5. \textit{Conclusion}.—The Court of Appeals greatly altered the statement against interest exception to the hearsay rule as applied in Maryland trial courts. In \textit{State v. Matusky}, the court made clear that the Supreme Court's interpretation of the corresponding Federal Rule of Evidence weighed heavily in the court's decision. The court also held that non-self-inculpatory statements contained within a declaration against interest are no longer admissible, regardless of their indicia of trustworthiness and reliability. Such a decision evades the original rationale behind the statement against interest exception—that such statements were inherently reliable because a person would not make such a declaration unless he believed it to be true. The non-self-inculpatory portions of a broad self-inculpatory declaration still may enjoy the requisite indications of trustworthiness. However, the \textit{Matusky} court's decision does not allow the leeway necessary to ensure the admissibility of valuable evidence that may fall within the narrow category of "collateral" statements.

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\begin{enumerate}
\item \textsuperscript{184} \textit{Id.} at 497, 682 A.2d at 708. As Judge Rodowsky so eloquently noted, "[t]o a reasonable person, the expurgated version sounds more like the statement of a mentally disturbed individual than a declaration against penal interest." \textit{Id.}, 682 A.2d at 708-09.
\item \textsuperscript{185} \textit{Cf.} \textit{Jefferson, supra} note 33, at 62 (arguing that if collateral statements were made inadmissible, this "would get around the familiar doctrine that the confession of a co-defendant is not admissible against the other defendant").
\item \textsuperscript{186} \textit{Williamson}, 512 U.S. at 612 (Kennedy, J., concurring in the judgment) (quoting 5 \textit{Wigmore, supra} note 66, § 1465, at 271).
\item \textsuperscript{187} \textit{See} \textit{Jefferson, supra} note 33, at 57.
\end{enumerate}
B. Closing the Door on the Residual Hearsay Exception

In State v. Walker, the Court of Appeals addressed, for the first time, the application of the residual hearsay exception under the newly codified Maryland Rules of Evidence. The court held that the trial court had erred in admitting out-of-court statements by the defendant's wife under the residual exception because there were no exceptional circumstances to justify admission. The majority failed, however, to offer any clear guidance as to what factors a trial court should consider in determining whether exceptional circumstances exist to merit application of the residual hearsay exception. In failing to provide such guidance, the Court of Appeals has likely made the standard for exceptional circumstances unattainable, and in so doing, has effectively closed the door on Maryland's residual hearsay exception.

1. The Case.—On June 10, 1994, Jose Iraheta, a Hispanic male, was accosted while riding his bicycle along Twinbrook Parkway in Montgomery County, Maryland. The assailant, a black male wearing a green, hooded shirt with the hood pulled tightly over his head, pushed Iraheta down and robbed him of sixty dollars at knife-point. The victim reported the robbery to the police but told the officers that he was not able to see the face of the assailant.

On June 11, 1994, Robin Hammond (Ms. Walker) and Larry Walker walked down Twinbrook Parkway in the same area where the Iraheta robbery occurred. A police car passed them, and Mr. Walker attempted to hide his face. When Ms. Walker questioned him about his behavior, the respondent told her that he had robbed a Hispanic man of sixty dollars the night before in the same area. The next day, while in the company of Ms. Walker, the respondent retrieved the

1. 345 Md. 293, 691 A.2d 1341 (1997).
2. Id. at 318-20, 691 A.2d at 1353-54.
3. Id. at 330, 691 A.2d at 1359.
4. See id. at 346-47, 691 A.2d at 1367 (Chasanow, J., dissenting) (“If the same unattainable standard for ‘exceptional circumstances’ [is used in future cases] . . . , then Maryland has no residual exceptions.”).
5. Walker, 345 Md. at 296, 691 A.2d at 1342.
6. Id.
8. Walker, 345 Md. at 296, 691 A.2d at 1342. Robin Hammond later became Robin Walker, Larry's wife, id. at 297, 691 A.2d at 1343, and will be referred to as Ms. Walker hereinafter.
9. Id. at 296, 691 A.2d at 1342.
10. Id.
hooded green sweatshirt that he said he had been wearing during the robbery and threw it into a dumpster.\textsuperscript{11}

Between June 11 and 15, 1994, Ms. Walker contacted the police and relayed Mr. Walker's confession to two different detectives.\textsuperscript{12} Ms. Walker told the detectives that the respondent was the father of her children and that she and Mr. Walker had lived together "intermittently" since 1989.\textsuperscript{13} However, in March 1994, Ms. Walker had moved out of the residence they shared because she believed that Mr. Walker's drug use "was a bad influence on the kids."\textsuperscript{14}

Five days later, Mr. Walker was arrested for the robbery of Jose Iraheta on the basis of Ms. Walker's statements.\textsuperscript{15} Before the start of the trial, which was set for January 12, 1995, Ms. Walker told the State's Attorney that she and Mr. Walker had been married on September 1, 1994.\textsuperscript{16} Ms. Walker further informed the State's Attorney that she intended to invoke her spousal privilege\textsuperscript{17} and would not testify against her husband.\textsuperscript{18} The State moved to have Ms. Walker's signed statements admitted.\textsuperscript{19} The respondent objected on the ground that the statements were hearsay and did not fall within any of the exceptions to the hearsay rule.\textsuperscript{20}

Relying on the residual exception to the hearsay rule extant under Rule 5-804(b)(5) of the Maryland Rules of Evidence,\textsuperscript{21} and on

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 296-97, 691 A.2d at 1342. Both detectives reduced her statements to writing, and Ms. Walker eventually signed both versions. Id. at 297, 691 A.2d at 1342.
\textsuperscript{13} Id. at 297, 691 A.2d at 1342.
\textsuperscript{14} Id. (internal quotation marks omitted).
\textsuperscript{15} Walker, 107 Md. App. at 512-15, 668 A.2d at 994-96.
\textsuperscript{16} Walker, 345 Md. at 297, 691 A.2d at 1343.
\textsuperscript{17} Id. In Maryland, a person cannot be compelled to testify as an adverse witness against his or her spouse in a criminal proceeding, except in certain domestic abuse proceedings. See Md. Code Ann., Cts. & Jud. Proc. § 9-106 (Supp. 1997).
\textsuperscript{18} Walker, 345 Md. at 297, 691 A.2d at 1343.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 297-98, 691 A.2d at 1343. At the hearing, defense counsel stated that it was his "understanding that Ms. Walker made her statement to the police 'because she wanted [respondent] to get some help for his drug problem.'" Id. at 297, 691 A.2d at 1343 (alteration in original). To this assertion the prosecutor replied, "'I believe that is accurate.'" Id. The court noted that there was "nothing in the record to indicate why Ms. Walker made the statements." Id. at 297 n.2, 691 A.2d at 1343 n.2.
\textsuperscript{21} Maryland's residual hearsay exception provides that:

Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes
the res gestae exception applied in *Metz v. State*, the trial court allowed the statements to be admitted against Mr. Walker. In applying the residual exception, the trial court found that Ms. Walker was unavailable because she exercised her privilege not to testify against her husband:

The court concluded that . . . the situation was "unique." It held that the statements were being offered as evidence of a material fact and that they were more probative of that fact than any other evidence that the State was able to procure through reasonable efforts. . . . It further found that the general purpose of the rules and the interest of justice would best be served by admission of the statements and that the statements appeared to be reliable.

The court also held that, alternatively, *Metz* could be relied upon to support the admission of a non-testifying spouse's out-of-court statements against a hearsay objection. Mr. Walker was convicted of robbery with a deadly weapon and sentenced to fifteen years in prison.

The Court of Special Appeals reviewed de novo all aspects of the trial judge's evidentiary ruling. The appellate court reversed the

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of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Md. R. 5-804(b)(5); see also infra note 57 (comparing the Maryland residual hearsay exceptions to their federal counterparts).

22. 9 Md. App. 15, 262 A.2d 331 (1970). In *Metz v. State*, Mr. Metz had been charged with assaulting his wife. *Id.* at 17, 262 A.2d at 332. Mrs. Metz exercised her spousal privilege and declined to testify against her husband at trial. *Id.* The court allowed the police officer who was called to the scene to testify about what he saw when he arrived and to recount a statement that Mrs. Metz had uttered. *Id.* at 17-18, 262 A.2d at 332-33. On appeal, Mr. Metz argued that his wife's statement should not have been admitted because it was covered by privilege and, alternatively, because it was hearsay. *Id.* at 18, 262 A.2d at 333. The hearsay issue had not been preserved on appeal, but the Court of Special Appeals did express its view, in dicta, that the statement was "part of the res gestae." *Id.* at 19-20, 262 A.2d at 333-34. Res gestae has been used to describe a remark that is made spontaneously or contemporaneously with the transaction to which it relates, thus inherently carrying with it a degree of credibility. See Burkowske v. Church Hosp. Corp., 50 Md. App. 515, 520, 439 A.2d 40, 44 (1982) (discussing the use of the res gestae exception to the hearsay rule), overruled in part by B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 324 Md. 147, 596 A.2d 640 (1991).


24. *Id.*

25. *Id.* at 303, 691 A.2d at 1345.

26. *Id.* at 295, 691 A.2d at 1342.

judgment, stating that the trial court had committed three reversible errors in connection with Ms. Walker's statements to the police. First, the court held that the trial court had erred in admitting the evidence because the trial court had failed to make a clear finding that exceptional circumstances existed. Second, the Court of Special Appeals held that the trial court had failed to consider all of the relevant factors in determining whether the statements to the police possessed circumstantial guarantees of trustworthiness. The trial court was directed, on remand, to make specific findings as to each of the elements in Rule 5-804(b). Third, the appellate court concluded, if those conditions were satisfied, the trial court was then to consider whether the statement would have been admissible under common law—an analysis that the trial court failed to undertake in the initial trial.

The Court of Appeals granted certiorari to consider whether the statements were wrongfully admitted under the residual exception to the hearsay rule.

2. Legal Background.—With the possible exception of a trial by jury, "there is, perhaps, nothing more esteemed in our Anglo-Ameri-
can law of evidence than the rule against hearsay.”  

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” As scholars have noted, “The principal reason to exclude hearsay evidence is to safeguard against unreliable second-hand accusations.” Before there was a rule against hearsay, a person could be tried and convicted by a statement made out of court without being allowed to confront the accuser. This “tale of tale” or “story out of another man’s mouth” was greatly criticized, and the rule prohibiting hearsay was recognized by the end of the seventeenth century. 

Nevertheless, almost immediately after courts started recognizing the rule against hearsay, they also recognized the equally compelling need for exceptions to the rule, because, as was discovered, hearsay exceptions saved time and provided the court with flexibility. These exceptions, however, have developed in a haphazard manner; “a picture of the hearsay rule with its exceptions would resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.” In this area of law, there is the unique combination of stringent application of the rule prohibiting hearsay with liberal application of the exceptions.


35. Md. R. 5-801(c).


37. See Beaver, supra note 34, at 788. The conviction and execution of Sir Walter Raleigh in 1603 for an act of high treason played a large part in the development of the hearsay rule. Id. Raleigh was convicted largely on the evidence of a statement from an alleged fellow conspirator, Lord Cobham, who later recanted his confession. Id.

38. Chasanow & Anderson, supra note 36, at 6. The rule against hearsay facilitates the cross-examination of the accuser. Id. at 7.

39. See id. at 7 (“Some early exceptions included involuntary utterances, regular entries into shopbooks, and dying declarations.” (footnotes omitted)).


41. See Chasanow & Anderson, supra note 36, at 8 (“[E]xceptions to the general rule against hearsay were necessary to provide flexibility to the courts, but the unique combination of harsh applications of the rule and liberal exceptions to the rule [has] created controversy.”).
Developing hearsay exceptions one case at a time caused so many difficulties in judicial proceedings that it was one of the primary reasons for the codification of the rules of evidence in both state and federal courts. As a matter of both federal and state law, hearsay is generally inadmissible unless it falls within one of the exceptions to the hearsay rule.

a. History of the Residual Hearsay Exception in Federal Courts.—The earliest documented case recognizing the concept of a catch-all or residual hearsay exception was G. & C. Merriam Co. v. Syndicate Pub. Co. In G. & C. Merriam, the issue was whether Ogilvie, the compiler of a dictionary, had based his book on Webster’s Dictionary. The only evidence was Ogilvie’s preface to the dictionary, which had been published sixty-three years before the trial. Judge Learned Hand, relying on Wigmore’s then recently published treatise, noted that there occasionally will be forms of hearsay that do not fit within the recognized exceptions but that, nevertheless, “fulfill[] both the requisites of an exception of the hearsay rule, necessity and circumstantial guarant[ees] of trustworthiness.” Because this was the best evidence on the subject and the matter could not be analyzed with any other evidence, Ogilvie’s preface to the dictionary was admitted as evidence.

The true origin of the federal residual hearsay exception, however, is usually traced to the Fifth Circuit’s decision in Dallas County v. Commercial Union Assurance Co. In that case, a clock tower on top of the Dallas County Courthouse had collapsed and fallen through the roof, causing severe damage. The plaintiff contended that the collapse was caused by a recent lightning strike, which would allow the

42. Id. at 8-9.
43. Id. at 6. “The Supreme Court has recognized dying declarations, prior testimony, business records, public records, excited utterances, statements made seeking medical treatment, and co-conspirator statements as ‘firmly rooted’ exceptions to the hearsay rule.” Id. at 4 n.11.
44. 207 F. 515, 518 (2d Cir. 1913).
45. Id.
46. Id. at 517-18.
48. G. & C. Merriam, 207 F. at 518. Judge Learned Hand continued: “[E]veryone else is dead who ever knew anything about the matter and could intelligently tell us what the fact is. . . . As to the trustworthiness of the testimony, it has the guaranty of the occasion, at which there was no motive for fabrication.” Id.
49. See id. (“Surely the law is not so unreasonable as [not to admit the evidence].”).
50. 286 F.2d 388 (5th Cir. 1961).
51. Id. at 390.
plaintiff to collect on its insurance policy. The defendant insurance company's experts testified that the courthouse had collapsed due to poor design, gradual deterioration, and faulty construction, and that the charring was due to a long-ago fire. The issue in *Dallas County* centered around the admissibility of a newspaper article offered by the insurance company as proof that the courthouse had been damaged by fire in 1901, and not, as the plaintiff contended, by a recent lightning bolt. The trial judge admitted the newspaper article despite plaintiff's objections that it was hearsay and not admissible under any recognized exception to the hearsay doctrine. The court of appeals held that the newspaper article was admissible because it was "necessary and trustworthy, relevant and material, and its admission [was] within the trial judge's exercise of discretion in holding the hearing within reasonable bounds."

The factors detailed in *Dallas County* were used in the creation of what are now the federal residual exceptions to the hearsay rule.

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52. *Id.* Dallas County had insurance coverage for damage caused by fire or lightning, and several residents reported that a bolt of lightning had hit the tower five days earlier. *Id.* There was evidence of charring on top of the tower, but the insurance company alleged that the clock tower collapsed due to faulty design. *Id.*

53. *Id.* To prove this point, the insurance company introduced a copy of the *Morning Times of Selma* from June 1901, which carried an article describing a fire at the courthouse while it was still under construction. *Id.* at 390-91.

54. *Id.* at 391; see also *supra* note 53.

55. *Dallas County,* 286 F.2d at 391. The plaintiff contended that the newspaper article was not a business record nor an ancient document, and therefore did not fall within either of those exceptions to the hearsay rule. *Id.*

56. *Id.* at 398. The court further explained that the article was "more reliable, more trustworthy, [and] more competent evidence than the testimony of a witness called to the stand fifty-eight years later." *Id.* at 397. The court also noted that a local newspaper reporter would be highly unlikely to falsify a story widely known to the community, because by so doing, he would subject himself and the paper to embarrassment. *Id.*

57. *See* Fed. R. Evid. 803(24) (providing a residual hearsay exception if the declarant is available as a witness); Fed. R. Evid. 804(b)(5) (providing a residual hearsay exception if the declarant is unavailable); *see also* Walker, 345 Md. at 314-15, 691 A.2d at 1351 (discussing the history of the codification of the Federal Rules of Evidence). The Senate Judiciary Committee cited *Dallas County* as an example in which "there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness [sic] and necessity could properly be admissible." S. Rep. No. 93-1277, at 19 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7065.

The State of Maryland added the "under exceptional circumstances" requirement to its residual hearsay exceptions. *See* Md. R. 5-803(b)(24); Md. R. 5-804(b)(5). Otherwise, the text of the Maryland Rules is almost identical to that of the Federal Rules. *See* Fed. R. Evid. 803(24); Fed. R. Ev Id. 804(b)(5); Md. R. 5-803(b)(24); Md. R. 5-804(b)(5). Federal Rule 803(24) and Maryland Rule 5-803(b)(24) differ, respectively, from Federal Rule 804(b)(5) and Maryland Rule 5-804(b)(5) only in that the former leave out the requirement that the declarant be "unavailable."
Notably, however, the Senate Judiciary Committee Report accompanying the residual exceptions cautions that these exceptions are intended to "be used very rarely, and only in exceptional circumstances." Despite the cautionary note included with the federal residual hearsay exceptions, the rules have been used liberally by many federal courts.

b. History of the Common Law Residual Hearsay Exceptions in Maryland Courts.—Although Maryland courts never formally embraced the approach intimated in Dallas County, Maryland case law reflects a moderately flexible approach to the application of a residual exception to the hearsay rule. The Court of Appeals has acknowledged that courts are free to create additional hearsay exceptions and are sometimes required to admit hearsay that does not fall within any of the recognized exceptions, but the court has deferred to the legislature for any decisions that would require a liberal exception to the traditional hearsay rules.

58. S. Rep. No. 93-1277, at 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7066. In justifying the residual exception, the Committee stated that "the well recognized exceptions to the hearsay rule[,] may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact." Id. at 7065; see also Beaver, supra note 34, at 792-93 (discussing the creation of the federal residual hearsay exception).

59. See, e.g., United States v. Medico, 557 F.2d 309, 313-17 (2d Cir. 1988) (approving the admission into evidence under Fed. R. Evid. 804(b)(5) of the double hearsay identification of the defendant’s getaway car); Furtado v. Bishop, 604 F.2d 80, 90-91 (1st Cir. 1979) (upholding the trial court’s admission of a lawyer’s affidavit under Fed. R. Evid. 804(b)(5) despite severe questions about the trustworthiness of the affidavit and the lack of the required notice); United States v. Iaconetti, 406 F. Supp. 554, 559-60 (E.D.N.Y.) (upholding a trial court’s admission into evidence of hearsay), aff’d, 540 F.2d 574 (2d Cir. 1976); see also infra note 183 (discussing Medico and Iaconetti).

60. 286 F.2d 388 (5th Cir. 1961). One commentator explained the importance of Dallas County in this way:

The importance of Dallas County is not just that it established a lenient test for admissibility—an analysis of the statement’s necessity and trustworthiness—but also that it represented the outer limits of judicial discretion: a court is empowered to admit otherwise inadmissible hearsay on a case-by-case basis, without resorting to a class exception or creating a new class exception.


61. But cf. Jeffrey E. Greene, Note, Residual Hearsay Exceptions: A New Opening?, 54 Md. L. Rev. 1100, 1100 (1995) ("In a significant change from Maryland’s common law, the newly adopted Maryland Rules of Evidence provide for the admission of hearsay evidence that does not fall within one of the commonly recognized exceptions to the hearsay rule." (emphasis added) (footnote omitted)).

62. See Chasanow & Anderson, supra note 36, at 21-22 (discussing the "healthy reluctance" of Maryland’s appellate courts to create new hearsay exceptions); cf. Cassidy v. State, 74 Md. App. 1, 8, 536 A.2d 666, 669 (1988) ("Maryland, in the common law tradition, is more rigorous and orthodox in its approach to hearsay exceptions.")
In *Foster v. State*, the Court of Appeals reversed a trial judge for his failure to admit hearsay evidence that did not fall under any of Maryland's common law exceptions to the rule against hearsay. The Court of Appeals held that the testimony had to be admitted because the excluded testimony was necessary to the accused's defense and had sufficient indicia of reliability. In a concurring opinion, Judge Eldridge stated that the constitutional question should never have been reached; instead, the testimony should have been admissible as a matter of state evidence law. Judge Eldridge cited *G. & C. Merriam* and *Dallas County* to support his contention that hearsay evidence, even if it does not fall within one of the recognized exceptions, may be admitted if "it meets the requirements of necessity and reliability."

In *Brown v. State*, the Court of Appeals appeared to expand the application of the residual hearsay exception. *Brown* involved a probation revocation hearing in which the defendant contended that the evidence against him was inadmissible hearsay and "contravened his due process right to confront witnesses against him." Due to the constitutional challenge, the Court of Appeals performed a multi-level analysis, in which it concluded that the proffered hearsay was so vital

63. 297 Md. 191, 464 A.2d 986 (1983). Respondent Foster, on trial for the murder of a motel manager, tried to show that her husband could have committed the crime. *Id.* at 195-96, 464 A.2d at 988-89. The husband admitted to having several confrontations with the victim, but he denied verbally threatening her. *Id.* at 199-200, 464 A.2d at 991. To impeach her husband's testimony, the respondent called a friend of the victim who testified that Foster's husband had recently threatened to kill the victim. *Id.* at 200, 464 A.2d at 991.

64. *Id.* at 210-12, 220, 464 A.2d at 996-97, 1001.

65. *Id.* at 210-12, 464 A.2d at 996-97. The court held that the failure to admit the evidence would deprive the accused of her Fourteenth Amendment right to due process of law. *Id.*

66. *Id.* at 230, 464 A.2d at 1006 (Eldridge, J., concurring). Judge Eldridge was concurring in the court's denial of a motion for reconsideration. *See id.*

67. *See supra* notes 44-49 and accompanying text.

68. *See supra* notes 50-56, 60 and accompanying text.

69. *Foster*, 297 Md. at 231-34, 464 A.2d at 1007-08 (Eldridge, J., concurring). Judge Eldridge did express his reluctance to extend this position to admit any hearsay evidence that is necessary and trustworthy, because Rule 803(24) of the Federal Rules of Evidence had "led to some excesses with which [he] could not agree." *Id.* at 234, 464 A.2d at 1008.

70. 317 Md. 417, 564 A.2d 772 (1989).

71. *Id.* at 419, 564 A.2d at 773. The violation of the condition of Brown's probation was that he allegedly possessed two guns. *Id.* Robin Bruce, the key witness relied upon by the State to prove that a probation violation had occurred, refused to testify against Brown at the revocation hearing despite his having already implicated Brown at Bruce's own sentencing. *Id.* at 419-20, 564 A.2d at 773. The State offered transcripts of the testimony given by Bruce from his trial, and Brown was subsequently found to be in violation of his probation. *Id.* at 420-21, 564 A.2d at 773-74.
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to the issue of guilt that the "indicia of reliability must be substantial to justify its admission when it cannot qualify under any of the firmly established exceptions to the hearsay rule." The court noted that the formal rules of evidence are not applicable in probation revocation hearings. While the Court of Appeals did not expressly adopt the residual hearsay exception, it suggested that hearsay evidence could be admitted if certain criteria were met:

The proposition that hearsay evidence may be sufficiently reliable to justify its admission where necessary to further the cause of justice, even though it does not fall within a recognized exception, is not new. This general principle has now achieved recognition in the Federal Rules of Evidence. The rule that reasonably reliable hearsay evidence may be admitted in probation revocation hearings is a logical extension of that proposition.

The Court of Appeals next addressed the residual hearsay exception in Tyler v. State. The State suggested that the "highly unusual circumstances" of the case called for the application of the residual hearsay exception. The Court of Appeals cited Brown to support the

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72. Id. at 426, 564 A.2d at 776.
73. See id. at 421-22, 564 A.2d at 774-75.
74. Id. at 426, 564 A.2d at 776 (citing, among other authoritative sources, G. & C. Merriam and Dallas County for the "combination of necessity and circumstantial guarantees of trustworthiness sufficient to justify admission of hearsay evidence"). The court found that the hearsay evidence against Brown did not possess "sufficient circumstantial guarantees of trustworthiness," and thus was inadmissible. Id. at 427-28, 564 A.2d at 777.
75. 342 Md. 766, 679 A.2d 1127 (1996). Petitioners Jerry Tyler and Gerald Eiland had been charged with murder, tried as co-defendants, and convicted. Id. at 769, 679 A.2d at 1129. The convictions were reversed because of the State's misuse of its peremptory challenges; on remand, Tyler and Eiland had their cases severed. Id. Eiland was tried first, blamed the entire shooting on Tyler, and was acquitted. Id. at 769-70, 679 A.2d at 1129. Tyler took the stand at his second trial and blamed the shooting entirely on Eiland. Id. When Eiland was called to the stand, he refused to testify, and the State sought to admit as evidence the transcript from Eiland's testimony at his own trial. Id. at 771-73, 679 A.2d at 1130-31. After Tyler objected to the evidence as hearsay, the trial judge ruled that it was admissible under the "former testimony" exception to the hearsay rule. Id. at 773, 679 A.2d at 1131. Tyler was later convicted. Id. The Court of Special Appeals upheld the conviction, although it held that the testimony was admissible as a "prior inconsistent statement," and not as former testimony. Id. at 773-75, 679 A.2d at 1131-32. The court acknowledged that it was seeking to "push[ ] out . . . the envelope" in order to prevent these two defendants from making a "laughingstock . . . of the criminal justice system." Tyler v. State, 105 Md. App. 495, 516-17, 660 A.2d 986, 996-97 (1995) (en banc), rev'd, 342 Md. 766, 679 A.2d 1127 (1996).
76. Tyler, 342 Md. at 780, 679 A.2d at 1134.
availability of this exception. Because the State had not preserved this issue for appeal, the Court of Appeals did not need to rule on the possible admissibility of this evidence under the residual exception. The court nonetheless addressed the merits of the claim and stated that the proffered testimony would not be admissible because it did not possess the requisite "guarantees of trustworthiness."

Maryland's Rules of Evidence.—Despite the decision to develop a state code of evidence shortly after the codification of the Federal Rules in 1976, the Maryland Rules of Evidence did not become effective until July 1, 1994. One of the most difficult decisions for the court was whether to adopt some form of the residual hearsay exceptions. The Court of Appeals voted to adopt the residual exceptions, using the federal language, but it placed introductory language in both Rule 5-803(b)(24) and Rule 5-804(b)(5) that stated that the exception should be used "[u]nder exceptional circumstances." In addition, the Maryland Rules Committee included a note to Rule 5-803 that was similar to the Federal Committee Note, stating that the residual exceptions should be "used very rarely, and only in exceptional circumstances."

77. Id. The Court of Appeals also referred to the residual hearsay exceptions that had recently been promulgated as Rules 5-803(b)(24) and 5-804(b)(5) of the Maryland Rules of Evidence. Id.
78. Id. at 780-81, 679 A.2d at 1134.
79. Id. at 781, 679 A.2d at 1134 (citing Md. R. 5-803(b)(24); Md. R. 5-804(b)(5)).
80. See Chasanow & Anderson, supra note 36, at 21-23 (discussing the development of the Maryland Rules of Evidence). In 1976, the Maryland Rules Committee was formed by the Court of Appeals to begin work on developing a code of evidence. Id. at 23. However, the court decided not to proceed with the project until 1988, when approximately 35 states had already codified rules of evidence. Walker, 345 Md. at 317, 691 A.2d at 1352. In December 1993, the Court of Appeals voted to adopt the proposed codification of the rules. See Chasanow & Anderson, supra note 36, at 23.
82. See Greene, supra note 61, at 1102 (discussing the history of the Maryland Rules of Evidence). In 1993, the Evidence Subcommittee of the Maryland Rules Committee recommended not including the residual exceptions in the Maryland Rules of Evidence. Id. The full Committee was evenly divided when a motion to reject the Subcommittee's recommendation to exclude the residual exceptions was made. Id.
83. Id. Maryland Rules 5-803(b)(24) and 5-804(b)(5) are identical except that the latter requires the declarant to be "unavailable." See supra note 57 (comparing the Maryland residual hearsay exceptions with their federal counterparts).
84. The Committee Note for Rule 5-803 states: The residual exceptions provided by Rule 5-803(b)(24) and Rule 5-804(b)(5) do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.
The Court's Reasoning.—The Court of Appeals began its analysis in *Walker* by dismissing the trial court's reliance on *Metz*, and reiterating that the res gestae exception to the hearsay rule is no longer part of Maryland's law of evidence. The court denied the existence of a common law residual exception to the hearsay rule. It stated that although, prior to 1994, "on rare occasion" the court had allowed "hearsay statements that did not fall within any of the recognized categorical exceptions to be admitted, [it] had never formally or directly recognized a general residual exception to the hearsay rule, much less defined the scope or contour of such an exception."

The court discussed *Foster*, *Brown*, and *Tyler* in detail to refute the State's contention that it had recognized a residual exception equivalent in scope to Rule 5-804(b)(5). The court emphasized that it was not without the authority to craft new exceptions to the hearsay rule, but simply had not done so before the adoption of the Rules of Evidence. The court also stated that although it had "in a few opin-

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It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule. Md. R. 5-803 committee note; accord S. Rep. No. 93-1277, at 18-20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7065-66 (discussing the Senate's reasons for adopting the residual hearsay exceptions while cautioning against overuse of the exceptions). The second paragraph in the Committee Note for Maryland Rule 5-803 is identical to one of the paragraphs in the Senate Report.

85. *Walker*, 345 Md. at 303-04, 691 A.2d at 1345-46; see also supra note 22 (discussing *Metz* and the res gestae exception). The court cited both *B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co.*, 324 Md. 147, 596 A.2d 640 (1991), and *Cassidy v. State*, 74 Md. App. 1, 536 A.2d 666 (1988), to support its finding that the Court of Appeals had previously abolished reliance on the res gestae exception. *Walker*, 345 Md. at 304, 691 A.2d at 1346.

86. *Walker*, 345 Md. at 304, 691 A.2d at 1346.

87. Id.

88. See supra notes 63-69 and accompanying text.

89. See supra notes 70-74 and accompanying text.

90. See supra notes 75-79 and accompanying text.

91. *Walker*, 345 Md. at 304-09, 691 A.2d at 1346-49.

92. Id. at 309-10, 691 A.2d at 1349. The court explained:

None of this is to say . . . that the common law of evidence . . . [is] entirely static . . . . The essence of the common law—indeed the heart of its enduring value and majesty—is its flexibility, its potential and allowance for development and growth, and that is as much the case with respect to the law of evidence, and the hearsay rule in particular, as it is in other areas of the law.
ions, cited or discussed [Federal Rules of Evidence] 803(24) and 804(b)(5) and cases such as Dallas County that applied a judicially-fashioned residual exception," it had "not formally embraced them as part of Maryland law."\textsuperscript{93}

After an extensive discussion of the history of both the Federal and Maryland Rules of Evidence,\textsuperscript{94} the Court of Appeals applied Maryland Rule 5-804(b)(5),\textsuperscript{95} and it stated that there are six conditions that must be satisfied for hearsay evidence to be admissible under this rule:

1) the witness must be "unavailable" . . . ;  
2) there must be "exceptional circumstances";  
3) the statement must not be specifically covered by any of the other exceptions;  
4) it must have "equivalent circumstantial guarantees of trustworthiness";  
5) the court must determine that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts, and (iii) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence; and  
6) the proponent of the statement has given the requisite advance notice of its intention to use the statement.\textsuperscript{96}

The Court of Appeals concluded that there was no dispute over the unavailability of the witness, that the statement was not covered by any other exception, and that advance notice had been given.\textsuperscript{97} The respondent had not challenged the trial court's finding that the statement was offered as a material fact, it was more probative on point than any other evidence, and the interests of justice would best be served by admission of the statement into evidence.\textsuperscript{98} The Court of Appeals determined that the central issues in the case were whether

\textsuperscript{93} Id. at 310, 691 A.2d at 1349.  
\textsuperscript{94} Id. at 310-18, 691 A.2d at 1349-53.  
\textsuperscript{95} Id. at 318-30, 691 A.2d at 1353-59.  
\textsuperscript{96} Id. at 318-19, 691 A.2d at 1353-54 (footnote omitted).  
\textsuperscript{97} Id. at 319-20, 691 A.2d at 1354. Ms. Walker was "'unavailable' to the State as a witness; the State never suggested that her statement was specifically covered by any of the categorical exceptions"; and notice was never brought up by the respondent. Id.  
\textsuperscript{98} Id. at 320, 691 A.2d at 1354.
there were "exceptional circumstances" and whether the statement had "equivalent circumstantial guarantees of trustworthiness."\textsuperscript{99}

To address these issues, the court needed to determine what findings, if any, a trial court must make regarding the admission of evidence under the residual exception.\textsuperscript{100} First, the Court of Appeals held that the trial court must be clear about whether it is admitting evidence under the residual exception.\textsuperscript{101} Although the text of Maryland Rule 5-804(b)(5) only requires the trial court to find (1) whether the statement is being offered as evidence of a material fact, (2) whether the statement is more probative on point than any other evidence, and (3) whether the general purposes of the rules of evidence and the interests of justice will best be served by admitting the evidence, the Court of Appeals determined that "it is incumbent on the trial court to make a specific finding, on the record, as to each [of the six] conditional element[s]."\textsuperscript{102} The Court of Appeals determined that the trial court did not, however, need to explain on the record how it arrived at each of the findings.\textsuperscript{103}

Second, the Court of Appeals turned to the appropriate standard of review.\textsuperscript{104} The court stated that rulings concerning the admissibility of evidence often involve discretion on the part of the trial court and that, ordinarily, such rulings will not be disturbed on appeal.\textsuperscript{105} However, the Court of Appeals stated that it was unwilling "to accord the same broad discretion to the ultimate decision to admit evidence under the residual exception."\textsuperscript{106} The Court of Appeals held that some trial court determinations—i.e., factual and discretionary deter-

\textsuperscript{99} Id. The court also stated that implicit in these two issues was the question "whether the court erred in concluding that the general purpose of the rules and the interests of justice would best be served by admission of Ms. Walker's statement." Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 321, 691 A.2d at 1354.

\textsuperscript{102} Id., 691 A.2d at 1355. The Court of Appeals stated that "the trial court [had] considered [each of] the six conditions and found that each was satisfied." Id. at 322, 691 A.2d at 1355; see also supra text accompanying note 96 (setting forth these six elements).

\textsuperscript{103} Walker, 345 Md. at 322, 691 A.2d at 1355. The Court of Special Appeals, in its analysis of this case, expressed as its principal concern that the trial court must explain how it arrived at each of the conditions. Id. The Court of Appeals acknowledged that there is some authority for the proposition that the trial courts must make these explanations, but noted that "failure to do so [does not] necessarily require[ ] remand or reversal." Id. If the record is insufficient to allow the appellate court to undertake an effective review, then a lack of explanation by the trial court may cause a reversal. Id. at 324, 691 A.2d at 1356.

\textsuperscript{104} Id. at 324, 691 A.2d at 1356.

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 324-25, 691 A.2d at 1356. The Court of Appeals explained its intent in adopting Maryland Rules 5-803(b)(24) and 5-804(b)(5): "We desired that the development of new hearsay exceptions be tightly controlled by us, and that is not feasible under an abuse of discretion standard of review." Id. at 325, 691 A.2d at 1356.
minations that guide courts in arriving at conclusions of law—will still be subject to a clearly erroneous or abuse of discretion standard, but that the appellate courts will apply a de novo standard of review to the legal conclusion regarding whether the evidence should be admitted under the residual exception.  

Finally, the Court of Appeals reviewed the substantive issues in the case, addressing first whether there were exceptional circumstances. The court stated that it had previously defined "exceptional circumstances" in the accompanying Committee Note as "new and presently unanticipated situations." In the instant case, the court noted that "the only circumstance that has even been suggested as being exceptional . . . is the fact that Ms. Walker married respondent after she spoke to the detectives and then invoked her privilege not to testify against him." The court discussed the spousal immunity privilege, which Ms. Walker invoked to prevent the State from compelling her to testify, and determined that the exercise of a privilege based on "legislatively declared public policy" cannot constitute an exceptional circumstance. Having found no exceptional circumstances to support the admission of Ms. Walker's statements, the Court of Appeals refused to consider whether the statement possessed equivalent guarantees of trustworthiness. Therefore, it affirmed the judgment of the Court of Special Appeals.

107. Id. at 325, 691 A.2d at 1356. If the subsidiary findings made by a trial court are "purely factual or discretionary," then the less stringent clearly erroneous standard of review will be applied to these findings. Id.

108. Id. This is the second requirement that must be met. See supra text accompanying note 96. The first requirement, that the defendant be unavailable, was met because Ms. Walker invoked her spousal immunity privilege and would not testify against her husband. See supra notes 17-18 and accompanying text.

109. Walker, 345 Md. at 325, 691 A.2d at 1357 (quoting Md. R. 5-803 committee note); accord supra note 84 and accompanying text (providing the language of the committee note).

110. Walker, 345 Md. at 326-27, 691 A.2d at 1357.

111. Id. at 327-30, 691 A.2d at 1358-59 (referencing Md. CODE ANN., CTS. & JUD. PROC. § 9-106 (Supp. 1997)). With few exceptions, the referenced statute excludes a person from being compelled to testify as an adverse witness against her spouse in a criminal proceeding. See Md. CODE ANN., CTS. & JUD. PROC. § 9-106; accord Walker, 345 Md. at 327, 691 A.2d at 1357.

112. Walker, 345 Md. at 329, 691 A.2d at 1359 ("We fail to see how the exercise of a privilege based on legislatively declared public policy that predated the rule by nearly 30 years can constitute such an exceptional circumstance. There is nothing 'unique' or exceptional about a spouse invoking his or her statutory privilege.").

113. Id. at 330, 691 A.2d at 1359.

114. Id.
4. Analysis.—Within the development of the Maryland common law, the Court of Appeals had always been wary of allowing trial courts to admit evidence under the residual hearsay exception,115 and the Walker court made it clear that it had never formally recognized a catch-all exception to the rule against hearsay.116 Because the residual exception appears in the adopted Maryland Rules of Evidence, it would seem that the Court of Appeals opened the door to evidence which would have been ruled inadmissible at common law.117 However, in its first opportunity to address the applicability of the exception, the Court of Appeals appears to have slammed the door shut, even though this case presented a “textbook example of the kind of hearsay evidence that should be admitted.”118

The Court of Appeals desired a “carefully limited residual exception,”119 because it did not approve of the “expansive manner in which some federal courts had been construing the residual exception.”120 To accomplish this, while drafting the rule providing for a residual hearsay exception,121 the court included the exceptional circumstances122 requirement along with an “extensive” committee note,123 “leav[ing] no doubt that the Maryland residual exceptions are more restrictive than their federal counterparts.”124 In Walker, the Court of Appeals appears to have chosen this exceptional circumstances requirement as the means by which it will retain tight control over the use of the residual hearsay exception in an effort to achieve uniformity and predictability in the exception’s application.

By choosing to retain tight control over the development and implementation of the residual hearsay exception, the Court of Appeals has strayed from the original purpose of the residual exception detailed in Dallas County, which is to allow evidence to be admitted if it is necessary and trustworthy.125 The Court of Appeals should examine the circumstances that collectively allow a statement to meet the requisites of the residual hearsay exception, rather than analyze each of the

115. See supra notes 60-62 and accompanying text.
116. See supra notes 86-93 and accompanying text.
117. See Greene, supra note 61, at 1113 (“While it is unlikely that the exceptions will be used on any regular basis, there is the potential to open the door to evidence previously inadmissible.”).
118. Walker, 345 Md. at 331, 691 A.2d at 1359 (Chasanow, J., dissenting).
119. Walker, 345 Md. at 318, 691 A.2d at 1353.
120. Id. at 317, 691 A.2d at 1352.
121. Md. R. 5-803(b) (24); Md. R. 5-804(b) (5).
122. See Md. R. 5-803(b) (24); Md. R. 5-804(b) (5).
123. See Md. R. 5-803(b) (24) committee note.
125. See supra notes 50-56 and accompanying text.
elements independently. Moreover, trial courts would best be served if, rather than using the exceptional circumstances requirement, the Court of Appeals used some of the tools already in place to achieve its goal of uniformity and predictability in the application of the residual hearsay exception.

a. By Applying the “Exceptional Circumstances” Requirement Stringently, the Court of Appeals Has Strayed from the Original Intent of the Residual Exceptions.—The Court of Appeals held that there were no exceptional circumstances surrounding the hearsay statements offered into evidence in Walker, and thus the court affirmed the Court of Special Appeals’s reversal of the trial court on the ground that the statements did not fall within the residual exception. In its analysis, the Court of Appeals’s majority did not explain “what could constitute exceptional circumstances or even what factors should be used to determine exceptional circumstances.” Judge Wilner, writing for the court, conceded that the Court of Appeals was unable to indicate what would constitute such circumstances, as it did not possess a “crystal ball”—i.e., it was unable to foretell which of an infinite number of possible scenarios (or salient characteristics thereof) should bear on an exceptional circumstances analysis. Instead, the majority opinion offered a vague definition: “those rare situations that were not anticipated” when the rules were adopted. This definition offers absolutely no guidance to trial courts in the application of this rule, except to suggest strongly that evidence is not going to be admitted under the residual exception.

The majority offered only one hint in its opinion that it might have ruled that this case presented exceptional circumstances: “Lurking here, perhaps, is some discomfort with the fact that respondent and Ms. Walker married after she made her statement but before trial.” Because the State did not contend that the marriage was a sham arranged solely to preclude Ms. Walker from testifying, the Court of Appeals did not have to address this issue. In dicta, the

126. See infra notes 144-156 and accompanying text.
127. See infra notes 157-187 and accompanying text.
128. Walker, 345 Md. at 330, 691 A.2d at 1359.
129. Id. at 340, 691 A.2d at 1364 (Chasanow, J., dissenting).
130. Walker, 345 Md. at 326, 691 A.2d at 1357.
131. Id.
132. See id. at 340, 691 A.2d at 1364 (Chasanow, J., dissenting) (“Surely the kind of exceptional circumstances envisioned by the majority are not things like the hearsay declarant had natural green hair and spoke fifteen languages.”).
133. Walker, 345 Md. at 329-30, 691 A.2d at 1359.
134. Id. at 330, 691 A.2d at 1359.
court stated that a sham marriage "could arguably constitute an exceptional circumstance."

Despite the dissent's contention that Walker presented "a textbook example of the kind of hearsay evidence that should be admitted," by prefacing its analysis with "arguably," the Court of Appeals seemed to shy away from explicitly stating that even a sham marriage would constitute exceptional circumstances.

In its unwavering effort to retain tight control over the use of the residual exception, the Court of Appeals appeared to forget, or perhaps disregard, the true purpose of the residual exception. If the exception were applied in the manner in which it was originally developed (i.e., as Judge Learned Hand applied it in G. & C. Merriam and as the Fifth Circuit applied it in Dallas County), Ms. Walker's statements would be admitted because her statements "fulfill[] both the requisites of an exception of the hearsay rule, necessity and circumstantial guaranty of trustworthiness."

Dissenting in Walker, Judge Chasanow explained:

Occasionally there are forms of hearsay that do not fit within the codified hearsay exceptions or pigeonholes but that should be admitted in the interests of justice and because the hearsay has at least the same circumstantial guarantees of trustworthiness and the same necessity inherent in the codified exceptions. In these exceptional circumstances, we compare the proffered hearsay to the reasons for creating a hearsay exception . . . .

Applying Maryland common law, the Court of Appeals previously acknowledged the validity of this reasoning in Foster, Brown, and Tyler. Now that the residual exception has formally been codified, the Court of Appeals appears to forget the origin of, and the reason for, the exception. Admittedly, the Court of Appeals intended to limit the use of the exception, but the underlying reason for having any residual exception is based on the reasoning espoused in G. & C. Merriam and Dallas County.

135. Id.
136. Id. at 331, 691 A.2d at 1359 (Chasanow, J., dissenting).
137. G. & C. Merriam Co. v. Syndicate Pub. Co., 207 F. 515, 518 (2d Cir. 1913); see also supra notes 44-49 and accompanying text.
138. Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); see also supra notes 50-56 and accompanying text.
139. G. & C. Merriam, 207 F. at 518.
140. Walker, 345 Md. at 340-41, 691 A.2d at 1364 (Chasanow, J., dissenting).
141. See supra notes 63-79 and accompanying text.
142. See supra notes 119-124 and accompanying text.
143. See supra notes 137-140 and accompanying text.
b. Application of the Residual Hearsay Exception in Walker.— The majority divided the rule into six different factors that had to be met in order for evidence to be admitted under the residual exception.\textsuperscript{144} Rather than analyzing each of these elements independently, the court should have looked at “[t]he circumstances that, collectively, ma[d]e Ms. Walker’s hearsay statements exceptional, trustworthy, and deserving of admission.”\textsuperscript{145} Exceptional circumstances should not necessarily constitute a separate requirement, but can be found expressly in the rest of the rule. The exceptional circumstance in the instant case is that Ms. Walker’s statements do not fall under any of the exceptions; yet, they still satisfy the necessity and trustworthiness requirements.

There are several circumstances that indicate that this hearsay was both necessary and trustworthy. First, Ms. Walker indicated that she gave the statements to the police because she wanted Mr. Walker to “get some help for his drug problem.”\textsuperscript{146} Ms. Walker initiated the interview with the police; this supports the spontaneity of her statements.\textsuperscript{147} The extensive details of Ms. Walker’s statement indicate that she must have talked to the robber or to the victim. Because the victim did not speak English, Ms. Walker clearly must have talked to the robber.\textsuperscript{148} In addition, the interview was in her parents’ home, in

\begin{itemize}
  \item See \textit{supra} note 96 and accompanying text.
  \item \textit{Walker}, 345 Md. at 343, 691 A.2d at 1365 (Chasanow, J., dissenting) (emphasis added). Judge Chasanow listed five circumstances that made Ms. Walker’s hearsay statements both exceptional and trustworthy:
    \begin{enumerate}
      \item Ms. Walker’s motives were to get help for her husband’s drug problem, inspiring her to tell the truth to the police.
      \item Ms. Walker most likely knew that a false statement to the police could have resulted in her imprisonment.
      \item If she lied, this would have been revealed once the victim told the police that Mr. Walker was not the robber.
      \item Ms. Walker related extensive details of the robbery, conclusively indicating that she must have talked to the robber or the victim. Because the victim did not speak English, she could not have talked to him. Therefore, because the robber was a male (i.e., not Ms. Walker herself), the only possibility is that the robber confessed, in great detail, to Ms. Walker.
      \item Mr. Walker could have called his wife to the stand to refute the statements if the police had inaccurately recorded them.
    \end{enumerate}
  \item \textit{Id.} at 343-344, 691 A.2d at 1365-66.
  \item \textit{Walker}, 345 Md. at 297, 691 A.2d at 1343; see also \textit{supra} note 20 and accompanying text.
  \item \textit{Walker}, 107 Md. App. at 530-31, 668 A.2d at 1004.
  \item See \textit{supra} note 145.
\end{itemize}
a non-hostile environment, and Ms. Walker had no reason to lie to the police because she was not a suspect in the case.\(^{149}\)

The Court of Appeals expressed concern that the federal courts' broad application of the residual exceptions would threaten to swallow the rule against hearsay.\(^{150}\) While federal courts may have gone too far in their expansive use of the exception, the Court of Appeals seems adamant about going just as far the other way in its restriction of the use of the residual exception. In the interests of justice, the Court of Appeals should settle somewhere in the middle and apply the residual exceptions as they were originally articulated in *G. & C. Merriam*\(^{151}\) and *Dallas County*.\(^{152}\) If this approach were used, Ms. Walker's statements would be admitted in the interests of justice, because the statements were both necessary for Mr. Walker's prosecution and trustworthy to the extent that they contained circumstantial guarantees.

The admission of Ms. Walker's statement would also satisfy the residual exception's requirement that the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence.\(^{153}\) Although Ms. Walker is statutorily protected from having to testify against her husband,\(^{154}\) admitting into

\(^{149}\) *Walker*, 107 Md. App. at 531, 668 A.2d at 1004. The Court of Appeals did not consider the trustworthiness or necessity of Ms. Walker's statements because it had concluded that the exceptional circumstances requirement had not been met. *Walker*, 345 Md. at 330, 691 A.2d at 1359. However, the Court of Special Appeals did point out some facts that called into question the trustworthiness of Ms. Walker's statements: She waited four days before calling the police; there may have been other personal reasons why Ms. Walker would want to fabricate a story against her husband; and it is unclear how having Mr. Walker arrested would provide help for his drug problem. *Walker*, 107 Md. App. at 531, 668 A.2d at 1004.

\(^{150}\) The Court of Appeals, "aware of that [federal] experience, expressly chose not to" construe the rule liberally. *Walker*, 345 Md. at 326, 691 A.2d at 1357. One commentator discussed the State of Washington's refusal to adopt the residual exceptions when it codified its rules of evidence: "By refusing to adopt the residual exceptions, Washington State has avoided the dangers that come with the use of such an amorphous exception. The residuals are a "Trojan Horse' that has been set upon the judiciary to wreak havoc and to emasculate the rule against hearsay." Beaver, supra note 34, at 794. But see Rand, supra note 60, at 874 ("Congress's failed attempt to limit judicial discretion in this area should not be lamented, however; if the requirements were interpreted strictly, they would too severely restrain the common-law authority and discretion of trial judges.").

\(^{151}\) *G. & C. Merriam Co.* v. Syndicate Pub. Co., 207 F. 515, 518 (2d Cir. 1913); see also supra notes 44-49 and accompanying text.

\(^{152}\) *Dallas County* v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961); see also supra notes 50-56 and accompanying text.

\(^{153}\) See Md. R. 8-04(b)(5)(C) (requiring that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence").

\(^{154}\) See Md. CODE ANN., CTS. & JUD. PROC. § 9-106 (Supp. 1997); see also supra notes 17, 111 and accompanying text.
evidence her previous statements made to the police would not weaken this privilege. Ms. Walker is only unavailable as a witness to the State.\textsuperscript{155} If her statements were admitted, Mr. Walker would still have the opportunity to cross-examine and impeach her. If the statements were untruthful or not recorded properly, Ms. Walker could have testified and refuted the evidence.\textsuperscript{156} Therefore, the interests of justice would best be served by allowing these statements into evidence.

c. Using the Tools That Are Already in Place.—Although the Court of Appeals may have gone too far in its desire to maintain tight control over the development and application of the new hearsay exceptions, its goal of providing "uniformity and predictability in the admission of [the] residual hearsay exception" is laudable.\textsuperscript{157} The Court of Appeals fears that if the trial courts have too much discretion in applying this standard, "flatly inconsistent decisions" would defeat the goal of a "well-defined jurisprudence."\textsuperscript{158} However, the Court of Appeals appears to have unnecessarily chosen the exceptional circumstances requirement as the vehicle to achieve this goal. Instead, the court could simply rely on some of the tools that are already in place to retain tighter control. Such tools include plenary review, requiring specific findings of fact, and strictly applying some of the other requirements in the rule that would offer trial courts real guidance.

(1) De Novo Review.—Federal appellate courts typically apply an abuse of discretion standard of review for the residual exception,\textsuperscript{159} and they have shown great reluctance in overturning a trial judge's decision.\textsuperscript{160} The Court of Appeals has stated that it is "unwilling . . . to accord the same broad discretion to the ultimate decision to admit evidence under the residual exception."\textsuperscript{161} De novo appellate

\textsuperscript{155} Walker, 345 Md. at 344, 691 A.2d at 1366 (Chasanow, J., dissenting) ("[T]he spouse of a person on trial for a crime may not be compelled to testify as an adverse witness . . . .") (quoting Md. Code Ann., Cts. & Jud. Proc. § 9-106 (1995) (ellipsis in original)).

\textsuperscript{156} Judge Chasanow explained: "If Ms. Walker's hearsay statements were admitted into evidence, Mr. Walker . . . could call her to refute the statements if they were untruthful or inaccurately recorded by the police." Id. at 344, 691 A.2d at 1366.

\textsuperscript{157} Id. at 333, 691 A.2d at 1360.

\textsuperscript{158} Walker, 345 Md. at 325, 691 A.2d at 1356 (internal quotation marks omitted); accord Beaver, supra note 34, at 790-91 ("The [federal] residual hearsay exceptions threaten to swallow the hearsay rule. . . . [C]atchall exceptions weaken the rule against hearsay, and . . . the policy of fostering fair trials is best advanced by excluding the catchall exceptions from the Rules of Evidence." (footnotes omitted)).

\textsuperscript{159} Walker, 345 Md. at 333-34, 691 A.2d at 1361 (Chasanow, J., dissenting).

\textsuperscript{160} Id. at 333, 691 A.2d at 1360.

\textsuperscript{161} Walker, 345 Md. at 324-25, 691 A.2d at 1356.
review allows the heightened appellate scrutiny that the court feels is necessary to prevent inconsistent decisions and promotes the desired "uniformity and predictability" in the trial courts' admission of residual exception hearsay.

Most appellate courts do not consider themselves to be in the business of policing trials for evidentiary errors. This lack of desire to scrutinize trial courts' evidentiary decisions can be even more pronounced in the review of evidence admitted under the residual exception. In the text of the rule, terms such as "circumstantial guarantees of trustworthiness" trigger a deferential standard of review, with appellate courts sometimes using this phrase themselves to justify findings of harmless error at the margins of the exceptions. Many trial judges use the catchall exceptions as a safety valve when tough decisions must be made, knowing that the appellate court will likely uphold the decision under the abuse of discretion standard. Appellate courts have a great deal of difficulty holding that trial judges abuse their discretion, because this can be an indictment of the trial judge's competency and professionalism, and judges do not like to chastise their colleagues.

The Court of Appeals has expressly chosen not to use the abuse of discretion standard, because it recognizes the dangers of using a deferential standard of review. Therefore, it will use the de novo standard to review evidence admitted under the residual exceptions. With this increased level of scrutiny, "there should be little danger that the residual exceptions will be abused or will swallow up

162. Id. at 325, 691 A.2d at 1356.
163. Id. at 333, 691 A.2d at 1360 (Chasanow, J., dissenting). Judge Chasanow agreed with the majority that there is a need for "uniformity and predictability in the admission of [the] residual hearsay exception." Id.
164. Cf. Eleanor Swift, The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?, 76 Minn. L. Rev. 473, 491 & n.52 (1992) (explaining that after judges "creatively apply" the residual exceptions, appellate courts will review the "fact-contingent applications of [the] doctrine with great deference").
165. Id. at 491-92.
166. See Myrna S. Raeder, Commentary, A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?, 76 Minn. L. Rev. 507, 514 (1992) ("The categorical hearsay exceptions currently appear to act as a security blanket; a judge's careful analysis of these hearsay exceptions is often an academic exercise which masks the erosion of the hearsay ban under the guise of the discretionary catchall exceptions.").
167. See id. at 518 ("Finding an abuse of discretion is an indictment of the trial judge's behavior which is absent from an abstract pronouncement that the judge misapplied the law.").
168. See supra notes 104-107 and accompanying text.
169. Walker, 345 Md. at 325, 691 A.2d at 1356.
the general hearsay prohibition." Because trial courts should now be cognizant that appellate courts will be taking a close look at the application of the residual exception, there should no longer be a need for appellate courts to use "exceptional circumstances" to strike down a lower court's ruling. The "exceptional circumstances" requirement is in the text of the rule, but because of its amorphous nature, it should not be the sole determinative factor precluding evidence from being admitted. The court should look at factors that collectively make statements admissible under the residual exceptions.

(2) Specific Findings of Fact.—To assist the appellate courts in their plenary review, the Court of Appeals should insist that the trial courts specifically state the findings of fact for each of the requirements under the rule. In Walker, the Court of Appeals determined that the trial court had to make findings on the record as to each of the conditional elements. It declined to go further and follow the dictates of the Court of Special Appeals in Walker, which would require reversal if a trial judge failed to announce subsidiary findings and conclusions. The Court of Appeals acknowledged the merit of the Court of Special Appeals's desire for more restrictive findings and it should have followed the Court of Special Appeals and other jurisdictions that have required trial courts to record specific findings.

One of the principal proponents of requiring specific findings was the Senate Judiciary Committee, which in its approval of the federal exception requested that trial courts announce the special facts

170. Id. at 334, 691 A.2d at 1361 (Chasanow, J., dissenting).
171. See supra note 145 and accompanying text.
172. See supra notes 100-103 and accompanying text.
173. 107 Md. App. at 526-27, 660 A.2d at 1002; see also Walker, 345 Md. at 322, 691 A.2d at 1355-56.
174. See Walker, 345 Md. at 322, 691 A.2d at 1355 ("Although there is some authority for the proposition that trial courts must make such a [detailed] record, we do not believe that the failure to do so necessarily requires remand or reversal.").
175. See, e.g., Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 713 (9th Cir. 1992) ("The district court erred by not making a specific finding that the . . . declaration was admissible under Rule 804(b) (5)."); Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1552 (9th Cir. 1990) ("Pursuant to Rule 803(24), the district court must make specific findings regarding the requisite elements of the exception."); State v. Nelson, 777 P.2d 479, 482 (Utah 1989) ("The court must make findings detailing its reasoning in admitting a statement under [the state's residual hearsay exception]."); see also United States v. Hinkson, 632 F.2d 382, 385 (4th Cir. 1980) (affirming the trial court on other grounds, but stating that the failure of the district court to make specific findings would "ordinarily" require remand).
and circumstances justifying the admission of evidence under the residual exception.\textsuperscript{176} A number of federal and state appellate courts have required these detailed findings, but if faced with a lack of sufficient detail, "have proceeded to examine the record and determine for themselves whether the disputed evidence was admissible."\textsuperscript{177}

The Court of Appeals could, and should, strictly require the trial court to make subsidiary findings, refusing to bow to pressure from the legal community to view the record without these findings.\textsuperscript{178} At least one state appellate court has reversed a case because the trial court failed to detail its reasoning for admitting an out-of-court statement.\textsuperscript{179} Requiring a trial court to announce the factors it considered, the weight it gave to those factors, and the reasoning process it employed, would necessarily result in a more careful application of the residual exception. And, in reviewing a trial court's decision regarding the admissibility of evidence, an appellate court would be able to make more uniform decisions if it knew what factors the trial court relied on in rendering its decision.

(3) Probative Value Requirement.—If the Court of Appeals wants to give trial courts actual guidance via the requirements of the residual exceptions rule, instead of relying solely on strict appellate review, it can point to the text of the rule, which commands that any evidence proffered must be the most probative on point.\textsuperscript{180} The Court of Appeals could accomplish its goal of limiting the application of the residual exceptions by setting this hurdle very high.\textsuperscript{181} Making the judge specifically find why the proffered evidence is more probative than other evidence, and strictly requiring that there is no other

\textsuperscript{176} S. Rep. No. 93-1277, at 20 (1974), reprinted in, 1974 U.S.C.C.A.N. 7051, 7066. "In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record." \textit{Id.}

\textsuperscript{177} Walker, 345 Md. at 323, 691 A.2d at 1355-56.

\textsuperscript{178} At least at the outset, this requirement would cause more remands and further congest Maryland's trial courts.

\textsuperscript{179} See Nelson, 777 P.2d at 482.

\textsuperscript{180} See Md. R. 5-804(b)(5)(B) ("[T]he statement [must be] more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts . . . .").

\textsuperscript{181} See Greene, \textit{supra} note 61, at 1112 n.86 ("A strict application of such a standard would eliminate all redundant evidence and place a heavy burden on proponents to show why the evidence in question is essential to their case."). \textit{But see} Beaver, \textit{supra} note 34, at 794-95 ("Advocates for the exception . . . erroneously believed that the exceptions could be adequately controlled by adding strict requirements for admission.").
evidence available through reasonable efforts, should effectively limit the rule.¹⁸²

Although the probative value requirement has been abused by the federal courts,¹⁸³ in the instant case, there should be no doubt that the trial court correctly found that Ms. Walker's statements were "evidence of a material fact" and more probative than any other evidence the State could have procured through reasonable means.¹⁸⁴ The Court of Special Appeals noted that these statements "were the only evidence of [Walker's] criminal agency."¹⁸⁵ Not only were the statements a material fact and the most probative evidence—they were the only probative evidence available. In contrast to federal cases in which the probative value requirement has been abused,¹⁸⁶ the trial court in *Walker* did not admit evidence that was "more or less proba-

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¹⁸². Cf. Myrna S. Raeder, *The Effect of the Catchalls on Criminal Defendants: Little Red Riding Hood Meets the Hearsay Wolf and Is Devoured*, 25 Loy. L.A. L. Rev. 925, 936 (1992) ("The only restriction that may have stemmed the [federal] catchall tide is the requirement that the statement be more probative . . . than any other evidence that the proponent can procure through reasonable means.").

¹⁸³. One commentator explained: "[T]his provision has rarely been viewed as imposing any additional condition on the catchalls . . . [as] demonstrated by the large number of decisions finding the admission of catchall hearsay to be harmless error." *Id.* For example, in *United States v. Iaconetti*, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d. Cir. 1976), the jury found a government contract inspector guilty of soliciting and accepting a bribe. *Id.* at 555. The crucial issue in the trial centered around a conversation between the defendant and the chief witness for the prosecution. *Id.* Because there was an outright conflict of credibility between the defendant and the chief witness, the court deemed the testimony of two rebuttal witnesses the most powerful evidence on this issue and admitted the testimony into evidence. *Id.* at 559-60. The court upheld the admission of the testimony, "even though it was no more probative—in fact, it was less probative—than the testimony of the Government's witness." Scott M. Lewis, *The Residual Exceptions to the Federal Hearsay Rule: Shuffling the Wild Cards*, 15 Rutgers L.J. 101, 115 n.99 (1983); cf. Md. R. 5-804(b)(5)(B) (requiring that the hearsay evidence be "more probative on the point for which it is offered than any other evidence").

In *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977), the out-of-court identification of a bank robbery suspect's getaway car was admitted under Rule 804(b)(5). *Id.* at 316. After the robbers fled, a man sitting outside the bank called out the make and license number of the car to a bank customer standing at the door. *Id.* at 313. The customer then relayed the information through the glass to a bank employee named Carmody, who was the in-court witness. *Id.* The court admitted this double hearsay, although it seemed to ignore the probative value requirement, as there was ample in-court identification of the defendant himself, as well as the car. *Id.* at 318. One commentator went so far as to state, "Far from being the only evidence available on this issue, it was the worst evidence the Government procured." Lewis, *supra*, at 113. The standard typically used in federal courts appears to be "more or less probative" or "somewhat helpful," both of which are gross distortions of the "more probative" language of the rule. *Id.*

¹⁸⁴. These requirements are set forth in Rule 5-804(b)(5)(A), (B) of the Maryland Rules of Evidence.


¹⁸⁶. See *supra* note 183.
tive” or “somewhat helpful,” but instead admitted evidence that met the strict textual requirements of the rule.

5. Conclusion.—The use of the exceptional circumstances requirement to retain tight control over the residual hearsay exception is puzzling. The difficulty in defining “exceptional circumstances” will make it troublesome for trial judges to utilize the rule appropriately and will thereby defeat the goals of uniformity and predictability. The federal courts have been inconsistent in their application of the residual exceptions because the standards for admissibility are vague. Because the Court of Appeals apparently desires much tighter control over the residual exceptions than the federal appellate courts have exhibited, it would have seemed logical to have changed the wording in the rule to eliminate this ambiguity. Instead, the court added more vague language—“under exceptional circumstances”—to a rule that was already poorly written.

Instead of providing a straightforward test of whether a hearsay statement is necessary and trustworthy, and should thus be admitted, the requirements imposed by the Court of Appeals are unrealistic hoops through which trial judges are forced to jump. The court already has the means to restrain the use of the residual hearsay exceptions, namely through de novo review, requiring specific findings of fact, and strictly enforcing the probative value requirement. The Court of Appeals has chosen instead to enforce the “exceptional circumstances” requirement strictly—enforcement that is likely to cause considerable confusion in Maryland’s trial courts. By choosing not to apply the rule in this case, despite the “textbook example of the kind of hearsay evidence that should be ad-

187. See Lewis, supra note 183, at 113 (discussing the more relaxed standard being applied by federal courts with respect to the probativity requirement).
188. Beaver, supra note 34, at 820 (concluding that those vague standards have “allowed trial judges to expand upon traditional hearsay exceptions unduly”).
189. See, e.g., Raeder, supra note 182, at 950 (offering several approaches to revising the wording of the residual exceptions).
190. See Rand, supra note 60, at 880 (“The problem with the residual exceptions as finally adopted, though, is that they are poorly drafted and unrealistically stringent.”).
191. See id. at 874 (explaining why the federal residual exceptions have caused courts to rebel and distort the exceptions as worded).
192. See supra notes 159-171 and accompanying text.
193. See supra notes 172-179 and accompanying text.
194. See supra notes 180-187 and accompanying text.
mitted,“195 the Court of Appeals has effectively closed the door on the residual hearsay exception.

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195. *Walker*, 345 Md. at 331, 691 A.2d at 1359 (Chasanow, J., dissenting).
A. Limiting Judicial Modification Power over Spousal Support Agreements

In Shapiro v. Shapiro, the Court of Appeals held that a spousal support agreement that precluded judicial modification except upon the happening of a stated event properly invoked the statutory exception to the rule of modifiability of spousal support agreements as provided in section 8-103(c) of the Family Law Article. In so doing, the court rejected the all-or-nothing approach to court modification taken by the Court of Special Appeals in its disposition of the case. The court also overruled the decision of the Court of Special Appeals in Langley v. Langley to the extent that it conflicted with the statute's interpretation as announced in Shapiro. In striking down the intermediate appellate court's construction of section 8-103(c), the Court of Appeals emphasized the importance of effectuating the intent of the parties to a spousal agreement. Consequently, the court's holding is more reflective of a commitment to general contract principles than to an accurate assessment of the statute's meaning and purpose. Nevertheless, Shapiro clarifies the law, left uncertain by Langley, regarding the propriety of partially modifiable spousal support agreements. The decision will, therefore, assist divorcing couples in fashioning spousal support arrangements.

1. The Case.—Debra and David Shapiro separated in December 1985, after thirteen years of marriage. In May 1988, the couple entered into a marital settlement agreement (the Agreement) that pro-

2. Id. at 665, 697 A.2d at 1351. Section 8-103(c) provides:
The court may modify any provision of a deed, agreement, or settlement with respect to alimony or spousal support executed on or after April 13, 1976, regardless of how the provision is stated, unless there is:
(1) an express waiver of alimony or spousal support; or
(2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.
3. Shapiro, 346 Md. at 655, 697 A.2d at 1345.
5. Shapiro, 346 Md. at 665, 697 A.2d at 1351 ("To the extent that Langley is inconsistent with our holding in this case, it is overruled.").
6. Id. at 664, 697 A.2d at 1350.
vided for both child and spousal support payments by Mr. Shapiro.\(^8\) The Agreement also stated that the spousal support payments would not be subject to court modification unless Mr. Shapiro became disabled, as defined by his disability insurance policy.\(^9\) The judgment for divorce, granted to the parties by the Circuit Court for Howard County, incorporated the Agreement.\(^10\)

Sixteen months after the divorce, Mr. Shapiro petitioned the circuit court for relief that included rescission of the Agreement and modification of the spousal support payments.\(^11\) Ms. Shapiro responded with a motion to dismiss, claiming that Mr. Shapiro had not stated sufficient grounds for rescission of the Agreement and that the spousal support provisions of the Agreement were not subject to modification by the court.\(^12\) Ms. Shapiro’s motion was granted.\(^13\) Mr. Shapiro then filed a motion for reconsideration of the order that dismissed his request for modification of spousal support, and the court held a hearing on that matter.\(^14\)

Relying on the Court of Special Appeals’s interpretation of section 8-103(c) of the Family Law Article in *Langley v. Langley*,\(^15\) the circuit court held that the spousal support payments were subject to court modification despite the Agreement’s express provision to the

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8. *Shapiro*, 346 Md. at 651, 697 A.2d at 1343. Mr. Shapiro’s agreement to pay child support included payment of each child’s college tuition, room, and board, in addition to monthly payments of $250 for each child. *Id.* at 652, 697 A.2d at 1344. Mr. Shapiro’s agreement to pay spousal support included monthly payments of $2,500 until January 1, 2009, when the monthly payments would be reduced to $1,250. *Id.* at 651, 697 A.2d at 1343.

9. *Id.* at 652, 697 A.2d at 1343-44. The Agreement provided, in pertinent part:

> "Said alimony payments shall not be modified by the Court except in the event that Husband shall become temporarily or permanently disabled as defined in Husband’s current disability insurance policy. In the event of such disability, Husband shall have the right to submit the issue of alimony to arbitration under the rules of the American Arbitration Association or some similarly recognized arbitration association. The provisions of this paragraph will not apply if Husband and Wife agree to support modifications as a result of any disability. The level of support preceding Husband’s disability shall remain in effect until said arbitration has resulted in the binding recommendation of a new support figure."

*Id.*

10. *Id.* at 651, 697 A.2d at 1343.

11. *Id.* at 652, 697 A.2d at 1344.


13. *Id.*


contrary.\textsuperscript{16} The Court of Special Appeals approved the circuit court’s application of \textit{Langley} and affirmed the lower court’s ruling.\textsuperscript{17} The intermediate appellate court found that the \textit{Langley} court’s construction of the statute required that the spousal support provisions of a separation agreement be either entirely modifiable or entirely non-modifiable.\textsuperscript{18} Thus, the court concluded that the paragraph in the Agreement providing for modification in the event of Mr. Shapiro’s disablement rendered the entire Agreement modifiable with regard to spousal support.\textsuperscript{19} The Court of Appeals granted certiorari to review whether the Agreement was modifiable under section 8-103(c).\textsuperscript{20}

2. \textit{Legal Background}.—

\textit{a. Section 8-103(c).—}The language in section 8-103(c) of the Family Law Article construed by the \textit{Shapiro} court evolved out of Chapter 849 of the Acts of 1975.\textsuperscript{21} Prior to that legislation, only spousal support payments fitting the definition of technical alimony\textsuperscript{22} were subject to court modification.\textsuperscript{23} Courts considered all other forms of spousal support to be contractual and therefore modifiable only to

\textsuperscript{16} \textit{Shapiro}, 346 Md. at 652-53, 697 A.2d at 1344. Remaining issues pending before the court, including possible modification of spousal support, were set for hearing. Brief of Petitioner at 3, \textit{Shapiro} (No. 123). At trial, Mr. Shapiro presented evidence that the attractiveness, for tax purposes, of spousal support as opposed to child support motivated the allocation of payments for spousal support and child support. \textit{Shapiro}, 346 Md. at 654, 697 A.2d at 1345. Persuaded by this evidence, the court entered a judgment on July 31, 1992, ordering that the spousal support provisions of the Agreement be considered child support for purposes of any further construction of the Agreement by the court. \textit{Id.} at 654-55, 697 A.2d at 1345. The court allowed Mr. Shapiro an offset against his monthly child and spousal support obligations to the extent he paid college education expenses in accordance with the Agreement. Brief of Petitioner at 3-4, \textit{Shapiro} (No. 123).

\textsuperscript{17} \textit{Shapiro}, 346 Md. at 655, 697 A.2d at 1345.

\textsuperscript{18} \textit{Shapiro}, No. 1841, slip op. at 8-9.

\textsuperscript{19} \textit{Shapiro}, 346 Md. at 652, 697 A.2d at 1344. The court also held that the recharacterization of spousal support as child support was not in error. \textit{Id.} at 655, 697 A.2d at 1345.

\textsuperscript{20} \textit{Id.} at 655, 697 A.2d at 1345. The court also granted certiorari to review the propriety of the circuit court’s revision of the agreement. \textit{Id.}

\textsuperscript{21} \textit{Id.} at 658, 697 A.2d at 1347.

\textsuperscript{22} \textit{See}, e.g., \textit{Horsey v. Horsey}, 329 Md. 392, 410, 620 A.2d 305, 314-15 (1993) (defining technical alimony as "a periodic allowance for spousal support, payable under a judicial decree, which terminates upon the death of either spouse or upon the remarriage of the spouse receiving the payments or upon the reconciliation and cohabitation of the parties" and noting that a "court exercising equitable jurisdiction has authority to modify its prior award of technical alimony" (citations omitted)).

\textsuperscript{23} \textit{See \textit{Shapiro}}, 346 Md. at 658, 697 A.2d at 1347 (stating that the statute was "enacted to overturn the rule . . . under which technical alimony was modifiable but contractual spousal support was not").
the extent allowed by contract law. The distinction between technical alimony and contractual support sometimes led to unsatisfactory results when divorcing parties labeled support payments "alimony" in their agreements, but did not fully describe them as such. In these instances parties were left with no recourse in the courts with respect to modification of spousal support.

To solve this problem, Chapter 849 of the Acts of 1975 eliminated the distinction between technical alimony and contractual support in the court modification context. The legislation amended Article 16, section 28, which in its original form recognized the validity of separation agreements and provided for judicial modification of child custody agreements. Language was added to the existing statutory framework to allow court modification of support, maintenance, property rights, and personal rights between a husband and a wife, and also to allow divorcing parties to preclude court modification of their agreement. However, Chapter 849 sparked criticism that it swept too broadly in including personal and property rights within the judicial modification power and in permitting contractual preclusion of judicial modification of child custody and support arrangements.

24. See Horsey, 329 Md. at 418-20, 620 A.2d at 318-20 (discussing, in terms of contract law, the possible judicial modification of a spousal support agreement that was not technical alimony and was entered into prior to 1976); Simpson v. Simpson, 18 Md. App. 626, 631, 308 A.2d 410, 414 (1973) (describing as "contractual" spousal support payments not constituting technical alimony), superseded by MD. CODE ANN., FAM. LAW § 8-103 (1991).

25. See, e.g., Simpson, 18 Md. App. at 631, 308 A.2d at 414 (holding that though the parties to a support agreement named the support payments "alimony" in their agreement, their failure to provide for termination of payments on the death of the payor placed the payments outside of a court's power to modify). The court explained, "That the parties called them alimony did not make them so." Id.

26. See, e.g., id. at 631-32, 308 A.2d at 414 (noting that the lower court judge "properly declined to terminate or modify the payments... since he had no power to do so" (footnote omitted)).

27. Shapiro, 346 Md. at 658, 697 A.2d at 1347.

28. Id. at 658-59, 697 A.2d at 1347; MD. ANN. CODE, art. 16, § 28 (1957).

29. Shapiro, 346 Md. at 659, 697 A.2d at 1347. Chapter 849 stated in pertinent part:

[P]rovided, that whenever any such deed or agreement shall make provision for or in any manner affect the care, custody, education or maintenance of any infant child or children of the parties, or shall make provision for or in any manner affect support, maintenance, property rights, or personal rights between the husband and wife, the court shall have the right to modify such deed or agreement in respect to such infants as to the court may seem proper, looking always to the best interests of such infants, or in respect to support, maintenance, property rights, or personal rights between the husband and wife regardless of the manner in which the provisions are expressed or stated unless the provisions or the deed, agreement, or settlement specifically state that they are not subject to any court modification.

Id. (alteration in original) (quoting 1975 Md. Laws 849).

30. Id. at 660, 697 A.2d at 1348.
This criticism led to Chapter 849's revision by the enactment of Chapter 170 of the Acts of 1976. The separation of the provisions dealing with spousal support from those dealing with child custody and support, and the addition of a provision allowing contractual waiver of spousal support, remedied the perceived problems in the 1975 legislation.

As a result of Chapter 296 of the Acts of 1984, the 1975 and 1976 enactments were restyled, without substantive change, into subsections (b) and (c) respectively of section 8-103 of the Family Law Article. The statute provides, in pertinent part:

(c) Certain exceptions for provision concerning alimony or support of spouse.—The court may modify any provision of a deed, agreement, or settlement with respect to alimony or spousal support executed on or after April 13, 1976, regardless of how the provision is stated, unless there is:

(1) an express waiver of alimony or spousal support; or
(2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.

Four years after the codification of section 8-103, the Court of Special Appeals limited the scope of the statute in Mendelson v. Mendelson. In that case, the court distinguished between separation agreements

31. Id.
32. Id. Chapter 170 stated in pertinent part:

Furthermore, any provision in the deed or agreement in respect to alimony, support and maintenance of the husband or wife is subject to modification by the court to the extent the court deems just and proper regardless of the manner in which the provisions with respect to the alimony, support and maintenance are expressed or stated unless there is an express waiver of alimony, support and maintenance by the husband or wife or unless the provisions of the deed, agreement, or settlement specifically state that the provisions with respect to the alimony, support and maintenance of the husband or wife are not subject to any court modification.

33. Id. (quoting 1976 Md. Laws 170).
34. MD. CODE ANN., FAM. LAw § 8-103(b) (1991). Subsection (b) provides:

(b) Exception for provision concerning support of spouse.—The court may modify any provision of a deed, agreement, or settlement with respect to spousal support executed on or after January 1, 1976, regardless of how the provision is stated, unless there is a provision that specifically states that the provisions with respect to spousal support are not subject to any court modification.

that are incorporated into a divorce decree and those that are merged into a divorce decree, holding that only the latter could be modified under section 8-103.\textsuperscript{36} The General Assembly, however, promptly overruled Mendelson in 1990 with the passage of section 8-105(b).\textsuperscript{37} This statute eliminated the often confusing distinction between incorporation and merger for the purpose of court modification.\textsuperscript{38} The combined effect of section 8-105(b) and section 8-103 broadened judicial power over spousal support agreements.\textsuperscript{39} At the same time, however, section 8-103(c)(2) limited this power by allowing an exception to modification when parties indicated in their agreement that spousal support payments could not be modified by courts.\textsuperscript{40}

The 1991 Court of Special Appeals decision in Langley v. Langley\textsuperscript{41} marked the first discussion of section 8-103(c)(2) in a reported opinion.\textsuperscript{42} In that case, the court considered a spousal support agreement that provided for modification in the event that the payor-spouse, Mr. Langley, was to become unemployed.\textsuperscript{43} Mrs. Langley argued that because the agreement specified an instance in which the support payments could be modified, the agreement should be non-modifiable in all other circumstances.\textsuperscript{44} However, the Langley agreement contained

\textsuperscript{36} Id. at 498-99, 541 A.2d at 1337. An incorporated agreement may be described as a \textquotedblleft hybrid of contract and court order." Doris Del Tosto Brogan, Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree, 67 Neb. L. Rev. 235, 245 (1988). The agreement is incorporated because it is presented to the court and made part of the divorce decree. Id. However, it continues to exist as an independent contract as well. Mendelson, 75 Md. App. at 499, 541 A.2d at 1337. In contrast, when an agreement is merged, "the contract is extinguished and the rights and obligations of the parties arise from the decree exclusively." Brogan, supra, at 245.

\textsuperscript{37} The statute provides, in pertinent part: "The court may modify any provision of a deed, agreement, or settlement that is: (1) incorporated, whether or not merged, into a divorce decree; and (2) subject to modification under § 8-103 of this subtitle." Md. Code Ann., Fam. Law § 8-105(b) (1991).

\textsuperscript{38} See Shaprio, 346 Md. at 678, 697 A.2d at 1357 (Eldridge, J., dissenting) ("This bill is expressly intended to overrule the holding of the Court of Special Appeals in Mendelson v. Mendelson." (quoting the Floor Report of the Senate Judicial Proceedings Committee on Senate Bill 541 of the 1989 General Assembly)).

\textsuperscript{39} See id. at 677, 697 A.2d at 1357 (stating that "[t]he General Assembly obviously believed that, in the context of spousal support, courts should have broader power to modify agreements").

\textsuperscript{40} See supra note 2.


\textsuperscript{42} Brief of Petitioner at 23, Shapiro (No. 123).

\textsuperscript{43} Langley, 88 Md. App. at 537, 596 A.2d at 90. The agreement in Langley provided for court modification "[i]n the event the Husband becomes unemployed and his income becomes substantially less than during the time of his employment," but contained no language specifically limiting judicial modification. Id.

\textsuperscript{44} Id. at 541, 596 A.2d at 92.
no language specifically precluding judicial modification in other circumstances. The court determined that the agreement's provision for modification upon a stated occurrence (in this case, Mr. Langley's being unemployed) did not invoke the exception to the rule of court modifiability as provided in section 8-103(c)(2). As a result, the court held that the agreement was fully modifiable.47 Declaring that "[s]ection 8-103(c) is unambiguous," the court concluded that "[w]ithout the requisite definitive statement [precluding any modification, the Langleys'] agreement is subject to modification by the court."49

The court in Langley referred several times to the need for a specific statement precluding any modification, implying that the requisite statement must preclude all modification in order to be effective under the statute. However, the court also noted that the agreement lacked a statement precluding "the court from modifying the support obligation under other circumstances." This portion of the opinion, conversely, suggests that the court may have permitted the agreement to be only partially modifiable if the agreement specifically precluded modification in other circumstances. Thus, the Langley court never addressed directly the propriety of partial modifiability.

b. Principles of Statutory Interpretation.—In Kaczorowski v. Mayor of Baltimore, the Court of Appeals recognized problems inherent in statutory interpretation and articulated a framework for statutory construction. Before the decision in that case, the court had been criticized for manipulating the canons of interpretation to achieve the desired outcome. Recognizing this criticism, in Kaczorowski, the court stated, "[j]ust as in the science of Physics every action has an equal and opposite reaction, so it seems that every canon of statutory construction has an equal and opposite canon." Nonethe-

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45. Id.
46. Id.
47. Id.
48. Id. at 540, 596 A.2d at 92.
49. Id. at 541, 596 A.2d at 92.
50. Id. at 540-41, 596 A.2d at 92.
51. Id. at 541, 596 A.2d at 92.
52. 309 Md. 505, 525 A.2d 628 (1987).
53. Id. at 512-13, 525 A.2d at 631-32.
54. See Melvin J. Sykes, A Modest Proposal for a Change in Maryland’s Statutes Quo, 43 Md. L. Rev. 647, 649 (1984) (asserting that the canons of interpretation employed by the Court of Appeals “are mere boilerplate and should be abandoned”).
55. Kaczorowski, 309 Md. at 512, 525 A.2d at 631. The court in Kaczorowski quoted Sykes’s law review article, implicitly recognizing the merit of the criticism. Id.; see also Jack Schwartz & Amanda Stakem Conn, The Court of Appeals at the Cocktail Party: The Use and
less, the court defended the utility of the canons of construction, explaining that "properly used, they afford an opportunity for principled decision making, as opposed to ad hoc judicial legislation."56

The court asserted that its primary aim in interpreting a statute is to give effect to the "objective, goal, or purpose" behind the law.57 Furthermore, it stated that the words of the statute must be the starting point in divining legislative intent.58 The court noted that the plain meaning rule "comports with common sense, because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal."59 The court then explained that when a statute "contains an ambiguity, courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment."60 Accordingly, a court may "consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense."61 Finally, the court pointed out that the plain meaning rule should not be so strictly applied that the context in which the language of a statute appears is ignored.62

In cases decided after Kaczorowski, the Court of Appeals applied the principles of interpretation enunciated in that seminal case.63 For instance, in Polomski v. Mayor of Baltimore,64 the court reiterated that effectuating legislative intent is the primary goal in interpreting a statute and that the language of the statute provides the starting point for


56. Kaczorowski, 309 Md. at 512, 525 A.2d at 631.
57. Id. at 513, 525 A.2d at 632.
58. Id.
59. Id.
60. Id. (quoting Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75, 517 A.2d 730, 732 (1986)).
61. Id. (quoting Tucker, 308 Md. at 75, 517 A.2d at 732).
62. Id. at 514, 525 A.2d at 632. Thus, the court may consider "'external manifestations,' such as "a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal." Id. at 515, 525 A.2d at 632.
63. Schwartz & Conn, supra note 55, at 437 ("In the seven years since Kaczorowski, the Court of Appeals has not wavered from its commitment to the approach expounded in that case.").
64. 344 Md. 70, 684 A.2d 1388 (1996).
Citing Kaczorowski, the court stated, "where the legislative will is not immediately apparent from the language of the statute, we employ the canons of statutory construction to guide our inquiry." However, the court also asserted that when "the language of the statute is clear, further analysis of legislative intent ordinarily is not required, and we give the words of the statute their ordinary and common meaning within the context in which they are used." Thus, the court confirmed the primacy of the plain meaning rule.

3. The Court's Reasoning.—In Shapiro, the Court of Appeals held that section 8-103(c) permits a spousal support agreement to preclude court modification in certain instances while allowing court modification in other instances. The court began its consideration by examining section 8-103(c) and scrutinizing the language in the portion of subsection (c)(2) that provides an exception to the rule of court modifiability when there is "a provision that specifically states . . . that the provisions with respect to alimony or spousal support are not subject to any court modification." Specifically, it found the statute ambiguous as to whether "the provisions" must refer to all, or may refer to only some, of the provisions of a spousal support agreement.

In an effort to resolve the statutory ambiguity, the court reviewed the evolution of the language in section 8-103(c) from the 1975 enactment until the statute's codification in 1984. Again, the court focused on the use of the words "provision" and "provisions." It noted that the pertinent part of the 1976 enactment stated the exception to modifiability in the following manner: "unless the provisions of the . . . agreement . . . specifically state that the provisions with respect to . . . support . . . are not subject to any court modification." The court found that the exclusive use of the plural form in the 1976 exception "created a semantic ambiguity as to the number intended." Referencing a Maryland rule of interpretation that states "[t]he singular always includes the plural, and vice versa, except where such

65. Id. at 75, 684 A.2d at 1340.
66. Id.
67. Id. (citations omitted).
68. Shapiro, 346 Md. at 665, 697 A.2d at 1351.
69. Id. at 656, 697 A.2d at 1346 (ellipsis in original) (quoting Md. CODE ANN., FAM. LAW § 8-103(c)(2) (1991)).
70. Id. at 656-57, 697 A.2d at 1346.
71. Id. at 658-62, 697 A.2d at 1347-49.
72. Id. at 661, 697 A.2d at 1349.
73. Id. at 660, 697 A.2d at 1348 (quoting Chapter 170 of the Acts of 1976).
74. Id. at 661, 697 A.2d at 1348.
construction would be unreasonable,” the court reasoned that the statute’s exception might be read to say, “unless a provision of the . . . agreement . . . specifically states a provision with respect to . . . support . . . is not subject to any court modification.” The court, therefore, determined that the 1976 legislation might be interpreted to allow divorcing parties to “specifically state exclusion from modifiability provision by provision.” Redirecting its analysis to section 8-103(c), the court explained that in changing the wording of the exception to modifiability from “provision” to “provisions,” the legislature did not intend to change the statute substantively. Thus, the court concluded that the statute did not “unambiguously support the construction applied by the courts below.”

Having addressed the statute’s ambiguity, the court noted, “We have uncovered nothing in the legislative history that indicates that the General Assembly ever focused on the issue with which we are here concerned.” The court next looked to legislative intent for guidance in determining the proper construction of section 8-103(c). The court asserted that “[t]he ultimate purpose [of the statute] was to prevent the unintended results under separation agreements that were produced by the technical alimony-contractual support dichotomy.” Therefore, the court decided that the intermediate appellate court’s interpretation of the statute was incorrect because it led to a frustration of the parties’ intent. Stating “[w]e [do not] discern in this statute . . . an intent to perpetuate the all or nothing approach to modifiability that characterized [the] prior law,” the court held that the Shapiro’s spousal support agreement properly invoked the statutory exception to judicial modifiability. Finally, after finding the Agreement non-modifiable under section 8-103(c), and noting that

75. Id. at 657, 697 A.2d at 1346 (alteration in original) (quoting Md. Ann. Code art. 1, § 8 (1996)).
76. Id. at 661, 697 A.2d at 1348 (omissions in original) (internal quotation marks omitted).
77. Id.
78. See id. at 661-62, 697 A.2d at 1349 (“A legislative intent supporting the interpretation of the courts below cannot be derived from the change between the 1976 language and the Code Revision language.”).
79. Id. at 663, 697 A.2d at 1349.
80. Id.
81. Id., 697 A.2d at 1349-50.
82. Id., 697 A.2d at 1349.
83. See id., 697 A.2d at 1350 (noting that to accept the interpretation of the courts below would be trading the frustration of one form of contractual intent for the frustration of another).
84. Id.
85. Id. at 665, 697 A.2d at 1351.
no other ground for modification was asserted, the court struck down
the revisions made to the Agreement by the circuit court.\textsuperscript{86}

In a dissenting opinion, Judge Eldridge sharply criticized the ma-
jority's interpretation of section 8-103(c), describing the court's analy-
sis as "novel and confusing."\textsuperscript{87} Agreeing with the lower court's
reading of the statute, Judge Eldridge stated, "the statutory language
is unmistakably clear . . . [and] [o]nly the most tortured reading
could find an ambiguity in this language."\textsuperscript{88} He also asserted that the
majority's interpretation of section 8-103(c) disregarded the legisla-
ture's purpose of increasing the judicial modification power.\textsuperscript{89} Fi-
nally, Judge Eldridge explained that because the General Assembly
had not altered the Langley court's reading of section 8-103(c), the
legislature had agreed to the decision's narrow interpretation of the
statute.\textsuperscript{90} Judge Eldridge noted that "where the General Assembly has
acquiesced in the judicial construction of a statute, there is a strong
presumption that the legislative intent has been correctly
interpreted."\textsuperscript{91}

4. Analysis.—In Shapiro, the Court of Appeals departed from a
history of considering spousal support agreements either fully modifi-
able or fully non-modifiable by the courts.\textsuperscript{92} In holding that Mr. Sha-
piro's support obligations could be modified only upon his
disablement, the court gave full effect to the intent of the parties as
evidenced by the words of their Agreement.\textsuperscript{93} In reaching its conclu-
sion, however, the court settled on a reading of section 8-103(c) that is
at odds with the statute's plain meaning and that may frustrate the
General Assembly's purpose in enacting the statute. Nevertheless, the
decision provides guidance to divorcing couples, as it clarifies the law
regarding the propriety of partially modifiable support agreements.

a. The Plain Meaning of Section 8-103(c).—Contrary to the
court's finding, the phrase "the provisions with respect to alimony or
spousal support" has just one meaning.\textsuperscript{94} Specifically, the phrase de-

\textsuperscript{86} Id. at 666-67, 697 A.2d at 1351.
\textsuperscript{87} Id. at 678, 697 A.2d at 1357 (Eldridge, J., dissenting).
\textsuperscript{88} Id. at 672, 697 A.2d at 1354.
\textsuperscript{89} Id. at 676-77, 697 A.2d at 1356-57 ("The majority opinion, with its reliance on tradi-
tional contract principles, wholly fails to give effect to the Legislature's clear purpose of
greatly increasing judicial modification authority.").
\textsuperscript{90} Id. at 677, 697 A.2d at 1357.
\textsuperscript{91} Id.
\textsuperscript{92} 346 Md. at 663, 697 A.2d at 1350.
\textsuperscript{93} Id. at 665, 697 A.2d at 1351.
\textsuperscript{94} Id. at 669, 697 A.2d at 1353 (Eldridge, J., dissenting).
notes all of the support or alimony provisions of an agreement. As Judge Eldridge pointed out in his dissent, the majority’s contention that “the provisions” might refer to some but not all of the spousal support provisions of an agreement runs contrary to the general rule that “in speaking of the component parts of any document, . . . the use of the plural term without limitation is all inclusive.” Significantly, previous opinions of the Court of Appeals support this usage of language. Additionally, much of the language in section 8-103(c) tends to rebut the court’s conclusion that the statute permits partial modifiability. For instance, the statute allows modification of a spousal support provision “regardless of how the provision is stated,” unless the subsection (c)(2) exception is invoked. The quoted phrase suggests a broad judicial power to modify spousal support agreements, despite the particular wording of an agreement. Also, the word “any” preceding the words “court modification” implies that the legislature intended an all-or-nothing approach to modification. Indeed, the word loses much of its relevance if it does not apply to a spousal support agreement in its entirety. For Judge Eldridge, the presence of the word “any” in subsection (c)(2) evidenced “[t]he Legislature’s rejection of selected or partial modifiability.”

Despite the clarity of section 8-103(c), the court engaged in a detailed review of earlier legislative language in an effort to uncover the proper interpretation of the statute. This exercise was unnecessary, because when “the language of the statute is clear . . . [the court gives] the words of the statute their ordinary and common meaning within

95. Id.
96. Id.
97. Id. at 670, 697 A.2d at 1353 (citing Scott v. Ford Motor Credit Co., 345 Md. 251, 253-55, 691 A.2d 1320, 1321-22 (1997) (using the phrase “the provisions of the loan agreement” to refer to all of the provisions); Polomski v. Mayor of Baltimore, 344 Md. 70, 75, 684 A.2d 1338, 1340 (1996) (referring to all of the language of a statute by stating “the language of the statute”); Ward Elec. Servs., Inc. v. Property & Cas. Ins. Guar. Corp., 325 Md. 1, 8, 599 A.2d 81, 84 (1991) (referring to the “words of the statute” to mean all of the words)).
98. See id. at 671, 697 A.2d at 1353 (stating that “the normal meaning of the words in § 8-103 clearly refutes the majority’s holding”).
100. Judge Eldridge argued that through this phrase, “[t]he General Assembly thus made it clear that the wording of a particular provision concerning alimony or spousal support was immaterial,” and that “judicial modifiability of any provision could be precluded only if there was a specific statement that the provisions, without limitation, could not be judicially modified.” Shapiro, 346 Md. at 670, 697 A.2d at 1353 (Eldridge, J., dissenting).
101. Id. at 668-69, 697 A.2d at 1352.
102. See supra notes 71-79 and accompanying text.
the context in which they are used." While the plain meaning rule "is not rigid," and a court may consider other factors in the determination of statutory meaning, the actual language of the statute must remain the primary guide. In Shapiro, the court did not need to look beyond the words of the statute, because the plain meaning provides a sensible construction of the law. Moreover, the court's analysis of the legislative background did little to elucidate the proper interpretation of the statute. Instead, the court obscured the clarity of section 8-103(c) through its complicated grammatical dissection of the earlier enactments.

b. **The Legislative Intent Behind Section 8-103(c).**—Both the majority and the dissenting opinions in Shapiro found support for their opposing interpretations of section 8-103(c) in the legislative intent behind the statute, illustrating the aphorism that legislative intent is often whatever the court wishes it to be. The majority believed the General Assembly enacted section 8-103(c) "to fulfill expectations based on the parties' agreement." In contrast, the dissent saw in the statute "a clear legislative intent favoring broad judicial authority to modify agreements with regard to alimony or spousal support." Implicit in this disagreement over legislative intent is the tension between competing values: an individual's freedom to contract and the public policy interests in regulating that freedom. Unfortunately, the opinion of the court failed to acknowledge this tension. Further-

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105. See id. (explaining that the need to look beyond the words of a statute arises when "a statute is plainly susceptible of more than one meaning and thus contains an ambiguity" (quoting Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75, 517 A.2d 730, 732 (1986))).
106. Sykes, supra note 54, at 652 ("Most courts and advocates have recognized that the search for intent is an illusory quest because intent is a meaningless metaphor for a nonexistent state of mind."). Sykes stated that although the ascertainment of legislative intent is the primary aim of statutory construction, "[t]he search for actual intent . . . is a myth." Id. at 650. He explained:

The legislature is not an individual with a will but an institution composed of many individuals, each with a distinct mind and personality. The legislature produces a product reflecting many different intentions and purposes. Psychoanalysts cannot always tell why individuals do the things they do; certainly inferring an overall intent from any group action is at a minimum more problematic.

Id. at 650-51.
107. Shapiro, 346 Md. at 663, 697 A.2d at 1349.
108. Id. at 668, 697 A.2d at 1352 (Eldridge, J., dissenting).
109. See Brogan, supra note 36, at 237 (identifying the conflicting interests in contractual freedom and in judicial power over the incidents of divorce as a source of problems in the law governing divorce settlement agreements).
more, in its commitment to general contract principles, the court overlooked the possibility that the General Assembly might have wished to restrict these principles in the area of spousal support agreements.

Indeed, substantial policy considerations weigh against treating a spousal support agreement as "any other contract."\(^{110}\) This is because such agreements are formed within a context that "deviates substantially from the competitive, arm's length bargaining between strangers in which standard bargaining principles were designed to operate."\(^{111}\) Specifically, divorcing couples are often under extraordinary stress and may not be fully able to anticipate and provide for changed circumstances in their agreement.\(^{112}\) Additionally, parties to a separation agreement are particularly susceptible to undue influence during the negotiation process.\(^{113}\) Thus, courts have a special interest in preventing "the marketplace mentality in marriage dissolution," and ensuring the continued fairness of support agreements.\(^ {114}\)

c. Langley’s Interpretation of Section 8-103(c).—Although the court overruled Langley to the extent that the decision conflicted with its interpretation of section 8-103(c),\(^ {115}\) Langley may be easily distinguished from Shapiro. Unlike the agreement construed in Shapiro, the agreement found modifiable in Langley contained no language prohibiting judicial modification.\(^ {116}\) This is significant because even if the court in Langley had stipulated to the propriety of partial

This tension between competing values has led to great variance and confusion in the laws of other states. See id. ("[T]he law of contracting between spouses has evolved as an ambiguous body of decisions that provides precious little guidance to lawyers and laypersons attempting to guide and direct their affairs."); Sally Burnett Sharp, Semantics as Jurisprudence: The Elevation of Form over Substance in the Treatment of Separation Agreements in North Carolina, 69 N.C. L. Rev. 319, 320 (1991) (asserting that "in virtually every state, marital settlement agreements have given rise to a body of case law that is at best confusing, and at times nothing less than impenetrable").

110. See Sally Burnett Sharp, Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom, 132 U. Pa. L. Rev. 1399, 1405 (1984) (arguing that contract principles "have often failed to provide adequate safeguards in the family law setting against either unfair results or unfair procedures").

111. Id. at 1406.

112. Id.

113. Id.

114. Id. at 1405. The interest of courts in retaining jurisdiction over spousal support agreements probably underlies the General Assembly’s specific overruling of Mendelson by enacting section 8-105(b), as that statute extended judicial power over such agreements. See supra note 37 and accompanying text.

115. See supra note 5 and accompanying text.

modifiability, the Langleys' agreement's failure to state explicitly that the agreement was not modifiable in other circumstances would have still left it modifiable under the statute. Therefore, it is unlikely that Langley would have been decided differently under the Shapiro court's construction of section 8-103(c). Additionally, Langley offered an ambiguous reading of section 8-103(b) that belies the significance of the General Assembly's acquiescence in the Langley decision. Specifically, the Langley opinion failed to indicate whether the Langleys' agreement would have satisfied the statutory exception had it included language precluding modification in other circumstances.\footnote{117} The majority in Shapiro properly noted that Langley may be read "in two different ways" with respect to that question.\footnote{118} Therefore, in overruling Langley, the Court of Appeals clarified the law more than it significantly changed the law.

5. Conclusion.—The Shapiro court's interpretation of section 8-103(c) enhances the contracting power of divorcing parties by allowing them to select circumstances under which stated portions of their spousal support agreements may and may not be judicially modified. Such individuals will not have to decide, as they may have had to under Langley, whether or not their spousal support arrangements will be entirely modifiable or entirely non-modifiable. Consequently, in the future, more divorcing couples will use the statutory exception to modifiability, placing an increased number of spousal support agreements beyond the purview of the courts.

The Shapiro decision nonetheless rests on a construction of section 8-103(c) that runs contrary to the plain meaning of the statute and possibly contradicts the legislative intent behind it. Ultimately, the correctness of the court's holding in Shapiro will be tested in the General Assembly where it may either suffer the fate of Mendelson and be overruled by statute, or through legislative acquiescence, endure as Maryland law.

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\footnote{117. Shapiro, 346 Md. at 654, 697 A.2d at 1345; see also supra text accompanying notes 50-51.}
\footnote{118. Shapiro, 346 Md. at 654, 697 A.2d at 1344.}
IX. HEALTH CARE

A. Making a Minor Case for Major Medical Expenses: Expanding a Child's Right to Sue for Pre-Majority Medical Expenses Caused by Third-Party Negligence

A recent Court of Appeals decision in Johns Hopkins Hospital v. Pepper makes it easier for a negligently injured child to recover pre-majority medical expenses even if the statute of limitations bars a suit for medical expenses by the child's parents. Refining its holding in Garay v. Overholtzer, the Pepper court expanded a child's right to sue by concluding that a negligently injured minor does not have to prove that his parents are indigent in order to assert his own claim for medical expenses. The Pepper decision will affect future negligence cases in two major ways. First, it will give negligently injured children a broader exception from the general rule that medical expense claims vest solely with parents. Second, the holding will allow parents who fail to file timely lawsuits to circumvent a procedural limitation that would otherwise insulate tortfeasors from full financial liability for negligent acts. Although the Pepper rule may inadvertently reward plaintiffs who sleep on their rights to sue, it will nonetheless furnish relief in a manner consistent with Maryland's "necessaries" doctrine and with public policies designed to force wrongdoers—rather than taxpayers—to bear the cost of injuries caused by tortious conduct.

4. Pepper, 346 Md. at 705, 697 A.2d at 1371.
6. Pepper, 346 Md. at 701, 697 A.2d at 1369.
8. See Garay, 332 Md. at 367, 631 A.2d at 443 (holding that a minor who becomes financially responsible for his own necessaries, including medical expenses, is entitled to bring a claim to recover those expenses).
9. See infra notes 116-118 and accompanying text for a discussion of the policy rationale for compensatory damages.
1. **The Case.**—Travis Pepper was born on January 6, 1987 at Easton Memorial Hospital, where he suffered from severe heart and lung abnormalities. Travis's attending physicians decided to transfer him to Johns Hopkins Hospital (Hopkins) in Baltimore City. After examining Travis, Hopkins surgeons concluded that he should undergo two separate surgical procedures—one to correct blood flow between his heart and his pulmonary artery, and another to repair a hole that allowed blood to flow between the right and left ventricles of his heart. Travis was four months old when he underwent the first operation in April 1987. He experienced post-operative complications that ultimately led to cardiac arrest. Doctors were able to revive Travis, but he suffered severe neurological impairment as a result of oxygen deprivation during his arrest. The second proposed surgery was never performed.

On March 23, 1993, Terry and Linda Pepper, Travis's parents, filed suit, as next friends on Travis's behalf, against Hopkins in the Circuit Court for Baltimore City. They sought damages and alleged that Hopkins, through its employees, negligently failed to treat Travis (Count I) and that Hopkins failed to adequately inform the Peppers of the risks involved with Travis's surgery (Counts IV and V). Terry and Linda Pepper brought individual claims alleging negligence and seeking, inter alia, recovery of medical expenses (Counts II and III), and they included a claim as joint claimants for loss of consortium (Count VI).

Hopkins successfully argued in a summary judgment motion that Terry and Linda Pepper's claims were barred by the applicable three-year statute of limitations, because any cause of action they might have

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. A "next friend" is similar to a guardian ad litem and is one who acts for the benefit of a minor who is unable to manage his own lawsuit. BLACK'S LAW DICTIONARY 724 (6th ed. 1991).
18. *Pepper*, 346 Md. at 685, 697 A.2d at 1361. Maryland's Health Claims Arbitration Act ordinarily requires persons having a claim against a health care provider to submit the claim to administrative arbitration before filing suit. See Md. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (1995). However, both the Peppers and Hopkins agreed to waive administrative arbitration pursuant to section 3-2A-06A of the same article.
20. *Id.*
had arose six years prior to the filing of their suit. Hence, only Travis's claims of negligent care and lack of informed consent survived.

On March 9, 1994, the Peppers submitted a pretrial memorandum, which stated there would be no amendments to Travis's original complaint. Nonetheless, they filed an amended complaint on June 13, 1994, adding to Travis's original negligence claim an allegation that, among other things, "Terry and Linda Pepper [ ] are financially unable to provide for the past and future care and treatment Travis will require and need . . . ." The trial court struck the amended complaint, stating that it was untimely.

On the first day of the trial, Hopkins moved in limine to exclude evidence related to medical expenses incurred by Travis Pepper or his parents. Hopkins asserted that, according to the holding in Garay, any claim for pre-majority medical expenses belonged solely to the parents of an injured child. Consequently, Hopkins argued that, because Terry and Linda Pepper's claims were barred by the statute of limitations, Travis's pre-majority medical expenses should be excluded as irrelevant. In addition, Hopkins argued that, because Maryland law requires parents to support an incapacitated and unemancipated adult child, and because Travis would always be incapacitated, Travis would never be able to assert his own pre- or post-majority claim for medical expenses. The Peppers, on the other hand, argued that Garay recognized four exceptions to the general

21. Id.; see also Md. Code Ann., Cts. & Jud. Proc. § 5-101 ("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.").
22. Pepper, 346 Md. at 686, 697 A.2d at 1361.
23. Id.
24. Id. (alteration and ellipsis in original) (quoting the June 13, 1994 amendments).
25. Id.
26. Id.
27. Id.; accord Garay v. Overholtzer, 332 Md. 339, 346, 631 A.2d 429, 432 (1993) (observing that Maryland law recognizes that the cause of action of medical expenses of a negligently injured child generally belongs to the parents of that child). However, Hopkins incorrectly suggested that Garay held that claims for pre-majority medical expenses belong exclusively to parents. Garay, in fact, held that certain circumstances would enable a negligently injured minor child to assert a claim on his own. Id. at 374, 631 A.2d at 446-47.
28. Pepper, 346 Md. at 686, 697 A.2d at 1361.
30. Pepper, 346 Md. at 686, 697 A.2d at 1361.
rule that claims for pre-majority medical expenses vest only with parents, and that at least two of the exceptions applied to Travis's case.  

The trial court rejected the Peppers' assertions and granted Hopkins's motion in limine based on its finding that none of the Garay exceptions applied to the case. The trial court specifically determined that the Peppers did not satisfy the necessaries exception because they failed to prove that they were indigent. Thus, the case went to trial both on the negligence count and on the issue of Travis's damages, which were limited to his lost future income and non-economic damages. The jury returned a verdict in Travis's favor for $750,000, but the court reduced the figure to $350,000 pursuant to a statutory non-economic damages cap. However, the jury did not award any damages for lost future earnings because it found that Travis would not live to an age at which he could become gainfully employed.

The Peppers appealed to the Court of Special Appeals, claiming, among other things, that the trial court erroneously excluded evidence of Travis's medical expenses even though the Peppers made a sufficient showing under the Garay necessaries exception that they

31. Id. at 686-87, 697 A.2d at 1361-62; see also Garay, 332 Md. at 374, 631 A.2d at 446-47 (recognizing that a minor is entitled to bring a claim for pre-majority medical expenses if he can show that "he or his estate either has paid or will be individually responsible to pay for medical expenses: (1) by emancipation, (2) by death or incompetence of his parents, (3) as necessaries for which his parents are unable or unwilling to pay [the 'necessaries exception'], or (4) by operation of a statute"). The Peppers specifically argued that the "necessaries" and "operation of statute" exceptions applied to Travis's case, because they were unable to pay for Travis's medical necessaries and because they automatically waived their right to sue in favor of Travis when they filed a claim for medical expenses on his behalf. Pepper, 346 Md. at 686-87, 697 A.2d at 1362.

32. Pepper, 346 Md. at 700, 697 A.2d at 1369.


34. Pepper, 346 Md. at 687, 697 A.2d at 1362; see also Md. Code Ann., Cts. & Jud. Proc. § 11-108(b) (limiting non-economic damages awards to $350,000 in personal injury actions occurring on or after July 1, 1986).

35. Pepper, 346 Md. at 687, 697 A.2d at 1362.

36. In Maryland, the doctrine of necessaries enables minors to avoid contracts they make with adults because of a presumption that unequal bargaining power exists between a child and an adult. See generally Monumental Bldg. Ass'n v. Herman, 33 Md. 128 (1870) (discussing how, at common law, persons under the age of 21 will not be bound by contracts they make for non-necessities because of a longstanding view that minors need protection from older persons who possess more experience in contractual dealings). However, the presumption of unequal bargaining power ceases to operate when children contract for "necessaries," such as board, clothing, medical aid, and education. Id. at 131. In those instances, children can be held liable for necessaries furnished to them if parents refuse or are unable to pay for them. Garay, 332 Md. at 368, 631 A.2d at 444.
were unable to pay the majority of those expenses. Hopkins contended that, even if Travis had a right to recover his own medical expenses, pleading rules required that his original complaint contain an explanation as to how Travis’s cause of action fell within the Garay necessaries exception. Because the complaint did not contain such an explanation, Hopkins argued, it failed to state a proper claim for medical expenses upon which Travis could recover.

The Court of Special Appeals found that the Peppers had indeed offered adequate evidence that they were unable to pay Travis’s medical expenses, and that the pleading stated Travis’s cause of action with enough specificity to enable a jury to consider his claim. In addition, the Court of Special Appeals found that the jury’s decision to deny recovery for Travis’s post-majority medical expenses was erroneously based on a finding that he would not live long enough to become gainfully employed. According to the opinion, the decision should have instead been based on a consideration of whether Travis would live to reach the age of eighteen. Citing these errors, the Court of Special Appeals remanded the case for a new trial on the amount of damages Travis was entitled to recover, if any, for pre- and post-majority medical expenses.

Hopkins next appealed to the Court of Appeals, which granted certiorari to determine whether the Court of Special Appeals erred in remanding Travis’s claim for medical expenses.

2. Legal Background.—Prior to Garay, Maryland courts adhered to the general rule that claims for a negligently injured child’s pre-majority medical expenses belonged to the parents of that child. Other jurisdictions have also held that only the parents of a negligently injured child have a right to recover medical expenses. Two

38. Id. at 68 n.11, 680 A.2d at 541 n.11.
39. Id. at 68-69, 680 A.2d at 541-42.
40. Id. at 67, 680 A.2d at 541.
41. Id. at 69, 680 A.2d at 542.
42. Id. at 72-73, 680 A.2d at 543-44.
43. Id.
44. Id. at 80, 680 A.2d at 547.
45. Pepper, 346 Md. at 692, 697 A.2d at 1364.
47. See, e.g., Stokes v. United States, 444 F.2d 69, 70 (4th Cir. 1971) (observing that, under North Carolina law, the parents of a negligently injured child have the right to sue to recover “expenses incurred for necessary medical treatment for the child’s injuries”);
traditional rationales underlie rules that vest medical expense claims solely in parents: First, because parents have a duty to pay a minor child's medical expenses, it is equitable to allow only parents to recover from the tortfeasor for the loss they have actually suffered; second, by limiting the cause of action to the parents, the law prevents "double recovery by children and their parents."  

Garay was the first Maryland case to expressly reject the notion that the right to recover medical expenses belongs exclusively to the parents of a negligently injured child. In Garay, an injured child and his parents sued a negligent driver more than five years after their cause of action arose. The original complaint contained both a claim by the child, through his mother as next friend, for injuries sustained in the accident and a claim by the child's parents (the Garays) for pre-majority medical expenses resulting from those injuries. The defendant successfully moved to dismiss the parents' claim for medical expenses because the parents filed their claim beyond the three-year statute of limitations. The Garays immediately amended their son's complaint to include a more specific claim for pre- and post-majority medical expenses. According to the Garay court, the defendant then moved to dismiss the amended complaint by asserting that the right to bring a cause of action to recover the sums expended for medical care rests solely with the parents of the minor, that the minor is under no legal obligation to pay for his medical care, that the minor lacks standing to pursue a claim for recovery of sums expended for his medical care, and that, because the parents' claim for medical expenses is

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Foster v. Foster, 142 S.E.2d 638, 641 (N.C. 1965) (holding that the right to recover "expenses of necessary medical treatment" vests in the parent of a negligently injured child). See generally Mark A. Reiter, Note, "Look Mom, I Can Do It on My Own": A Child's Independent Right to Recover Medical Expenses in Missouri, 61 Mo. L. Rev. 705 (1996) (noting that, prior to 1995, Missouri case law held that only parents had a right to recover for their child's medical expenses).  

48. See Hudson, 226 Md. at 528, 174 A.2d at 342 ("[T]he parent who has actually incurred the obligation to pay for such medical services is entitled to recover for them ... "); Reiter, supra note 47, at 705 (explaining that Missouri law allows a negligently injured child to recover damages for personal injury and parents to recover damages for the child's medical expenses in order to ensure that the party who actually suffers a particular loss recovers that loss from a wrongdoer).  

49. Reiter, supra note 47, at 705.  

50. See Garay, 332 Md. at 374, 631 A.2d at 446-47 (holding that exceptions exist to the general rule that only parents may make a claim for pre-majority medical expenses of their negligently injured child).  

51. Id. at 343-44, 631 A.2d at 431-32.  
52. Id.  
53. Id. at 344, 631 A.2d at 431.  
54. Id. at 345, 631 A.2d at 431.
barred by limitations, an attempt by the minor to bring the claim amounts to an invalid assignment of the claim.\textsuperscript{55}

The trial judge again granted the defendant's motion to dismiss.\textsuperscript{56} The Garays appealed the dismissal to the Court of Special Appeals, but prior to the intermediate appeal, the Court of Appeals issued a writ of certiorari to decide whether a negligently injured child can make his own claim for medical expenses.\textsuperscript{57}

The Court of Appeals's analysis centered around three basic issues: (1) whether compulsory joinder rules required the parents to join in their son's claim, thereby enabling the Garays' claim for medical expenses to be tolled during their child's minority; (2) whether the Garays had properly waived and assigned their claim for medical expenses to their son; and (3) whether the minor had independent standing to bring the claim for medical expenses.\textsuperscript{58}

The court answered the first of the three issues in the negative, stating that "the parents' claim for medical expenses is not required to be joined in the same action brought by the injured minor to recover for its own personal injuries."\textsuperscript{59} Consequently, the court found meritless the Garays' assertion that their claim for medical expenses could be tolled along with their child's claim.\textsuperscript{60}

As to the second issue, the court held that, even if the parents could waive the right to recover medical expenses in favor of their minor child, a waiver would take effect only if the parents had filed a claim for medical expenses on behalf of the child within the three-year limitations period.\textsuperscript{61} Because the Garays failed to waive their claim for medical expenses within the limitations period, they forfeited the opportunity to waive the claim and assign it to their son.\textsuperscript{62}

The Garay court presented its critical holding when it addressed the third issue—whether the Garays' son had independent standing to bring a claim for pre-majority medical expenses. The court observed that, under most circumstances, the right to recover medical expenses vests with the parents of a negligently injured minor.\textsuperscript{63} However, the court flatly rejected the assertion that a "child can never re-

\textsuperscript{55} Id., 631 A.2d at 432.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 349-50, 631 A.2d at 434.
\textsuperscript{59} Id. at 353, 631 A.2d at 436.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 365, 631 A.2d at 442.
\textsuperscript{62} Id.
\textsuperscript{63} Id. (citing Hudson v. Hudson, 226 Md. 521, 530, 174 A.2d 399, 343 (1961)).
cover medical expenses’ and stated that “[i]n limited circumstances, a minor may be individually held liable for his medical expenses, and in those circumstances, the minor must, of necessity, be allowed to recover those medical expenses.”

The court explained that the right of parents to recover medical expenses stems from the statutory duty imposed on parents to care for a child. Ordinarily, the duty makes parents “contractually liable for medical expenses incurred on the child’s behalf.” Nevertheless, the court decided to follow the reasoning of Moses v. Akers, a Virginia case that set forth four circumstances, each of which constitutes an exception to the general rule that parents possess the exclusive right to recover a minor’s pre-majority medical expenses. This decision created a new Maryland rule for medical expense claims by negligently injured minors. Put simply, the Garay court held that a child may make his own claim for medical expenses if he can show that “he or his estate either has paid or will be individually responsible to pay for medical expenses: (1) by emancipation, (2) by death or incompetence of his parents, (3) as necessaries for which his parents are unable or unwilling to pay, or (4) by operation of statute.” Accordingly, the court found that the lower court had erred in dismissing the Garays’ amended complaint for pre- and post-majority medical expenses, and it reversed and remanded the case for a trial to

64. Id.
65. Id.
67. Id.
69. Similar to the Garay exceptions, the Moses court stated that a minor child could recover medical expenses in any of the following circumstances: (1) he has paid or agreed to pay the expenses; or (2) he alone is responsible by reason of his emancipation or the death or incompetency of his parents; or (3) the parent has waived the right of recovery in favor of the infant; or (4) recovery therefore is permitted by statute.
70. Garay, 332 Md. at 374, 631 A.2d at 446-47. The court opined that the Garays’ son might be liable to pay his medical expenses based specifically on the third and fourth factors. Id. at 371-73, 631 A.2d at 445-46. Based on the facts presented, the court believed that the child could be held liable to pay his medical expenses under the doctrine of necessaries. Id. at 371, 631 A.2d at 445. The court also noted that because a Maryland statute could make the child subject to a hospital lien on a portion of his recovery, it would be “unfair to disallow a claim by a minor child for medical expenses, but to then subject that minor child’s recovery to the hospital lien.” Id. at 373, 631 A.2d at 446 (referring to the 1990 version of Md. Code Ann., Com. Law II § 16-601 (Supp. 1997), which allows a hospital to create a lien against a wrongfully injured patient’s damages award in order to satisfy the patient’s unpaid hospital bills).
determine whether the Garays' son could recover those expenses under the newly declared exceptions.\textsuperscript{71}

Although Garay was the first Maryland case to define exceptions to the general rule that the right to sue for medical expenses vests solely in the parents of a negligently injured child, the court's expansion of a child's right to recover medical expenses comports with recent trends in other jurisdictions. For example, in 1995, the Missouri Supreme Court "took a significant step in furthering a child's right to fully recover for medical injuries"\textsuperscript{72} by holding in Boley v. Knowles\textsuperscript{73} that the right to maintain an action to recover medical expenses vests jointly in the parents and the child.\textsuperscript{74} The Boley court also held that a negligently injured child may recover medical expenses even though the statute of limitations bars the parents' claim for such expenses.\textsuperscript{75} Like the Garay court, the Boley court based its decision partly on the necessaries doctrine and partly on the existence of a state statute that permitted hospitals to claim a lien upon the proceeds of a child's action for injuries.\textsuperscript{76} By contrast, other courts have held that when parents allow the statute of limitations to expire, their failure to make a claim for medical expenses automatically operates as a formal waiver of the claim in favor of the child.\textsuperscript{77} Hence, prior to Pepper, case law in Maryland and elsewhere acknowledged, in some form, a negligently injured child's right to sue for pre-majority medical expenses. However, prior to Pepper, Maryland law remained unclear as to what circumstances would trigger the Garay necessaries exception.

3. The Court's Reasoning.—In Pepper, the Court of Appeals observed that the Peppers were barred from making or waiving a claim
for medical expenses because they failed to do either within the three-year limitations period. Nonetheless, the court reiterated its holding in Garay that a negligently injured child may assert a claim for medical expenses under the necessaries exception when parents show they cannot afford to pay for the child's necessary medical care. According to the opinion, the child's claim under the necessaries exception will be preserved even when the statute of limitations bars a parental claim for medical expenses. Most importantly, the Pepper court specifically rejected parental indigence as a prerequisite to a child's right to recover medical expenses.

Hopkins argued that Travis had no standing to sue for medical expenses, because Travis could not suffer a justiciable injury "unless and until [his] Parents . . . [were] unable to provide for his needs," thereby making the child legally responsible for his own medical expenses under the necessaries exception. In other words, Hopkins asserted that, unless the Peppers could show they had no financial resources that could pay for medical expenses actually incurred, Travis could not maintain an action for pre-majority medical expenses in his own name. The court disagreed, stating that its holding in Garay precludes pre-majority medical expense claims by a minor only when the child's parents have the means to furnish necessary medical care and fail to sue the tortfeasor within the three-year limitation period. The Pepper court explained:

[W]e think a minor child's showing that his or her parents were in the past, are presently, or in the future will become, financially unable to meet his or her medical needs, sufficiently triggers that child's right to recover medical expenses in his or her own name from a wrongdoer. That a child is presently not liable for such expenses is irrelevant.

The opinion articulated a nonexhaustive list of possible factors that should be used to determine whether parents can afford to pay for necessary medical care:

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78. Pepper, 346 Md. at 696-97, 697 A.2d at 1366-67.
79. Id. at 705, 697 A.2d at 1371.
80. Id.
81. Id. at 701, 697 A.2d at 1369.
83. Id. at 27-33.
84. Pepper, 346 Md. at 701, 697 A.2d at 1369.
85. Id. at 695-96, 697 A.2d at 1366 (emphasis added) (footnote omitted).
Whether or not parents are able to afford necessary medical care for their negligently injured minor child will vary from case to case according to the circumstances of the parties involved, including, but not limited to, parental income, existing financial assets and obligations, the number of children in the family, available insurance coverage, the cost of living and inflation rate, whether or not both parents work, or are even capable of working in light of the child's injuries, and other economic and non-economic factors too numerous to list.\textsuperscript{86} 

Note that the court stressed that the enumerated factors would "vary from case to case." The court also observed that additional factors such as the "nature of the injury and the duration and manner of treatment" would make it impossible for the court to adopt a "bright line" rule for determining whether parents can afford to pay for a negligently injured child's necessary medical care.\textsuperscript{87} 

The court then considered evidence proffered by the Peppers concerning their financial situation.\textsuperscript{88} Based on that evidence, the court found a "meaningful dispute" as to whether the Peppers could afford to meet all of Travis's medical needs:

[W]e find it difficult to imagine that a family of substantial means could bear the financial burden of his care. The Peppers claim a yearly income of approximately $21,000, and have one other child. Pre-majority medical expenses for Travis are alleged to be slightly in excess of 1.1 million dollars . . . . [A] cursory review of the record reveals that Terry and Linda Pepper are, at some level, financially incapable of providing all of Travis's medical necessaries.\textsuperscript{89} 

Thus, the court rejected the argument that if the family had any resources left to pay for Travis's past and present medical costs, Travis

\textsuperscript{86} Id. at 701, 697 A.2d at 1369. 
\textsuperscript{87} Id. 
\textsuperscript{88} Id. at 702-04, 697 A.2d at 1369-71. The evidence included the following: (1) Linda Pepper no longer worked outside the home, because she had to stay home to care for Travis; (2) the Peppers had a net monthly income of $1,537.75 and had monthly expenses of $2,289; (3) the Peppers did not have an individual savings account; (4) the Peppers' income was insufficient to pay for Travis's future medical needs; (5) Travis was not receiving necessary medical services and equipment; (6) expert testimony indicated that Travis's medical needs for the remainder of his life would exceed $7,600,000; and (7) the Peppers indicated that they were unwilling to provide for Travis's medical expenses if they required the Peppers to sell their home, to tap into their retirement savings, or to access their older son's college fund. Id. 
\textsuperscript{89} Id. at 704-05, 697 A.2d at 1371.
could not maintain his cause of action. The court, in dicta, explained that public policy and justice would not be served if courts allowed negligently injured children to be "twice victimized" by construing the necessaries exception as narrowly as Hopkins suggested. It opined that a child who might ultimately be liable to pay for medical necessaries—because his parents could no longer afford them—should not have to go uncompensated simply because the parents failed to make a timely claim for medical expenses. Therefore, the court found that, under the circumstances presented, Travis deserved a new trial on damages, which would include a consideration of pre- and post-majority medical expenses.

4. Analysis.—After Pepper, a negligently injured child in Maryland does not have to prove that his parents are indigent—that is, lacking means to pay for any of the medical care provided to the child—in order to assert his own claim for medical expenses under the Garay necessaries exception. It is enough for the child's parents to show that they cannot afford all of the child's necessary medical expenses. This clarification of Garay expands a negligently injured child's right to sue for pre-majority medical expenses by allowing foreseeable parental inability to pay, rather than actual indigence, to trigger the Garay necessaries exception. The Pepper result may enable parents to circumvent the statute of limitations more easily when they fail to make a timely claim for medical expenses. Nonetheless, the holding is a reasonable outcome in light of the State's interest in preserving an injured person's right to sue for damages, making tortfeasors accountable for their actions, and enabling families to remain self-sufficient.

a. Implications for the Statute of Limitations.—One arguable drawback to the Pepper decision is that it will render the statute of limitations useless against parents who sleep on their right to sue for their children's medical expenses. Several policy implications underlie statutes of limitations:

90. Id. Rather than basing an assessment of financial incapacity on whether the Peoples could afford to pay for any of Travis's medical expenses, the court indicated that such an assessment should rest on whether the parents are incapable of paying the estimated cost of all of the child's medical necessaries. Id.
91. Id. at 695, 697 A.2d at 1366.
92. Id.
93. Id. at 705, 697 A.2d at 1371.
94. See id. at 701, 697 A.2d at 1369.
95. See id. at 704-05, 697 A.2d at 1371.
96. See id.
One of the purposes of such statutes is to assure fairness to a potential defendant by . . . encouraging promptness in prosecuting actions; suppressing stale or fraudulent claims; avoiding inconvenience that may stem from delay, such as loss of evidence, fading of memories, and disappearance of witnesses; and providing the ability to plan for the future without the uncertainty inherent in potential liability.\footnote{97}

Limitations periods also protect plaintiffs who exercise diligence in pursuing claims and "promote judicial economy."\footnote{98} Thus, if children can sue for medical expenses several years after they have been negligently injured, the tortfeasor will suffer a disadvantage. However, defendants already face such a dilemma when torts involve minors. Under Maryland law, the statute of limitations is generally tolled for minors until three years after the minor reaches the age of majority.\footnote{99} If a child has a cause of action at the age of eight, for example, a defendant receives notice that he may face liability thirteen years later, after the child turns eighteen. The \textit{Pepper} result, although inconvenient for defendants, is consistent with other cases that have held that the statute of limitations tolls for minors.\footnote{100} In this respect, \textit{Pepper} offers no less protection for defendants than the existing tolling provision of the statute of limitations.

Furthermore, the court has attempted to lessen the impact of the statute of limitations in other cases when doing so promotes fairness and equity. In \textit{Pierce v. Johns-Manville Sales Corp.},\footnote{101} the court ruled in favor of a plaintiff who discovered he had lung cancer more than six years after he developed an initial cause of action for asbestos exposure.\footnote{102} When the plaintiff later discovered that he had lung cancer,
he sued the manufacturer of the asbestos products to which he had been exposed. The court considered the defendant's argument that the plaintiff's second claim should be subject to a limitations period based on the original cause of action. Specifically, the defendant asserted that the later claim relied on the same underlying facts of the earlier claim. Nevertheless, the court ultimately determined that the resulting "unfairness" to the plaintiff outweighed the need to preserve the limitations period for the defendants; hence, the court applied the "discovery rule" and allowed the plaintiff to make a claim for damages related to his lung cancer more than six years after his initial cause of action arose.

Like the situation in Pierce, a strong argument exists that Travis Pepper could not have "discovered" his own cause of action for medical expenses until his claim actually came into existence through his parents' inability to meet all of his present and future medical necessities. Hence, it would have been unfair to subject Travis's separate claim for medical expenses to the three-year limitations period that applied to his parents. The Pepper court alluded to this need for a fair application of the law when it stated that "public policy and justice" demanded that Travis Pepper receive the right to assert his claim under the circumstances, notwithstanding the limitations bar to his parents' claim for medical expenses.

Other courts have expanded statutory limitations periods in cases involving negligently injured children far more than did the court in Pepper. In fact, some jurisdictions go so far as to allow parents to benefit from the same tolling provisions that apply to their minor children. In those jurisdictions, parents can ostensibly neglect to file

103. Id. at 661, 464 A.2d at 1023-24.
104. Id. at 663, 464 A.2d at 1025.
105. Id. at 667-68, 464 A.2d at 1027.
106. Id. at 663-64, 464 A.2d at 1025. Under the discovery rule, a cause of action arises for a latent disease when the plaintiff knew or should have known the nature and cause of the harm done to him. Id. (citing Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 83, 394 A.2d 299, 306 (1978)). The rationale behind the rule is that plaintiffs should not be penalized for failing to assert claims they did not know existed. Id. at 664, 464 A.2d at 1025.
107. Id. at 667-68, 464 A.2d at 1027.
108. Pepper, 346 Md. at 695, 697 A.2d at 1366.
lawsuits within the limitations period and, nevertheless, make their own claim for medical expenses years after the limitations period has run. Nowhere in Pepper did the court suggest that the Peppers could have tolled their claims along with Travis's. To the contrary, the court expressly found that the parental claims were separate and indeed subject to the three-year statute of limitations. Thus, although Pepper may enable parents to circumvent the statute of limitations if they meet certain criteria, such a circumvention must rest solely on the existence of a genuine cause of action for the negligently injured child. If none exists, parents will still be barred from asserting a claim for medical expenses beyond the three-year limitations period, thereby eliminating any risk of double recovery by parents and child for the same loss.

Moreover, it seems absurd to say that an interest in protecting defendants from aged claims should, alone, outweigh the interest of a negligently injured minor in asserting a "newly discovered" claim for medical expenses against the party responsible for causing his injuries. Such an approach would contradict the long-held legal view that tortiously injured persons have a right to pursue damages in court. By interpreting Garay in a manner that makes it easier for a child vic-

expenses with children's claims for injuries, that it would contravene the purpose of the tolling statute to subject the parents to a different limitations period than the child), aff'd sub nom. Vedutis v. South Plainfield Bd. of Educ., 362 A.2d 51 (N.J. Super. Ct. App. Div. 1976). See generally John H. Derrick, Annotation, Tolling of Statute of Limitations, on Account of Minority of Injured Child, as Applicable to Parent's or Guardian's Right of Action Arising out of Same Injury, 49 A.L.R.4TH 216 (1986 & Supp. 1997) (citing cases that have held that the claims of parents of negligently injured children, under certain circumstances, may be tolled pursuant to statutes that toll the children's claims until the age of majority, as well as citing cases that have held to the contrary).

110. See, e.g., Manley, 339 N.W.2d at 211 (allowing parents of a negligently injured child to make a claim for expenses resulting from the child's injuries even though they failed to file their claim within the one-year limitations period); Vedutis, 343 A.2d at 174-75 (permitting parents of a negligently injured child to file their claim three years after their cause of action arose, even though the statute of limitations required plaintiffs to file such suits within two years).

111. Pepper, 346 Md. at 696-97, 697 A.2d at 1367.

112. See id. at 696, 697 A.2d at 1366 (stating that parental claims that are barred by the statute of limitations cannot be "implicitly assigned to the minor child").

113. See id. (explaining that parents who fail to file timely claims will still be unable to sue—either on their own behalf or on behalf of their minor child—for medical expenses they have paid or can afford to pay in the future).

114. The Maryland Declaration of Rights provides as follows:

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.

MD. CONST. DECL. OF RTS. art. 19.
tim of medical negligence to make a valid claim for medical expenses, the court enables the person who suffers or who will suffer economic injury to receive compensation for her loss. In so doing, the court remains faithful to the idea that "the party that suffered the loss [should be able to] recover from the tortfeasor for that specific loss."115

The court's decision also reinforces the public policy interest of making tortious actors liable for the injuries caused by their wrongful conduct.116 In Maryland and elsewhere, tort damages force wrongdoers to compensate their victims117 and, in punitive-damages cases, can influence individuals to act within established standards of conduct.118 If hospitals, physicians, or other individuals have increased exposure to liability for injuries caused to minors as a result of negligence, they may monitor their conduct in the future more closely to avoid paying compensatory and punitive-damages awards. A contrary argument exists that, in the medical context, increased exposure to liability will result in a "medical malpractice crisis" similar to that experienced in the late seventies and early eighties.119 But that argument has little merit when one considers that Pepper does not give child victims of medical malpractice an "automatic" right to sue on their own for pre-majority medical expenses. The child or party suing on the child's behalf will still have to prove that the claim falls within the Garay necessaries exception before the claim can be heard.120 Furthermore, the assumption that parents will use Pepper as an excuse to sleep on their rights to sue for medical expenses ignores the reality that, in most cases, parents of greater financial means than the Peppers will

115. Reiter, supra note 47, at 705.
117. See Weishaar v. Canestralle, 241 Md. 676, 685, 217 A.2d 525, 530-31 (1966) ("Damages are supposed to compensate the injured person for the wrong which has been done him." (quoting Guido v. Hudson Transit Lines, 178 F.2d 740, 742 (3d Cir. 1950) (citing RESTATEMENT OF TORTS § 910 (1939))); Exxon Corp. v. Yarema, 69 Md. App. 124, 137, 516 A.2d 990, 997 (1986) ("The award of compensatory damages is an attempt to make the plaintiff whole again by monetary compensation."); see also Morrissette v. Boiseau, 91 A.2d 130, 131 (D.C. 1952) (noting that compensatory damages are designed to repair actual damage that the plaintiff suffered due to the defendant's wrongful conduct).
118. See, e.g., Yarema, 69 Md. App. at 137, 516 A.2d at 997 (observing that punitive damages are awarded "to punish the wrongdoer to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct" (internal quotation marks omitted)).
119. See generally Nancy E. Leibowitz, Casenote, 16 U. BALT. L. REV. 571 (1987) (discussing contentions that a specific expansion of the limitations period as to medical negligence suits caused an overwhelming volume of medical malpractice cases).
120. See supra note 51 for a discussion of the Garay necessaries exception.
find less risk in making a parental claim for medical expenses within three years than in letting the limitations period expire, hoping to satisfy the necessaries exception later.

b. Interest in Avoiding Taxpayer Burden.—The court's decision in Pepper also makes sense in light of the State's interest in promoting the self-sufficiency of families. In recent years, Maryland has been at the forefront of a nationwide movement to curb dependency on public assistance programs.121 Taken literally, however, Hopkins's approach to the necessaries exception would likely force many families of negligently injured children to use public assistance programs to pay for medical expenses, even though third parties tortiously caused the injuries.122 The Hopkins approach would require parents to show that they have expended all available financial resources on a negligently injured child's medical expenses before the child could qualify to make his own claim for those expenses.123 Such a requirement would compel families in the Peppers' situation to deplete all income in order to qualify as "unable to pay" under the necessaries exception. Once the parents qualified as unable to pay, the child could then sue in his own name to recover medical expenses. However, it could take many months or even years for a child plaintiff to win a civil judgment in his favor, depending upon the length of the court's docket.124 In the meantime, the family would likely have to seek some form of public assistance to fund the child's medical expenses.

121. See, e.g., Robert A. Erlandson, Welfare Recipients "Grab Brass Ring": Woodlawn Women Train to Become Paramedics, BALTIMORE SUN, Aug. 29, 1997, at 3B, available in 1997 WL 5527453 (commenting on a work-training program aimed at helping women to work their way off the welfare rolls); Peter Jensen, Glendening Seeks Limit on Welfare, BALTIMORE SUN, Feb. 8, 1996, at 1A, available in 1996 WL 6604081 (discussing Maryland's push to remove individuals from welfare programs by forcing them back to work).

122. According to the Maryland Department of Health and Mental Hygiene's most recent Medical Assistance Program report, the State spent more than $600 million on medical assistance programs for persons under the age of 21 in 1995. That figure represented more than 27% of all payments made by the State's Medical Assistance Program. MARYLAND MED. ASSIST. PROGRAM, THE YEAR IN REVIEW: FISCAL YEAR 1995, at 42 (1996). Although the State does not keep statistics on the number of public assistance program payments made to families with children who have extraordinary medical bills, it is reasonable to believe that a family that depletes its finances to pay for a negligently injured child's medical bills might eventually have to access public assistance funds.

123. See Brief of Petitioner at 25-26, Pepper (No. 108) (contending that a "minor does not suffer a justiciable injury until his parents are unable to meet his medical expenses and he becomes responsible for them under the doctrine of necessaries").

124. Cf. Theodore Eisenberg & Kevin M. Clermont, Trial by Jury or Judge: Which Is Speedier?, 79 JUDICATURE 176, 178 (1996) (stating that the average judge-tried civil trial spends 755 days on the docket and that the average jury-tried civil trial remains on the docket 678 days).
On the other hand, if parents can show that they cannot pay for all of the child’s necessary medical expenses without first having to show that they are indigent, the child’s claims could be heard before the parents became destitute. Thus, parents could retain some means of providing support to their families and use subsequent awards to the negligently injured child to pay for that child’s medical expenses. In fact, the Pepper court addressed the need to avoid a rule that would force families to rely on public assistance programs when it implied its desire to prevent “the taxpayer [from bearing] a financial burden that rightfully should be borne by the tortfeasor.”

Because Pepper’s holding should only bear on cases of extraordinary medical expenses, the families who will actually benefit from Pepper will be those facing incredible medical bills—bills that could easily deplete a family’s income or savings. By providing an avenue for the injured child to recover pre-majority medical expenses, Pepper provides those families with an alternative to becoming dependent upon public assistance. As a result, Pepper furthers the State’s policy of lessening dependence on public assistance programs.

5. Conclusion.—Pepper’s outcome may increase a negligent actor’s exposure to liability for an injured child’s medical expenses, but that result is not necessarily an undesirable one under circumstances analogous to the Pepper case. Furthermore, although Pepper may enable parents to circumvent the statute of limitations, the court’s decision limits such a possibility to cases in which a negligently injured minor has no other means of receiving and paying for all of the past, present, and future costs of necessary medical treatment for which he is financially responsible. In fact, if parents fail to make a claim for medical expenses within the statute-of-limitations period and possess

125. Pepper, 346 Md. at 701, 697 A.2d at 1369.

126. In Travis’s case, estimates placed medical expenses in the millions of dollars, thereby making it impossible for his parents to afford the total expense of his necessary medical care. Id. at 704, 697 A.2d at 1371. However, if the medical expenses were in the thousands of dollars, for example, the Peppers may not have been able to prove that they could not afford necessary medical care for Travis. If the Peppers could not show an inability to pay, they would have never qualified under the necessaries exception. See id. at 701, 697 A.2d at 1369 (determining that parents cannot benefit from the Garay necessaries exception if they possess the means to pay for the child’s necessary medical and related care).

127. Instead of turning to public assistance programs, a family could use damages awards to pay for the injured child’s medical necessities. In fact, the Court of Special Appeals alluded to this desirable alternative when it stated that “[t]ort recovery is designed, inter alia, to prevent an injured party from becoming destitute and a burden upon innocent parties.” Pepper, 111 Md. App. at 71, 680 A.2d at 543.

128. See Pepper, 346 Md. at 694, 697 A.2d at 1365-66.
the financial means to provide all of the medical care their minor child needs, they will not fall within the Pepper rule. Consequently, Pepper makes sense from both a policy and a moral perspective: It makes tortfeasors accountable for their negligent acts, helps families to remain self-sufficient, and protects the rights of negligently injured children who would otherwise suffer because of their parents' failure to comply with the statute of limitations.

ALLISON L. ALEXANDER

B. Preventing Medical Malpractice Claimants from Evading the Certificate of Merit Requirement Under the Health Care Malpractice Claims Act

In Goicochea v. Langworthy, the Court of Appeals effectively prevented a plaintiff from circumventing the requirements of the Maryland Health Care Malpractice Claims Act (the Act). In holding that the facts alleged by the respondent were insufficient to distinguish the action from a traditional medical malpractice claim, the court closed a potential loophole in the arbitration process for medical malpractice claimants who cannot, or will not, obtain a certificate of a qualified expert (also known as a certificate of merit). Furthermore, the Court of Appeals clarified the process by which trial courts should determine whether a claim is subject to the Act. Most importantly,

129. See id. at 701, 697 A.2d at 1369.
3. Goicochea, 345 Md. at 721-22, 694 A.2d at 476.
4. See id. at 729, 694 A.2d at 479 (concluding that the factual allegations made by Langworthy did not distinguish his claim from a medical malpractice claim, because the allegations "fail[ed] to set forth any factual basis upon which the circuit court could properly conclude that Goicochea's actions . . . were totally unrelated to the performance of a routine hernia examination").
5. Id. The Act requires that a potential plaintiff obtain a certificate of qualified expert before filing a medical malpractice claim. See Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(1)(i) (Supp. 1997) (stating that, unless the sole issue is a lack of informed consent, a claim against a health care provider shall be dismissed if a claimant "fails to file a certificate of a qualified expert . . . attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury"). The certificate of qualified expert is commonly referred to by practitioners as the certificate of merit. See Terry L. Trimble, Note, Delegates Deliver a Deathblow to Maryland's Health Claims Arbitration System, 55 Md. L. Rev. 893, 898 & n.45 (1996) (discussing in detail the development and requirements of the certificate of qualified expert).
6. See Goicochea, 345 Md. at 727-29, 694 A.2d at 478-79 (applying the test constructed in Jewell v. Malamet, 322 Md. 262, 271-75, 587 A.2d 474, 479-80 (1991), to the facts alleged by Langworthy in a logical, straightforward manner to determine whether Langworthy's claim was subject to the Act); see also infra notes 78-90 (discussing Jewell); infra notes 144-152 and accompanying text (discussing the analyses of the Court of Special Appeals and
however, the decision in Goicochea demonstrated how the court balances the competing policy goals of compensating legitimate tort claims and reducing the cost of medical malpractice litigation.  

1. The Case.—On November 27, 1992, after developing pain in his right groin, John Langworthy visited Dr. Juvenal Goicochea for a hernia examination in Dr. Goicochea’s office in Bethesda, Maryland. Although Langworthy consented to the examination, he later claimed that Dr. Goicochea exceeded the scope of a routine hernia examination and thereby committed assault and battery. Specifically, Langworthy alleged that Goicochea maliciously and violently jammed an index finger into Langworthy’s left spermatic cord and inguinal canal, causing permanent injury and pain to his left groin area.

Fourteen months after the allegedly tortious medical examination, Langworthy filed a statement of claim pursuant to the Act. The claim alleged that Dr. Goicochea maliciously injured Langworthy during the course of the examination and that, as a result, Langworthy experienced chronic groin pain, abnormal swelling, and laceration of soft tissues around his left spermatic cord. Because Langworthy

the Court of Appeals regarding the facts in Goicochea, and comparing these analyses with the odd result in Jewell).

7. See infra notes 153-163 and accompanying text (analyzing this balance and concluding that the court tipped the balance in favor of defendants).


9. Goicochea, 345 Md. at 722, 694 A.2d at 476.

10. In his brief to the Court of Appeals, Langworthy stated: [Dr. Goicochea] very adroitly put on a pair of surgical gloves. Turning to face his victim with the doctor’s malice aforethought, the petitioner said, “I am going to examine the left side first.”

[Dr. Goicochea] very adroitly put on a pair of surgical gloves. Turning to face his victim with the doctor’s malice aforethought, the petitioner said, “I am going to examine the left side first.”

11. See id. at 11-12 (describing allegedly malicious conduct and permanently painful injuries); see also supra note 10.


13. Goicochea, 345 Md. at 722, 694 A.2d at 476; see also Brief of Respondent at 17, Goicochea (No. 106) (describing Langworthy’s alleged injuries in detail).
failed to file a certificate of qualified expert, the Health Claims Arbitration Office (HCAO) dismissed his claim.\textsuperscript{14} Before the claim was dismissed, however, Langworthy filed a complaint in the Circuit Court for Montgomery County, alleging assault and battery.\textsuperscript{15} As a result, Dr. Goicochea later argued before the Court of Appeals that Langworthy "apparently realized that he would be unable to substantiate his claim of medical malpractice through a Certificate of Qualified Expert and thus attempted to circumvent this requirement by filing a Complaint in [circuit court]."\textsuperscript{16}

In the circuit court, Dr. Goicochea filed a motion to dismiss, arguing that Langworthy's claim was subject to arbitration as a condition precedent to filing suit.\textsuperscript{17} Thus, at issue was whether Langworthy's claim of assault and battery should have proceeded directly to the circuit court as an intentional tort, or whether his claim alleged a "medical injury" under the Act, thus requiring arbitration before pursuing a malpractice claim in the circuit court.\textsuperscript{18} According to Goicochea, the facts alleged by Langworthy did not sufficiently distinguish the claim from traditional medical malpractice, and the claim was therefore subject to the certificate requirement of the Act.\textsuperscript{19} The circuit court concurred with Dr. Goicochea and dismissed the complaint.\textsuperscript{20} The court concluded that the facts alleged in the complaint were insufficient to remove it from the purview of the Act.\textsuperscript{21} Furthermore, the court concluded that because the HCAO had already dismissed Langworthy's claim, it would be inappropriate to stay the tort action until the conclusion of further arbitration proceedings.\textsuperscript{22}

\textsuperscript{14} See Goicochea, 345 Md. at 722, 694 A.2d at 476 (indicating that a certificate of qualified expert is a requirement under Md. Code Ann., Cts. & Jud. Proc. § 3-2A-04(b)(1)(i)); see also supra note 5 (detailing the requirements of section 3-2A-04(b)(1)(i)).

\textsuperscript{15} Goicochea, 345 Md. at 722, 694 A.2d at 476. Remarkably, Langworthy represented himself pro se throughout the entire process of arbitrating, litigating, and appealing his claim. See Brief of Respondent at 12-14, Goicochea (No. 106) (explaining that Langworthy filed a pro se claim because an attorney refused to represent him without a certificate of merit). This was not the first time John Langworthy has taken a pro se claim from a circuit court to the Court of Appeals. See Langworthy v. State, 284 Md. 588, 591, 399 A.2d 578, 580 (1979) (noting Langworthy's pro se appeal in a case in which he successfully interposed the defense of insanity to a rape conviction, and considering whether Langworthy's appeal was improperly dismissed by the intermediate appellate court).

\textsuperscript{16} Brief of Petitioner at 1, Goicochea (No. 106).

\textsuperscript{17} Goicochea, 345 Md. at 723, 694 A.2d at 476.

\textsuperscript{18} See id. at 721, 694 A.2d at 476.

\textsuperscript{19} Id. at 724, 694 A.2d at 477; see also Brief of Petitioner at 12-13, Goicochea (No. 106).

\textsuperscript{20} See Goicochea, 345 Md. at 723, 694 A.2d at 476. The circuit court reasoned that because Langworthy alleged that the assault and battery arose during the providing of health care by a physician, the Health Care Malpractice Claims Act applied to his claim. Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.
In the Court of Special Appeals, Langworthy argued that the circuit court should have exercised jurisdiction over his claim of assault and battery. He contended that the assault and battery did not constitute a medical injury as defined by statute and that his claim, therefore, should proceed directly to trial without arbitration. He entreated the appellate court to vacate the decision and remand the case to circuit court, arguing that Dr. Goicochea’s actions constituted gratuitous acts of torture with no medical validity. Neither the circuit court nor the HCAO expressly determined whether Langworthy’s claim arose out of a medical injury or a gratuitous act. As a result, the Court of Special Appeals held that “because Langworthy asserts . . . [a claim] for assault and battery, the circuit court should determine whether Langworthy’s claim is based on an alleged gratuitous act that obviously was not part of the medical treatment.” The Court of Special Appeals therefore vacated the judgment of the circuit court and remanded the case for further proceedings in accordance with its opinion.

23. See Langworthy, 106 Md. App. at 269, 664 A.2d at 424. Section 3-2A-02(a) of the Courts and Judicial Proceedings Article provides that “[a]ll claims . . . by a person against a health care provider for medical injury allegedly suffered by the person . . . are subject to and shall be governed by the provisions of this subtitle.” Md. Code Ann., Cts. & Jud. Proc. § 3-2A-02(a) (1995). In addition, section 3-2A-01(f) defines a “medical injury” as an “injury arising or resulting from the rendering or failure to render health care.” Id. § 3-2A-01(f).


25. See id. at 273, 664 A.2d at 426; see also Brief of Respondent at 14, 35-36, Goicochea (No. 106) (arguing to the Court of Appeals that Goicochea had acted with “unlawful malice and gratuitous purpose” and with “no conceivable medical validity”). Langworthy researched the topic of torture at the National Library of Medicine in Bethesda, Maryland. Id. at 14. Based on his research, Langworthy claimed before the Court of Appeals that “South American fascist dictatorships like the State of Peru where Goicochea obtained his State-sponsored medical degree have been practising the medical torture of communists, libertines and other nonconformists.” Id. at 14-15. At various points in his brief to the Court of Appeals, Langworthy compared Dr. Goicochea to the following: (1) a doctor who performed an abortion on a mother against her will, id. at 19, (2) a Nazi war criminal who performed nonconsensual sterilizations on prisoners (the scope of Langworthy’s presentation included the Nuremberg Code and other international human rights documents), id. at 21, (3) a doctor who raped his patient after obtaining consent to a medical procedure, id. at 23, (4) a doctor who took off his pants and “climbed on top” of his patient (and later claimed it was medically valid treatment), id. at 25, and finally, (5) convicted serial killer Jeffrey Dahmer, who used surprise tactics to stun his victims, id. at 32.

26. See Langworthy, 106 Md. App. at 273, 664 A.2d at 426. Dr. Goicochea argued before the Court of Appeals, however, that because HCAO heard and eventually dismissed Langworthy’s claim, by implication the HCAO determined the claim was within its purview. See Brief of Petitioner at 8, Goicochea (No. 106).


28. Id.
The Court of Appeals granted certiorari to determine whether Langworthy's intentional tort claim fell within the ambit of the Act.

2. Legal Background.—Maryland, like many other states, enacted legislation directed at curing the medical malpractice insurance crisis of the late 1960s and early 1970s. While the Maryland legislature created a statute that utilized arbitration, and later the certificate of merit requirement, as the primary tools to combat the high cost of health care litigation, other jurisdictions enacted legislation combining a variety of tools for the same purpose. Some of these tools included shortening the limitations period, setting up medical review panels and committees, creating damage caps, and creating patient compensation funds. The Maryland statute and the statutes enacted in other jurisdictions share the recurring question whether an action based on non-professional negligence or intentional tort falls within the purview of a medical malpractice statute. In Maryland, courts have had a difficult time producing a clear answer to this question.

a. Maryland's Response to Health Care Litigation.—In 1976, the Maryland General Assembly enacted the Health Care Malpractice Claims Act in response to the medical malpractice insurance crisis of the late 1960s and early 1970s. The legislators attempted to devise a statute that would protect legitimate tort claimants while simultaneously reducing the number of frivolous medical malpractice suits filed. Despite attempts to identify clearly which claims are covered

30. Goicochea, 345 Md. at 721, 694 A.2d at 476.
31. See infra notes 38-43 and accompanying text (describing the requirement of non-binding arbitration and the certificate of merit requirement placed on litigants).
32. See infra note 92 and accompanying text (listing various medical malpractice statutes and their requirements, and noting that they share a similar scope and purpose to the Maryland statute).
34. See Trimble, supra note 5, passim (discussing the background of the medical malpractice crisis, the creation and evolution of the Health Care Malpractice Claims Act, and the effect of the unilateral waiver on health claims arbitration in Maryland); see also Kenneth S. Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 Md. L. Rev. 489, 490 (1977) (describing the increase in severity and frequency of medical malpractice claims).
35. The fact that the dominant medical insurer in Maryland ceased offering medical malpractice insurance in the mid-1970s caused considerable apprehension in the legislature. See Attorney Gen. v. Johnson, 282 Md. 274, 280-81, 385 A.2d 57, 61 (1977) (recognizing that the Act was created in response to the medical malpractice insurance crisis and that the crisis was precipitated by the dominant medical insurer’s ceasing to offer medical malpractice insurance despite a dramatic rate increase).
36. See Johnson, 282 Md. at 308, 385 A.2d at 76 (describing the purpose of the Act).
by the Act, the Court of Appeals has been forced periodically to redraw the line between claims intended for arbitration and claims intended for trial.\textsuperscript{36} As a result, the cases on point have often been unclear and subject to misapplication.\textsuperscript{37}

The Act requires claimants to submit to nonbinding arbitration as a condition precedent to filing suit against a health care provider.\textsuperscript{38} However, because of the enactment of section 3-2A-06B of the Courts and Judicial Proceedings Article in 1995,\textsuperscript{39} any party may waive this requirement and proceed to circuit court, provided the parties have filed a certificate of merit.\textsuperscript{40} In effect, the 1995 amendment to the Act eviscerated the requirement of nonbinding arbitration.\textsuperscript{41} Nevertheless, the Act still requires the certificate of merit,\textsuperscript{42} and this tool has proven to be a strong impediment to frivolous suits.\textsuperscript{43}

\textsuperscript{36} See Goicochea, 345 Md. at 727, 694 A.2d at 478 ("Jewell v. Malamet clarified the holding in Nichols v. Wilson, concerning the circumstances under which intentional torts . . . are covered by the Act." (citation omitted)); Jewell v. Malamet, 322 Md. 262, 265-67, 587 A.2d 474, 475-76 (1991) (discussing the legislative history of the Act and the court's struggle to distinguish between cases covered by the Act and those outside its purview); Nichols v. Wilson, 296 Md. 154, 155, 460 A.2d 57, 58 (1983) ("Once again we are called upon to determine what type claim against a health care provider is covered by the Health Care Malpractice Claims Act . . . .").

\textsuperscript{37} See Cannon v. McKen, 296 Md. 27, 44, 459 A.2d 196, 205 (1983) (Davidson, J., dissenting) (pointing out a contradiction in the holding of the majority, and stating that "the omission . . . of any allegation relating to the essential characteristic distinguishing medical malpractice from [other] negligence . . . inevitably leads to the conclusion that the claim . . . is not based upon medical malpractice, but rather . . . upon [other] negligence"); infra notes 139-153 and accompanying text (describing the inconsistent approach adopted in Jewell and its subsequent clarification in Goicochea).

\textsuperscript{38} See Md. Code Ann., Cts. & Jud. Proc. § 3-2A-02(a) (1995); see also Johnson, 282 Md. at 283-84, 385 A.2d at 63 (stating that the Act "in essence requires that malpractice disputes be submitted to nonbinding arbitration as a condition precedent to the institution of a court action").


\textsuperscript{40} See id.; see also Trimble, supra note 5, at 893 (recognizing that the General Assembly unanimously enacted the new section during the 1995 session); supra note 5 (describing the certificate of merit).

\textsuperscript{41} See Trimble, supra note 5, at 893 (stating that under the 1995 amendment "parties are likely to waive the overwhelming majority of cases, effectively destroying the health claims arbitration system"); see also infra note 169 (citing the statistics for claim filings in 1996 and 1997, and concluding that the unilateral waiver has had an enormous impact on the arbitration process).


\textsuperscript{43} See Trimble, supra note 5, at 907 (illustrating how the certificate of merit requirement reduced the number of medical malpractice claims following the Act's enactment in 1986).
Periodic challenges have been leveled against the Act. The early challenges alleged constitutional defects, but in later cases the questions have been primarily jurisdictional. Beginning with *Attorney General v. Johnson*, the Court of Appeals upheld the constitutionality of the Act. *Johnson* concerned a wrongful death action against physicians in a hospital. The plaintiffs sought a declaratory judgment that the Act was unconstitutional because they could not immediately file a medical malpractice action in circuit court against the physicians. The court concluded that the creation of a condition precedent to filing suit neither violated the rights of medical malpractice claimants to jury trials nor deprived them of equal protection of the laws.

After *Johnson*, the Court of Appeals addressed a more specific challenge to the language of the Act in *Oxtoby v. McGowan*, a case involving an injury alleged to have occurred before the Act became effective. Because the claimants questioned the jurisdiction of the Act, they proceeded directly to circuit court without arbitration. The court reasoned that although an arbitration panel was not an administrative agency, the requirement that a claimant submit to arbitration before proceeding to circuit court was analogous to the doctrine of exhaustion of administrative remedies. Under this doctrine, a liti-

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44. See, e.g., *Attorney Gen. v. Johnson*, 282 Md. 274, 277, 385 A.2d 57, 59 (1978) (recognizing the issue before the court to be whether the Act was "constitutionally infirm").
45. See infra notes 154-155 and accompanying text (listing cases that have considered the jurisdiction of the Act).
47. Id. at 277, 385 A.2d at 59.
48. Id.
49. Id.
50. Id. at 299, 385 A.2d at 71; see also U.S. CONST. amend. VII (declaring that "the right of trial by jury shall be preserved"); MD. CONST. DECL. OF RTS. art. 5 (stating that "the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury").
51. *Johnson*, 282 Md. at 309, 385 A.2d at 77; see also U.S. CONST. amend. XIV (declaring that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"); MD. CONST. DECLARE. OF RTS. art. 24 (stating that "no man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land"). The Court of Appeals also held that the Act did not violate the separation of powers doctrine. The court determined that the Act did not vest judicial power in an administrative agency, and that the Act, therefore, did not violate the doctrine that the powers of the three branches of government be forever separate and distinct. *Johnson*, 282 Md. at 283-84, 385 A.2d at 63.
52. 294 Md. 83, 447 A.2d 860 (1982).
53. Id. at 85, 447 A.2d at 862 (noting that the Act "shall take effect July 1, 1976"); accord MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-01 (effective July 1, 1976).
54. *Oxtoby*, 294 Md. at 86, 447 A.2d at 862.
55. Id. at 91, 447 A.2d at 865.
gant must pursue the specially created statutory remedy before resorting to an action in the courts.\textsuperscript{56} Moreover, the \textit{Oxtoby} court remarked that if a litigant fails to pursue the statutorily mandated procedures, then the court will, of its own motion, vacate the judgment and order the action dismissed.\textsuperscript{57} Despite this strong language, unless presented with evidence supporting the circuit court's decision to permit the case to proceed without arbitration, the \textit{Oxtoby} court could not conclude that the trial court erred in proceeding with the case.\textsuperscript{58} The court made this decision because it could not determine whether the cancer that led to the death of the plaintiff's wife developed prior to July 1, 1976.\textsuperscript{59} If the cancer developed after July 1, 1976, then the claim would need to go through arbitration as required by the Act.\textsuperscript{60} The trial judge, who ruled that the action could proceed to circuit court, did not include a statement of facts in his ruling.\textsuperscript{61} Therefore, the appellate court assumed that there had been sufficient evidence at the time of trial for the trial judge to conclude that the cancer developed before July 1, 1976.\textsuperscript{62} As a result of this insufficient record, the appellate court reasoned that, even though the requirement of non-binding arbitration was analogous to the doctrine of exhaustion of administrative remedies, the appellate court could not conclude that the trial court erred in allowing the claim to proceed.\textsuperscript{63}

In the cases following \textit{Oxtoby}, the court began to determine on a case-by-case basis which claims fell under the Act and which claims could proceed directly to circuit court.\textsuperscript{64} In \textit{Cannon v. McKen},\textsuperscript{65} the claimant, Gloria Cannon, filed suit in circuit court, alleging that the defendant breached a duty to exercise reasonable care when Cannon was injured by wall-mounted x-ray equipment that fell on her.\textsuperscript{66} Cannon also sued based on the fact that the x-ray equipment was defective and unreasonably dangerous.\textsuperscript{\textit{Id.}} The last count of her complaint stressed that Dr. McKen warranted that the wall-mounted x-ray equipment was safe and fit

\textsuperscript{56. \textit{Id.}}
\textsuperscript{57. \textit{Id.}}
\textsuperscript{58. \textit{Id.} at 92, 447 A.2d at 865.}
\textsuperscript{59. \textit{Id.}}
\textsuperscript{60. \textit{Id.}}
\textsuperscript{61. \textit{Id.}}
\textsuperscript{62. \textit{Id.}}
\textsuperscript{63. \textit{Id.}}
\textsuperscript{64. See, e.g., Goicochea, 345 Md. at 721, 694 A.2d at 476 (identifying the issue before the court as whether a claim was subject to the arbitration requirements of the Act); Jewell v. Malamet, 322 Md. 262, 267, 587 A.2d 474, 476 (1991) (same); Brown v. Rabbitt, 300 Md. 171, 172, 476 A.2d 1167, 1168 (1984) (same); Nichols v. Wilson, 296 Md. 154, 155, 460 A.2d 57, 58 (1983) (same); Cannon v. McKen, 296 Md. 27, 28, 459 A.2d 196, 197 (1983) (same).}
\textsuperscript{65. 296 Md. 27, 459 A.2d 196 (1983).}
\textsuperscript{66. \textit{Id.} at 29, 459 A.2d at 198. Cannon also sued based on the fact that the x-ray equipment was defective and unreasonably dangerous. \textit{Id.} The last count of her complaint stressed that Dr. McKen warranted that the wall-mounted x-ray equipment was safe and fit
non argued that her action did not arise from the rendering or failure to render health care, and that it therefore could not be a medical injury as defined by the Act.\textsuperscript{67} The Act defines a "medical injury" as an "injury arising or resulting from the rendering or failure to render health care."\textsuperscript{68} The Court of Appeals explained the legislative policy behind the Act:

\[\text{T]he legislature intended to include in the scope of the Act only those claims for damages done to or suffered by a person originating from, in pertinent part, the giving of or failure to give health care. In our view, the legislature did not intend that claims for damages against a health care provider, arising from non-professional circumstances where there was no violation of the provider's professional duty to exercise care, to be covered by the Act. It is patent that the legislature intended only those claims which the courts have traditionally viewed as professional malpractice to be covered by the Act.}\textsuperscript{69}

In keeping with legislative intent, the court held that the Act did not cover claims involving a health care provider's failure to exercise reasonable care in non-professional situations.\textsuperscript{70} In so holding, the court announced an exception to the general jurisdiction of the Act: If a complaint alleges facts that an injury occurred from a health care provider's negligence in a non-professional situation, then the claim should proceed to circuit court without arbitration.\textsuperscript{71}

Two months later, the court heard \textit{Nichols v. Wilson},\textsuperscript{72} in which the principal issue was whether factual allegations of assault and battery and intentional infliction of emotional distress removed a claim from the purview of the Act.\textsuperscript{73} Quoting language from \textit{Cannon}, the
court reiterated that only claims for violations of a health care provider’s professional duty to exercise care fall within the Act.\textsuperscript{74} In her complaint, Nichols alleged:

Before suture removal and while Evaun M. Nichols was being held down, without provocation, Edward Earl Wilson, M.D., intentionally, violently, maliciously, wantonly, and recklessly struck with his hand the left cheek of Evaun M. Nichols with great force causing [her] to suffer and sustain serious, painful and permanent injuries to her body, severe mental anguish and shock to her body systems, and other damages and injuries.\textsuperscript{75}

The court concluded that such allegations were not within the purview of the Act because the legislature did not intend such a claim to proceed differently than any other intentional tort, even though it occurred during the rendering of health care.\textsuperscript{76} Thus, the court created a second exception to the general jurisdiction of the Health Care Malpractice Claims Act: After Nichols, it followed that if a physician allegedly maliciously injured a claimant during the rendering of health care, and the alleged conduct had no possible medical validity, then the Act was inapplicable.\textsuperscript{77}

Eight years later, in Jewell v. Malamet,\textsuperscript{78} the court revisited the issue of whether and in what circumstances the allegations of an intentional tort might remove a claim from the purview of the Act.\textsuperscript{79} In her complaint, Marlene Jewell alleged that when Dr. Malamet first examined her, the following incidents occurred:

While the gown was completely pulled up, he . . . push[ed] on [her] stomach and then around her groin muscles. After pushing on the groin muscles and saying, “is that sore, is that

\textsuperscript{74} Nichols, 296 Md. at 161, 460 A.2d at 61.
\textsuperscript{75} Id. at 155-56 n.2, 460 A.2d at 58 n.2.
\textsuperscript{76} Id. at 161, 460 A.2d at 61.
\textsuperscript{77} See id. (stating that “[n]o way can it be said that the legislature intended [an intentional, malicious, wanton, and reckless act] to be within the Act even though such action took place during the rendering of health care”).
\textsuperscript{78} 322 Md. 262, 587 A.2d 474 (1991).
\textsuperscript{79} Id. at 267, 587 A.2d at 476.
sore," he then started to fondle her around the lips of the vagina. Malamet inserted his finger up into the vagina, not wearing a rubber glove or any protective equipment, and then continued asking if [she] was sore.80

In his second examination, Dr. Malamet allegedly requested Jewell to pull down her pants and underwear to her knees and lie on the examining table bent over on her stomach.81 Jewell claimed he proceeded to fondle the area in and around her vagina and buttocks, again without rubber gloves or protective equipment.82 Jewell also claimed that after making her sit up, the doctor then pulled up her sweatshirt and bra and fondled her breasts, ostensibly to determine muscle pain in the area of the chest.83

The circuit court dismissed the claim, holding that the factual context determined proper jurisdiction of the claim and that, under the "totality of the circumstances," the claim Jewell filed originated from the rendering of health care.84

The Court of Appeals agreed with the trial judge that the factual context, and not the label of the claim, determined jurisdiction.85 The court then considered whether Jewell's claims arose out of a medical injury.86 During oral argument, the court noted that if Dr. Malamet conceded that the alleged procedures had no medical validity, then the action would proceed in circuit court as a regular tort action.87 Because the court discovered that Dr. Malamet planned to use expert testimony to show that the purported fondling of Jewell's breasts was part of a medically valid treatment,88 the court determined that it could not conclude as a matter of law that the allegations were

80. Id. at 268, 587 A.2d at 477.
81. Id.
82. Id.
83. Id. at 268-69, 587 A.2d at 477.
84. Id. at 271, 587 A.2d at 479.
85. Id. at 271-72, 587 A.2d at 479. The court remarked that it did "not believe that the mere fact that the challenged conduct arose during the course of a consensual physical examination by a physician [was] decisive of jurisdiction." Id.
86. Id.
87. Id. at 275, 587 A.2d at 480.
88. Id. Only after the court pressed the defendant did he concede that his defense would include expert testimony tending to show that the alleged conduct did not deviate from the standard of care. Id. Furthermore, in its brief to the court as amicus curiae, the HCAO requested reversal of the circuit court decision, because that court determined that arbitration was not the proper forum in which to place Jewell's claim. Id. at 274, 587 A.2d at 480. Disregarding the HCAO, the court remanded the case to circuit court so that the court below could stay the tort action until the conclusion of further arbitration proceedings. Id. at 276, 587 A.2d at 481.
free from the requirements of the Act. In this manner, the court clarified *Nichols*: when an injury was not clearly gratuitous and intentional, the claim would be subject to arbitration, unless the physician conceded that the alleged conduct was not a medically valid part of treatment.

Although the *Jewell* court clarified *Nichols* by focusing on the jurisdictional inquiry on the factual basis for allegations rather than on mere labels, it still left the policy behind the decision unstated. Without a clear statement of policy underlying these decisions, it is difficult to predict which claims will be treated as mere labels and which claims will be treated as having a sufficient factual basis to be removed from the Act. Meanwhile, in other jurisdictions similar questions have arisen regarding the jurisdiction of medical malpractice statutes, despite the fact that these jurisdictions often used methods in addition to or other than arbitration to reduce the cost of health care litigation.

### b. Other Jurisdictions' Responses to Health Care Litigation

Outside Maryland, several courts have addressed the issue of whether intentional torts allegedly committed by health care providers should fall within the purview of state medical malpractice statutes. Medical

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89. *Id.* at 275, 587 A.2d at 481.
90. *Id.* at 274-75, 587 A.2d at 480-81.
91. *See, e.g.*, Montagino v. Canale, 792 F.2d 554, 556 (5th Cir. 1986) (holding that the three-year medical malpractice statute of limitations in Louisiana applied even when a plaintiff alleged an intentional tort); Herrera v. Superior Court, 204 Cal. Rptr. 553, 556-57 (Ct. App. 1984) (holding that a medical malpractice action, under California's Medical Injury Compensation Act, can include theories other than negligence, including intentional torts); Robbins v. Orlando, H.M.A., Inc., 683 So. 2d 664, 665 (Fla. Dist. Ct. App. 1996) (holding that an allegation that a weight-loss program intentionally failed to inform a participant of its connection to a psychiatric facility and falsely represented the participant as being clinically depressed to her insurance company did not fall under a medical malpractice statute requiring pre-suit screening); Murphy v. Mortell, 684 N.E.2d 1185, 1188 (Ind. Ct. App. 1997) (holding that an allegation that a hospital technician molested a patient while she was unconscious was not a claim for medical malpractice within the scope of the Indiana Medical Malpractice Act); *Doe ex rel. Roe v. Madison Ctr. Hosp.*, 652 N.E.2d 101, 107 (Ind. Ct. App. 1995) (holding that an allegation that a mental health counselor coerced a minor patient into sexual intercourse, resulting in her contracting a venereal disease, did not fall under coverage of the Indiana Medical Malpractice Act); *Van Sice v. Sentany*, 595 N.E.2d 264, 267 (Ind. Ct. App. 1992) (holding that a patient's claim of battery, consisting of allegations that a physician failed to disclose fully inherent risks and alternatives to proposed treatment and as a result failed to obtain informed consent, fell within the scope of the Indiana Medical Malpractice Act); *Jones v. Wilkin*, 905 P.2d 166, 168 (Nev. 1995) (per curiam) (holding that intentional tort claims brought against health care providers for allegedly providing false information of possible drug offenses to the Nevada Department of Investigation did not fall within Nevada's medical malpractice statute).
malpractice statutes in other jurisdictions share a similar scope and purpose to that of the Health Care Malpractice Claims Act in Maryland;\(^9\) this could explain why many courts in these jurisdictions have followed similar approaches to dealing with claims of intentional torts committed by health care providers.\(^9\)

For example, in *Murphy v. Mortell*,\(^9\) the Indiana Court of Appeals held that a patient’s claim that a respiratory therapy technician molested her while she was restrained and unconscious did not fall within the ambit of the Indiana Medical Malpractice Act.\(^9\) The court pointed out that the allegations brought by the patient did not describe the rendering of professional services.\(^9\) On the contrary, the court determined that the allegations created questions of fact for a jury to resolve without application of the medical standard of care.\(^9\)

The Indiana Court of Appeals determined the proper jurisdiction of the claim by examining the substance of the allegations.\(^9\) Furthermore, the court stated that “[t]he [Indiana] Medical Malpractice Act does not specifically exclude intentional torts from the definition of malpractice; however, the Act pertains to curative or salutary conduct of

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92. *See* CAL. CIV. PROC. CODE § 1295 (West 1982) (encouraging and facilitating arbitration of medical malpractice claims by specifying uniform language to be used in binding arbitration agreements); FLA. STAT. ANN. § 766.101 (West 1997 & Supp. 1998) (providing for a medical review committee to review medical malpractice complaints during a presuit screening period); IND. CODE ANN. §§ 27-12-1-1 to 27-12-18-1 (Michie 1994 & Supp. 1997) (establishing a cap on damages in medical malpractice cases, providing for a patient compensation fund, and requiring the presentation of a medical malpractice claim to a medical review panel before commencing suit); LA. REV. STAT. ANN. § 9:5628 (West Supp. 1997) (establishing a one-year statute of limitations period for medical malpractice cases); NEV. REV. STAT. ANN. § 41A.016 (Michie 1996) (requiring submission of medical malpractice cases to a screening panel before suit may be filed).

93. *See* Robbins, 683 So. 2d at 665 (stating that “whether a plaintiff must give the requisite presuit notice outlined in [a Florida medical malpractice statute] is fact dependent” and that allegations determine whether the claim arises out of a rendering or a failure to render health care services); Liles v. P.I.A. Medfield, Inc., 681 So. 2d 711, 712 (Fla. Dist. Ct. App. 1995) (examining whether a claim for the tort of false imprisonment involved the rendering of medical care or services); Murphy, 684 N.E.2d at 1188 (stating that the court looks to the substance of the claim to determine the applicability of Indiana’s Act and concluding that allegations that a health care provider molested an unconscious and restrained patient did not constitute the rendering of professional health services nor did it have a curative purpose); Madison Ctr. Hosp., 652 N.E.2d at 104 (holding that allegations of sexual assault of a psychiatric patient by a counselor did not fall under Indiana’s Act); Jones, 905 P.2d at 168 (concluding that allegations did not describe medical malpractice under the Nevada statute, because the patient did not accuse health care providers of “failing to use reasonable care, skill or knowledge when they diagnosed and treated her back pain”).


95. Id. at 1188.

96. Id.

97. Id.

98. Id.
a health care provider within his or her professional capacity."

As a result of its examination, the Indiana Court of Appeals determined that the injury was not for a therapeutic purpose. Therefore, the court concluded, the injury was not due to medical malpractice and should not fall under the Indiana Medical Malpractice Act.

Similarly, in Jones v. Wilkin, the Supreme Court of Nevada permitted a patient to bring an intentional tort action against health care providers in district court without first submitting her claim to the Nevada Medical Legal Screening Panel. In Jones, the court stressed that the patient did not accuse the defendants of "failing to use reasonable care, skill or knowledge when they diagnosed and treated her back pain." The court thus examined whether the claim arose during the rendering of or failure to render health care. Because the court concluded that the alleged conduct did not involve the rendering of or failure to render medical services, it held that the claim did not fall within the purview of Nevada's medical malpractice statute.

Both within Maryland and without, questions of jurisdiction have plagued state health care malpractice statutes. Within Maryland, the addition of the unilateral waiver provision has severely limited the Act, but challenges to the Act's jurisdiction continue. Because the unilateral waiver provision allows either party to waive arbitration under the Act, most cases proceed directly to circuit court. Nevertheless, parties who fail to obtain a certificate of merit still face a substantial obstacle to judicial resolution of their claims. Some, like the respondent in Goicochea, may try to avoid the requirements of the Act by labeling a medical malpractice action as a claim of intentional tort.

99. Id. (emphasis added).
100. Id.
102. Id. at 167-68.
103. Id. at 167.
104. Id.
105. Id. at 168.
106. See infra notes 169-170 and accompanying text (explaining that the unilateral waiver eviscerated the Act and that the prospects of repeal grow stronger each year).
107. See supra note 41 and accompanying text (discussing the effect of the unilateral waiver on health claims arbitration in Maryland); infra note 169 and accompanying text (reporting statistics from the Health Claims Arbitration Office and concluding that the future of health claims arbitration in Maryland grows dimmer each year).
108. See infra notes 134-136 and accompanying text (describing how the certificate of merit deters claims that lack an adequate factual basis).
109. See supra note 16 and accompanying text (noting the argument of Dr. Goicochea that Langworthy attempted to circumvent the certificate of merit requirement under the Act by filing a claim for assault and battery in circuit court).
3. The Court's Reasoning.—In *Goicochea v. Langworthy*, the Court of Appeals held that the plaintiff, John Langworthy, provided inadequate factual allegations to remove his claim from the purview of the Health Care Malpractice Claims Act. Applying the analysis first articulated in *Jewell*, the court could not conclude that "Goicochea's actions had no conceivable medical validity or were totally unrelated to the performance of a routine hernia examination." Accordingly, the Court of Appeals dismissed Langworthy's appeal, reversed the judgment of the Court of Special Appeals, and ordered the lower court to affirm the judgment of the trial court.

The Court of Appeals recognized that malpractice claims must be submitted to arbitration as a condition precedent to maintaining a tort action in circuit court. The court asserted that the critical question was whether the alleged assault and battery constituted a "medical injury" under the Act. In particular, the court relied on *Cannon* to articulate the principle that a medical injury includes traditional forms of medical malpractice, but does not include injuries that occur when a health care provider is not engaged in providing medical care.

Using the factual analysis constructed in *Jewell*, the court examined the circumstances under which allegations that a physician committed an assault and battery will remove a claim from the Act. The court stated that if the alleged injury was inflicted "during the rendering of medical services," and the alleged conduct of the physician had any conceivable medical validity in relation to the treatment provided, then the claim would be subject to the provisions of the Act. On the other hand, if the conduct alleged was clearly not re-

110. *Goicochea*, 345 Md. at 729, 694 A.2d at 479.
111. *Id.; see also Jewell v. Malamet*, 322 Md. 262, 275, 587 A.2d 474, 480-81 (1991) (analyzing whether or not Dr. Malamet's conduct could have had any conceivable medical validity).
112. *Goicochea*, 345 Md. at 730, 694 A.2d at 480.
113. *Id.* at 725-26, 694 A.2d at 477-78.
114. *Id.* at 726, 694 A.2d at 478; *see also supra* note 5 (setting forth the definition of "medical injury" under the Act).
115. *See Goicochea*, 345 Md. at 725-27, 694 A.2d at 477-78 (describing the background of the Act and considering the meaning of the term in the context of case law).
116. *See id.* at 726, 694 A.2d at 478 (quoting language from *Cannon v. McKen* to determine what actions fall within the meaning of the phrase "medical injury"); *see also Cannon v. McKen*, 296 Md. 27, 34, 459 A.2d 196, 200 (1983) (indicating that a medical injury is one that "originat[es] from, in pertinent part, the giving or failure to give health care").
117. *Goicochea*, 345 Md. at 726, 694 A.2d at 478.
118. *Id.* at 728, 694 A.2d at 479.
119. *Id.*
lated to the medical services rendered, or was "completely lacking in medical validity," then, the court concluded, the matter should proceed directly to circuit court.²⁰ Because Langworthy failed to provide sufficient factual allegations on which to distinguish his claim from a traditional medical malpractice action, the court determined that his claim was subject to the provisions of the Act.²¹

In considering the factual allegations against Dr. Goicochea, the court remarked that he obviously had to apply some amount of force to perform a hernia examination.²² Because Langworthy claimed the injury resulted from excessive force applied to his spermatic cord, the court determined that it could not properly conclude that Dr. Goicochea's actions "had no medical validity or were totally unrelated to the performance of a routine hernia examination."²³ Finally, the court stressed that a claimant cannot remove a claim from the Act merely by adding the adjectives "malicious" or "willful."²⁴

The court presented its analysis in logical, straightforward steps. First, the court recognized the principle that the factual context in which the injury occurred determines the proper forum for making an initial determination as to whether the claim alleges a "medical injury."²⁵ Second, the court stated that the Act is implicated whenever a plaintiff is injured during the rendering of health care, regardless of whether the complaint sounds in negligence or in intentional tort.²⁶ Third, because the Act is implicated whenever health care is rendered, the court required that, in such situations, trial courts should determine whether the factual allegations remove the claim from coverage of the Act.²⁷ In a single paragraph, the Court of Appeals clarified the factual analysis articulated in Jewell, as follows:

Consequently, under Jewell, the determination of the proper initial forum for cases involving allegations of intentional torts committed by health care providers depends upon the factual context in which the tort was allegedly committed. Where the plaintiff alleges that he or she was injured by a health care provider during the rendering of medical treatment or services, the Act is implicated, regardless of whether the claim sounds in negligence or intentional tort.

¹²⁰ Id.
¹²¹ Id. at 729, 694 A.2d at 479.
¹²² Id.
¹²³ Id.
¹²⁴ Id. (internal quotation marks omitted).
¹²⁵ Id. at 728, 694 A.2d at 479.
¹²⁶ Id.
¹²⁷ Id.
When confronted with such a claim, the trial court must determine if the plaintiff's factual allegations remove the claim from the Act's coverage. If the complaint sets forth facts showing that the claimed injury was not inflicted during the rendering of medical services, or that the injury resulted from conduct completely lacking in medical validity in relation to the medical care rendered, the Act is inapplicable, and the action may proceed without first resorting to arbitration.128

In short, if a claim does not arise during the rendering or failure to render health care, then it is not subject to the Act. Likewise, if an injury results from conduct that has no conceivable medical validity in relation to the care given, it is also not subject to the Act. But if the trial court is uncertain whether the factual allegations remove a claim from the Act, the court should not exercise its jurisdiction over the action.129 Rather, the trial court should allow the HCAO to hear the claim and make an initial determination as to whether or not the claim alleges a "medical injury."130

4. Analysis.—In Goicochea v. Langworthy, the Court of Appeals held that a medical malpractice claim cannot avoid the requirements of the Health Care Malpractice Claims Act "simply by adding the adjectives 'malicious' or 'willful.'"131 The court reasoned that such labels, without a substantial factual basis, do not distinguish an intentional tort from professional negligence.132 The court also clarified the proper analysis under the test articulated in Jewell.133

From a policy standpoint, this decision is important because it illustrates how the court balances two competing policy goals: compensating legitimate tort claimants and reducing the cost of medical malpractice litigation.134 By precluding plaintiffs from simply labeling

128. Id.
129. Id. at 728-29, 694 A.2d at 479.
130. Id. at 729, 694 A.2d at 479.
131. Id.
132. See id. ("Langworthy fails to set forth any factual basis upon which the court could properly conclude that Goicochea's actions had no conceivable medical validity or were totally unrelated to the performance of a routine hernia examination.").
133. See id. (importing the factual analysis provided in Jewell, but constructing it in clear steps and in a single paragraph); see also supra note 111 (setting forth the Jewell analysis); supra notes 125-130 and accompanying text (presenting Goicochea's clear, simple steps).
134. These policies can be inferred from the way in which the court applied the test that determines whether a claim falls under the Act or should proceed to circuit court. See Goicochea, 345 Md. at 728, 694 A.2d at 479. The court reinforced the idea that only claimants with legitimate causes of action should proceed in either forum: "A plaintiff may not remove a medical malpractice action from the ambit of the statute simply by adding the
an injury "intentional" without an adequate factual basis, the court restricted access to the judicial system to only those claimants who obtain a certificate of merit. This decision should, therefore, conserve judicial resources for claimants with legitimate injuries as well as reduce the number of frivolous suits filed. Accordingly, the decision of the court flows reasonably from the manifest purpose of the Health Care Malpractice Claims Act.

a. Clarifying the Jewell Test.—One way in which Goicochea furthered the policy of reducing the cost of medical malpractice litigation is that lower courts now have a more intelligible approach to determine whether a health care claim should be arbitrated first or whether the claim should proceed directly to trial. While the Jewell court announced the test used to determine the proper initial forum for a health care claim, its presentation of the test was scattered

adjectives 'malicious' or 'willful.' Id. at 729, 694 A.2d at 479. Because Langworthy did not obtain a certificate of merit, the court had no choice but to dismiss his claim. See id. at 729-30, 694 A.2d at 480. Thus, a frivolous claim was taken out of the court system in the course of deciding whether the facts alleged could properly remove the claim from the purview of the Act. Id.

For a closer look at the development of these policies, see Attorney General v. Johnson, 282 Md. 274, 306-08, 385 A.2d 57, 76-77 (1978). See also Trimble, supra note 5, at 898 & n.45 (stating that the General Assembly attempted to "curtail meritless claims by requiring that a plaintiff provide [a certificate of merit]").

135. See Goicochea, 345 Md. at 729-30, 694 A.2d at 479-80 (indicating that, normally, when a claim subject to the Act is filed in circuit court, the court should stay the civil action until the conclusion of any pending arbitration proceedings, but noting that when the HCAO has dismissed a case for failure to file a certificate of merit, immediate dismissal of the claim is appropriate).

Of course, if the plaintiff genuinely has a claim against a health care provider for non-professional negligence or intentional tort and the plaintiff can factually distinguish her claim from a traditional medical malpractice action, then the claim should proceed directly to circuit court. See supra notes 124-126 and accompanying text.

136. This prediction is based on common sense. If claimants, or their attorneys, know that they cannot get around the certificate of merit requirement by alleging intentional torts with no sufficient bases, then they will be less apt to bring such suits because the costs associated with these cases will outweigh the probabilities of success.

137. In Johnson, the Court of Appeals remarked that the trial court found the legislation "ambiguous as to the precise purpose arbitration would serve." Johnson, 282 Md. at 307, 385 A.2d at 76. But, somewhat equivocally, the trial court also observed that "the announced purpose of the Act—to reduce the cost of medical malpractice claims, thus reducing the cost of liability insurance and stabilizing the [health care] market—justified distinguishing the treatment of medical malpractice claims from other tort liability claims." Id. at 308, 385 A.2d at 76; see also infra note 154 and accompanying text (discussing the purpose of the Act and citing support for the proposition that the manifest purpose of the Act is to reduce the cost of medical malpractice claims).
throughout various parts of the opinion.\textsuperscript{138} In \textit{Goicochea}, on the other hand, the test was articulated in a single paragraph\textsuperscript{139} and was treated carefully, one step at a time.\textsuperscript{140} The court examined Langworthy's complaint and concluded that it was based on the alleged application of excessive force during a hernia examination.\textsuperscript{141} This conduct could not be removed from the Act simply by being labeled "willful."\textsuperscript{142}

It seems likely that the Court of Appeals chose to review the factual analysis of \textit{Goicochea} under the \textit{Jewell} test in order to address the mistaken conclusion of the Court of Special Appeals that "a claimant with a legitimate assault and battery claim will never be able to have his case heard."\textsuperscript{143} The Court of Special Appeals interpreted \textit{Jewell} to mean that when a patient is injured while receiving medical treatment—even if the injury arose from an incident unrelated to valid medical treatment—the patient must file with the HCAO.\textsuperscript{144} As the Court of Appeals demonstrated through its step-by-step analysis, however, that interpretation of \textit{Jewell} was too broad.\textsuperscript{145}

By making the test easier to follow, \textit{Goicochea} will reduce litigation expenses incurred by both plaintiffs and medical care providers. Plaintiffs will not be forced to get a certificate of merit if they can provide sufficient factual allegations that demonstrate the injury was not inflicted during the rendering of health care or that the injury-causing conduct had no medical validity in relation to the care pro-

\textsuperscript{138} See \textit{Jewell} v. Malamet, 322 Md. 262, 271-75, 587 A.2d 474, 479-81 (1991) (analyzing the facts alleged by Jewell to determine whether Jewell's claim belonged in circuit court or was subject to the Act); see also supra note 111 (setting forth the \textit{Jewell} analysis).

\textsuperscript{139} See \textit{Goicochea}, 345 Md. at 727-28, 694 A.2d at 478-79 (outlining the factual analysis first constructed in \textit{Jewell}); see also supra text accompanying note 128 (quoting \textit{Goicochea}'s concisely articulated paragraph).

\textsuperscript{140} See \textit{Goicochea}, 345 Md. at 727-28, 694 A.2d at 478-79; see also supra notes 125-130 and accompanying text (presenting \textit{Goicochea}'s clear, simple steps).

\textsuperscript{141} See \textit{Goicochea}, 345 Md. at 729, 694 A.2d at 479 ("The asserted cause of Langworthy's injury was that Goicochea allegedly applied too much force.").

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} Langworthy, 106 Md. App. at 275, 664 A.2d at 427 (emphasis added).

\textsuperscript{144} See id. at 274, 664 A.2d at 427 (concluding that, when a claimant is injured while receiving medical care, she must file with the HCAO, even if the claim is unquestionably one for assault and battery). The Court of Special Appeals based this interpretation on the fact that the court in \textit{Jewell} instructed the parties to return to the HCAO so that the HCAO could determine whether the claim was for medical injury. See \textit{id.}

\textsuperscript{145} See \textit{Goicochea}, 345 Md. at 728, 694 A.2d at 479 (stating that the court in \textit{Jewell} recognized that a plaintiff can bring an action in circuit court against a physician for assault and battery); accord \textit{Jewell} v. Malamet, 322 Md. 262, 275, 587 A.2d 474, 481 (1991) (stating that "if counsel had conceded that the conduct complained of had no conceivable validity as part of the examination being conducted, the resolution of the case would be for the trier of fact in the circuit court as an action for assault and battery").
Provided. Because the factual analysis constructed in Goicochea was applied correctly, it resolves any confusion created by the unusual result reached in Jewell.

The Jewell opinion is unsatisfying because it created a sensible test, but applied the test to the facts in an illogical manner. The result was illogical because, given the facts alleged in the complaint, the court should have found that the physician's conduct had no medical validity in relation to the examination performed. Under Goicochea's rearticulation of the Jewell test, it is likely that the Jewell court would have reached this result.

In Jewell, the plaintiff alleged that she was sexually assaulted during the course of two examinations. Among other things, the plaintiff alleged that during the examinations, the physician fondled her breasts and vagina without wearing protective gloves. Under the Goicochea analysis, the court would have rigorously examined the factual context of the complaint and the HCAO amicus curiae brief supporting the jurisdiction of the circuit court.

This more fact-intensive approach to the case, coupled with the application of the Jewell test, would have culminated in a more satisfying result than that actually reached in Jewell. Applying the test incorrectly, as the Jewell court did, would actually lead to an increase in the cost of medical malpractice litigation. Such claims are more likely to be appealed or return to circuit court at the conclusion of future arbitration proceedings because the result does not follow logically from the application of the test to the factual allegations. Particularly in cases like Jewell, in which the HCAO filed an amicus brief arguing that

146. See Goicochea, 345 Md. at 728, 694 A.2d at 479 (ruling that a complaint setting forth a sufficient factual basis to support a theory of intentional tort may proceed to circuit court without being subject to the Act).
147. See Jewell, 322 Md. at 274-75, 587 A.2d at 480 (analyzing the facts of the case, but failing to conclude that the injury described by Jewell was not a "medical injury").
148. See id. at 267-69, 274, 587 A.2d at 477, 480 (describing the facts alleged in the complaint and noting that the HCAO felt that the claim should have proceeded to litigation, not arbitration).
149. Id. at 267-68, 587 A.2d at 477.
150. Id. at 268, 587 A.2d at 477; see also supra notes 78-83 and accompanying text (describing the facts alleged in the Jewell complaint).
151. Cf. Goicochea, 345 Md. at 729, 694 A.2d at 479 (examining the substance of Langworthy's claim with care and in detail); supra notes 122-124 and accompanying text (discussing the application of the Goicochea analysis to the facts alleged in Langworthy's complaint). Even assuming Jewell wanted to proceed in arbitration, one wonders if she could have obtained a certificate of merit, because she did not complain of a demonstrable physical injury; rather, she merely asserted general injuries and emotional pain. See Jewell, 322 Md. at 269, 587 A.2d at 477. Note, however, that the HCAO submitted an amicus curiae brief that sided with the plaintiff in Jewell. See id. at 274, 587 A.2d at 480.
Jewell’s claim belonged in circuit court, it seems like a waste of taxpayer dollars to remand such a claim to the HCAO for consideration when the claim will almost certainly be sent back to circuit court. By contrast, Goicochea clarified the Jewell test and minimized the chance of such misapplication, because the result of Goicochea aligned the application of the test to the factual allegations. With a more coherent and succinct factual analysis, the Act’s implied policy goals—redressing legitimate tort claims and reducing the cost of health care litigation—become more ascertainable.

b. Balancing Policy Goals.—In Attorney General v. Johnson, the court determined that the purpose of the Health Care Malpractice Claims Act was “to reduce the cost of medical malpractice claims.” In subsequent cases, the court approved this understanding of the Act’s purpose. The legislature apparently hoped that nonbinding arbitration would be less expensive than litigation and that it would hasten claim resolution. While it has been debated whether the Act has actually succeeded in these areas, the opinion rendered in Goicochea furthers the underlying policy of the Act in at least two ways: compensating plaintiffs with legitimate tort claims and reducing the cost of medical malpractice litigation.

(1) Compensating Plaintiffs with Legitimate Tort Claims.—One policy goal that concerns the court is compensating legitimate tort claims and thereby distributing justice fairly. This is the underpinning

152. See Goicochea, 345 Md. at 729, 694 A.2d at 479 (applying the analysis first constructed in Jewell with more careful attention to the factual context of the case than was exemplified by the Jewell court); see also supra notes 122-124 and accompanying text (discussing the application of the factual analysis to Langworthy’s allegations in Goicochea).

153. 282 Md. 274, 308, 385 A.2d 57, 76 (1978); accord supra note 134 (inferring judicially recognized policies from the application of the Jewell test in Goicochea); supra note 137 (describing the ambiguity of the Act and the interpretation of legislative intent by the court).


155. See Johnson, 282 Md. at 308, 385 A.2d at 77 (noting a trial judge who explained that the Act bears a fair and substantial relationship to the purpose of rapid and less expensive claim resolution).

156. Compare Trimble, supra note 5, at 919 (noting that “[t]he great success of [the Act] was ... that it deterred many potential claimants from pursuing their claims”) with Paul C. Weiler, The Case for No-Fault Medical Liability, 52 Md. L. Rev. 908, 915 (1993) (stating that when “[v]iewed as a form of insurance, the malpractice regime has major flaws”).
of public confidence in the judiciary. Although the Goicochea opinion does not explicitly recognize the need to compensate legitimate tort claims, this concern underlies the court's emphasis on whether the physician's conduct was "completely lacking in medical validity in relation to the medical care rendered." If the conduct bears no medically valid relation to the treatment rendered, then the court will accept the plaintiff's argument and direct the claim to circuit court for resolution.

A legitimate intentional tort claim (or a claim of non-professional negligence), on the other hand, should not be subject to the requirements of the Act. This is because such a claim was not the concern of the legislature when the statute was enacted. Nonetheless, if the conduct is arguably medically valid in relation to the treatment rendered, then the court will balance the need to redress legitimate injuries with the need to reduce the cost of medical malpractice litigation.

There can be no doubt that Goicochea tipped the scales heavily in favor of the Act. Under the Goicochea analysis, when physician conduct bears some medically valid relation to the treatment rendered, it necessarily falls within the category of claims that the statute was intended to address. Thus, the threshold that health care providers must meet in order to have a claim fall within the purview of the Act is quite low.

Notwithstanding the foregoing analysis, if the underlying policy of compensating legitimate tort claims is to have any weight at all, the court must carefully analyze the conduct in terms of its "medical validity." For example, the fact that, in Jewell, the physician was alleged to have conducted a digital examination of the plaintiff's vagina while he was not wearing protective gloves should have indicated to the court that the conduct lacked medical validity. Simply because conduct has some relation to the medical treatment rendered does not necessarily mean that it is per se medically valid. As a result of this gap in

157. See William L. Reynolds, Judicial Process in a Nutshell, 55 (2d ed. 1991) ("Justice cannot be fully satisfied without an opinion that explains the manner in which the decision was reached . . . . Without [an] appearance of fairness, the confidence in the system so necessary to its continued success cannot be maintained.").

158. Goicochea, 345 Md. at 728, 694 A.2d at 479.

159. See supra notes 70-77 and accompanying text (describing the legislative policy of the Act and discussing the relationship between the medical validity of the alleged conduct of a provider and whether a claim of intentional tort will be subject to the requirements of the Act).

160. See supra notes 78-83 and accompanying text (describing the alleged sexual assault).
the court's reasoning, the phrase "medically valid" needs to be explored further in future cases.

(2) Reducing the Cost of Medical Malpractice Litigation.—On the other side of the balance, the Goicochea decision will lead to a reduction in the number of frivolous medical malpractice lawsuits confronting the courts, and such a reduction will comport with the intent of the statute as divined by the court. Goicochea sends an unambiguous message to claimants without a certificate of merit: Unless they can sufficiently distinguish a tort claim from professional negligence, they have no alternative but to terminate prosecution of the case. Because this creates a difficult standard to meet for plaintiffs with skimpy claims against health care providers, the opinion discourages frivolous lawsuits. The opinion eliminates from consideration those claims that have neither a certificate of merit nor an adequate factual basis to support a theory other than professional negligence. Furthermore, because the factual analysis employed by trial courts is intelligible under Goicochea, the policies underlying their decisions will be more readily ascertainable. Again, had the court in Goicochea chosen to discuss the policy reasons behind its decision, the clarification of the Jewell test would have been even more apparent. However, as a result of the reduction in frivolous claims and the attendant decrease in the cost of medical malpractice litigation, the decision in Goicochea is entirely consistent with the purpose of the Health Care Malpractice Claims Act as intended by the General Assembly and divined by the Court of Appeals.

5. Conclusion.—Goicochea affirmed and clarified the factual analysis constructed in Jewell. By creating a coherent factual analysis and applying it logically, the Court of Appeals provided guidance to lower courts in resolving the jurisdictional issues that arise under the Health Care Malpractice Claims Act and in dealing with the frustrations of plaintiffs and defendants as they attempt to litigate medically related claims. Furthermore, in correcting the Court of Special Ap-

161. See supra notes 153-154 and accompanying text (discussing the purpose of the Act as interpreted by the court).
162. See supra note 5 and accompanying text (noting the danger to a claimant's case of failing to file a certificate of merit).
163. See supra notes 34-35 and accompanying text (noting that the Act was created to reduce frivolous claims and hasten claim resolution).
164. See Goicochea, 345 Md. at 729, 694 A.2d at 479 (“This case cannot be distinguished, on any principled basis, from Jewell v. Malamet . . . .”).
165. See id. at 728-29, 694 A.2d at 479 (describing how to conduct a proper factual analysis when confronted by a claim “[w]here a plaintiff alleges that he or she was injured by a
peals’ misapplication of the Jewell test, the Court of Appeals ensured that future claimants who are unable to acquire a certificate of merit will not be able to subvert the requirements of the Act by labeling their claims as intentional torts.\textsuperscript{166} Strong policy arguments were available to the Court of Appeals in reaching this decision; yet, the court did not voice these arguments explicitly.\textsuperscript{167} As a practical matter, court rulings will be better received if they are accompanied by a thorough discussion of their underlying policies.\textsuperscript{168} In this case, the court should have explicitly addressed the competing policy goals of compensating legitimate tort claims and reducing the cost of medical malpractice litigation.

With respect to the Health Care Malpractice Claims Act, the future of claims arbitration in Maryland becomes dimmer with each passing year.\textsuperscript{169} In fact, the only provision in the Act with any substance is the certificate of merit requirement.\textsuperscript{170} If reducing the cost of medical malpractice litigation remains a serious goal of the General Assembly, then perhaps the time has come to consider options other than arbitration or litigation.\textsuperscript{171}

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\textsc{Peter Stackpole}
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\footnotesize{health care provider during the rendering of medical treatment or services \ldots regardless of whether the claim sounds in negligence or intentional tort\textsuperscript{\textit{\textendash}.\textsuperscript{\textit{\textendash}}}).

\textsuperscript{166} See \textit{id.} at 729, 694 A.2d at 479 ("A plaintiff may not remove a medical malpractice action from the ambit of the statute simply by adding the adjectives 'malicious' or 'willful.").

\textsuperscript{167} See \textit{supra} notes 134, 153 and accompanying text (providing an analysis of the competing policy arguments inferred from and approved in \textit{Goicochea}).

\textsuperscript{168} See \textit{REYNOLDS, supra} note 157, at 60-61 (discussing the argument for reasoned elaboration in opinion writing, and noting that reasoned elaboration helps the court’s audience "see the goals identified by the court, its method of reaching those goals, and permits criticism of opinions using the same bases").

\textsuperscript{169} See Health Claims Arbitration Office, Case Statistics Through December 31, 1997 (1998) (reporting that, out of 927 medical malpractice claims closed in 1996 and 1997, only 29 were closed by an arbitration panel, while 808 waived arbitration under the Act—the remaining 80 claims were either settled or dismissed); \textit{Trimble, supra} note 5, at 919 (describing an informal survey reporting that 84\% of claimants' attorneys and 75\% of defendants' attorneys would waive arbitration under the unilateral waiver in 80\% of their cases, and concluding that, given these numbers, "it is likely that the General Assembly will have no choice but to \ldots repeal the [Act]").

\textsuperscript{170} See \textit{Trimble, supra} note 5, at 907 ("The single most effective mechanism for discouraging claimants may be the certificate of merit."); see also \textit{supra} notes 129-132 and accompanying text (noting that the certificate of merit requirement discourages meritless claims).

\textsuperscript{171} See \textit{Weiler, supra} note 156, at 948 ("[W]hen one compares the promise of medical no-fault with the performance of malpractice litigation, the no-fault alternative has more than enough merit to justify its availability as a legal option."). See generally Lynn A. Kerbeshian, \textit{ADR: To Be or \ldots?}, 70 N.D. L. Rsv. 381 (1994) (discussing alternative dispute resolution generally, and providing an analysis of mediation, arbitration, and summary jury trials).}
X. Procedure

A. The Constitutionality of Ordinary First-Class Mail as a Method of Initial and Original Service of Process

In *Miserandino v. Resort Properties, Inc.*, the Court of Appeals refused to give full faith and credit to a Virginia judgment levied against two Maryland residents because the method used to serve process was constitutionally inadequate. The court observed that the use of ordinary first-class mail to serve the defendants with initial and original notice of the action against them in Virginia violated due process. The decision challenged the Virginia legislature's amendment to its long-arm statute, which struck the requirement that notice be sent by "registered or certified mail" and required only that notice be "mailed."

*Miserandino* presented a case of first impression for the Court of Appeals, and the outcome may affect other causes of action in which service by first-class mail has been allowed by statute. Refusing to draw a bright-line rule applicable to service of process in all actions, the court devised a three-part test to distinguish actions that allow service

2. *Id.* at 67-68, 691 A.2d at 220.
3. *Id.* "Initial service of process" means that the method of service is the first attempted by the plaintiff. "Original service of process" means that the process institutes the judicial proceeding, as distinguished from mesne process which defines process during the adjudication. BLACK'S LAW DICTIONARY 1205 (6th ed. 1990).

When actions were commenced by original writ, instead of, as at present, by summons, the method of compelling the defendant to appear was by what was termed "original process," being founded on the original writ, and so called also to distinguish it from "mesne" or "intermediate" process, which was some writ or process which issued during the progress of the suit. The word "process," however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ.

*Id.*

4. 1987 Va. Acts ch. 449, 459 (codified as amended at VA. CODE ANN. § 8.01-329(c) (Michie 1992)). Prior to 1987, service upon nonresidents was sufficient when the plaintiff served the Secretary of the Commonwealth of Virginia, “provided that notice of such service, a copy of the process or notice, and a copy of the affidavits are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the defendant.” *Id.* (emphasis added). In 1987, Virginia’s General Assembly amended the statute so that service would be sufficient upon the defendant, “provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith mailed, by the Secretary to the person or persons to be served.” § 8.01-329(c) (emphasis added). The change implied that service of process by ordinary first-class mail was permitted.

Registered and certified mail differ in the following ways: registered mail provides a record of sending, a record of receipt, and indemnity for loss or damage. Certified mail provides only a record of receipt. Ordinary first-class mail provides none of these protections to promote successful delivery. Note, *Service of Process by Mail*, 74 Mich. L. Rev. 381, 381 n.5 (1975) (citing 39 C.F.R. §§ 161.1, 168.1 (1975)).
by ordinary first-class mail from actions that mandate a more rigorous method of service.

1. The Case.—In January 1993, Resort Properties, Inc. (Resort Properties) filed a “Warrant in Debt” in a Virginia district court against Maryland residents Gerard and Karen Miserandino. The dispute arose out of the Miserandinos' alleged default in a time-share interest in property located in Warren County, Virginia. Pursuant to Virginia’s long-arm statute, Resort Properties served process upon the Secretary of the Commonwealth of Virginia who was then authorized to serve the defendants. The Miserandinos failed to appear for the hearing because they allegedly did not receive notice. In February 1993, Resort Properties obtained a default judgment in the amount of $4,211.82.

In June 1993, pursuant to the Uniform Enforcement of Foreign Judgments Act, Resort Properties recorded the foreign judgment in the Circuit Court for Carroll County, Maryland. The Miserandinos moved to strike Resort Properties’s registration of the Virginia judgment because they alleged that they had not received notice of the Virginia action. In September 1993, the circuit court held a hearing on the Miserandinos’ motion. The court initially granted the Miserandinos’ motion to strike, but later reversed its own ruling and recorded the Virginia judgment. The Court of Special Appeals affirmed, holding that procedural due process does not require actual

5. See Petitioners' Brief and Appendix at 4-5, Miserandino v. Resort Properties, Inc., 345 Md. 43, 691 A.2d 208 (1997) (No. 93). “Warrant in Debt” was the title of the printed form filed by Resort Properties to initiate the suit in the Warren County General District Court to collect on the alleged debt. Id. at 5.


7. See id.; see also Va. Code Ann. § 8.01-329(c) (1992) (authorizing this procedure for service of process).

8. Miserandino, 345 Md. at 47, 691 A.2d at 210.

9. Petitioners' Brief and Appendix at 6, Miserandino (No. 93).


11. Miserandino, 345 Md. at 47, 691 A.2d at 209.

12. Id., 691 A.2d at 209-10.

13. Brief and Appendix of Respondent at 2, Miserandino (No. 93).

14. Miserandino, 345 Md. at 48-49, 691 A.2d at 210; see also Brief and Appendix of Respondent at 2-3, Miserandino (No. 93). In its original decision, the circuit court erroneously relied on Maryland's Uniform Foreign Money Judgments Recognition Act, Md. Code Ann., Cts. & Jud. Proc. § 10-701 to -709 (1995). The court reversed its ruling upon Resort Properties’s motion contending that the decision should instead have been based on Maryland's Uniform Enforcement of Foreign Judgments Act. Brief and Appendix of Respondent at 2-3, Miserandino (No. 93).
Consequently, service upon the Secretary of the Commonwealth was valid despite the Miserandinos' argument that they never received actual notice of the suit. The Court of Appeals granted certiorari on the question "whether initial and original service of process by first-class mail is constitutionally sufficient to confer in personam jurisdiction over a nonresident individual in a long-arm jurisdiction case."17

2. Legal Background.—The obligation to inform a litigant of impending actions is a fundamental requirement of the Fourteenth Amendment's procedural due process guarantee. At a minimum, the procedural safeguards of the Due Process Clause require that "deprivation of life, liberty or property by adjudication be preceded by notice . . . ."19 Notice affords interested parties to the proceeding the opportunity to be heard.20 Failure to notify a party of the action against him denies him this fundamental right.

Personal service of process has always been regarded as the most reliable guarantee that a defendant will receive notice of an action against him.21 Nevertheless, legislatures have adopted alternative means of service that are more efficient and less expensive than actual service, including serving a state official, posting notice, publishing notice, mailing a waiver of service, mailing service by registered or certified mail, mailing service by ordinary first-class mail, or a combination of these methods.22 Whatever method is chosen, the means of service must comport with the guarantee of procedural due process.23

17. Miserandino, 345 Md. at 52, 691 A.2d at 212 (emphasis omitted).
20. Baker v. Baker, Eccles, & Co., 242 U.S. 394, 403 (1917); see also Restatement (Second) of Judgments § 2 cmt. a (1982) ("The right to be heard before one's interests are adjudicated is a fundamental principle of fairness. Giving notice to persons whose interests are to be adjudicated makes possible exercise of that right.").
21. See Restatement (Second) of Judgments § 2 cmt. a (noting that the common law mode of direct manual delivery of a summons to the interested parties provided "substantial assurance of giving actual notice").
23. See supra note 18 and accompanying text.
The substitute method must approximate the likelihood of actual notice guaranteed by the common law method of personal service.\textsuperscript{24}

The Supreme Court has ruled on the sufficiency of service of process in only a handful of cases, limiting its holdings to the narrow set of facts on which these cases have been brought. In\textit{ Hess v. Pawloski},\textsuperscript{25} the Court held that a Massachusetts statute requiring nonresident motorists to stand trial in the state in which an automobile accident occurred, did not contravene the Due Process Clause of the Fourteenth Amendment, provided that there was sufficient service of process.\textsuperscript{26} The statute's requirements that a plaintiff leave a copy of the process with the registrar, send a copy to the defendant via registered mail, and attach the return receipt to the process complied with the Court's standards of sufficient service.\textsuperscript{27} In\textit{ Wuchter v. Pizzutti},\textsuperscript{28} the Court held that state laws explaining the method of serving process on a nonresident must indicate a "reasonable probability that if the statutes are complied with, the defendant will receive actual notice."\textsuperscript{29} The Court said that a statute that allowed service of process upon the Secretary of the State, without instructions that the Secretary of the State serve the defendant, did not ensure, within a reasonable probability, that the defendant would be notified.\textsuperscript{30} The \textit{Wuchter} Court stated in dicta that statutes of this kind impose on the plaintiff or the official receiving service "the duty of communication by mail or otherwise with the defendant."\textsuperscript{31}

The Supreme Court distilled the core principles of procedural due process pertaining to notice in civil proceedings in \textit{Mullane v. Cent-}

\textsuperscript{24} See \textit{Restatement (Second) of Judgments} § 2 cmt. a (explaining that the established standard requires that substitute service must be reasonably certain to convey actual notice to the interested party).

\textsuperscript{25} 274 U.S. 352 (1927).

\textsuperscript{26} \textit{Id.} at 356-57. In \textit{Hess}, the defendant was involved in an accident in Massachusetts. \textit{Id.} at 353. The defendant argued that because he was not personally served with process, his constitutional rights to due process were violated. \textit{Id.} at 353, 355. The \textit{Hess} Court declared that service of process by registered mail was sufficient where: (1) the defendant had impliedly consented to the appointment of the registrar of his nonresident state as an agent on whom process may be served, and (2) the defendant "actually receive[d] and receipt[ed] for notice of the service and a copy of the process." \textit{Id.} at 356.

\textsuperscript{27} \textit{Id.} at 354.

\textsuperscript{28} 276 U.S. 13 (1928).

\textsuperscript{29} \textit{Id.} at 24. Pizzutti, a resident of New Jersey, brought suit against Pennsylvania resident Wuchter when his horse-drawn wagon was struck by Wuchter's car on a New Jersey roadway. \textit{Id.} at 15. Service was made by leaving process with the Secretary of the State of New Jersey. \textit{Id.}

\textsuperscript{30} \textit{Id.} at 24-25.

\textsuperscript{31} \textit{Id.} at 20.
The Court held that where the names and mailing addresses of the parties to a proceeding were at hand, notice by publication violated the Due Process Clause of the Fourteenth Amendment. The Court defined sufficient notice as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In addition, the Court reasoned that the method of notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." The Court observed that "the mails" would have been a means more likely to have apprised the defendants of the proceedings than publication. On these facts, publication alone was unconstitutional, but the status of service by "the mails" remained less certain.

The Court stated that use of "the mails" was "an efficient and inexpensive means of communication," and intimated that ordinary mail was a sufficient form of service under due process. The Court, however, has not uniformly approved of mailed service. In Greene v. Lindsey, the Court characterized "mail service" as "an inexpensive and efficient mechanism . . . to enhance the reliability of an otherwise unreliable notice procedure," but stated that "process served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires." The Court implied that mail service alone was an insufficient method of service under

32. 339 U.S. 306 (1950). Central Hanover Bank, as trustee for several smaller trusts whose beneficiaries were nonresidents of New York, published notice of a proceeding for the settlement of the beneficiaries' accounts in a local New York newspaper as per the requirements of section 100-c(12) of the New York Banking Law. Id. at 309.

33. Id. at 320.
34. Id. at 314.
35. Id. at 315.
36. Id. at 318.
37. Id. The Court reiterated this point in Walker v. City of Hutchinson, 352 U.S. 112 (1956), in which the Court stated that newspaper publication of proceedings to fix compensation in condemnation cases did not measure up to the quality of notice required by due process when the name and address of the defendant were ascertainable. Id. at 116.
39. Id. at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency. . . . [W]e find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail . . .").
40. 456 U.S. 444, 456 (1982). Greene invoked the language of Mullane, stating that "[u]nder these conditions, notice by posting on the apartment door cannot be considered a 'reliable means of acquainting interested parties of the fact that their rights are before the courts.'" Id. at 453-54 (citing Mullane, 339 U.S. at 315).
41. Id. at 455.
42. Id. at 455 n.9.
due process, but nevertheless reasoned that mail service, combined with other substitute methods such as posted service, would be constitutionally preferable.\(^4\)

The Court has also stated that notice by publication to creditors in probate actions was an insufficient method of giving notice to all known or reasonably ascertainable creditors,\(^4\) and that notice by publication and posting was an insufficient method of service in a tax sale proceeding.\(^5\)

The Supreme Court has not addressed the sufficiency of service of process on nonresident defendants by ordinary first-class mail alone.\(^6\) The Court’s due process analyses of notice protocols in other types of proceedings provide a framework for evaluating the constitutional sufficiency of ordinary first-class mail as a means of substituted service. The Court’s analyses emphasize that a court must consider the totality of the circumstances before it can conclude that a particular method of service comports with the requirements of procedural due process.\(^7\) On different facts a more or less stringent notice requirement may be present. One factual scenario may justify the use of ordinary first-class mail to serve process, while other scenarios may prohibit that use on the grounds of a denial of due process.

Other federal and state courts have rarely addressed the constitutionality of service of process by ordinary first-class mail alone.\(^8\) In *Miles v. District of Columbia*,\(^9\) the U.S. District Court for the District of Colum-

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43. Id.
44. See *Tulsa Prof’l Collection Servs. v. Pope*, 485 U.S. 478, 491 (1988) (remanding case to determine whether interested party’s identity was "reasonably ascertainable," for if it was, then lack of actual notice would have violated due process).
45. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The Court held that posting a notice in the county courthouse of the sale of real property for nonpayment of property taxes, coupled with the publication of the announcement, failed under the requirements of the Due Process Clause of the Fourteenth Amendment. *Id.* In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Court held that the combination of newspaper publication and posting within the vicinity of the property subject to the proceedings was not a constitutionally valid means of notice when the name and address of the party sought could easily have been ascertained. *Id.* at 211.
46. *Miserandino*, 345 Md. at 52, 691 A.2d at 212.
47. See, e.g., *Mullane*, 339 U.S. at 314-15 (1950) (stating that the constitutional requirements are satisfied if "with due regard for the practicalities and peculiarities of the case these conditions are reasonably met").
48. *Miserandino*, 345 Md. at 52, 691 A.2d at 212.
49. 354 F. Supp. 577 (D.D.C. 1973), aff’d, 510 F.2d 168 (D.C. Cir. 1975). The District of Columbia Board for the Condemnation of Insanitary Buildings sent notice by ordinary first-class mail to a property owner regarding its decision to raze her buildings. *Id.* at 579. In addition to the mailed notice, the Board published notice of its decision in a local paper, which listed condemned properties by street address. *Id.* at 583. On this issue, the court found that because the publication only listed the address of the properties, and in
bia held that notice sent by ordinary first-class mail of the District's
decision to raze the plaintiff's buildings was unconstitutional. The
court found that under the circumstances where the District had had
numerous contacts with the plaintiff over a period of six years, and
where the plaintiff had spent substantial sums of money to improve
the condition of the building, "due process of the law requires no less
than registered or certified mail notice as the type reasonably
designed to inform the plaintiff . . . and [to] afford her the opportu-
nity to register her objections." In State v. Lewis, the Supreme Court of Kansas found that notice
of the revocation of a driver's license sent by ordinary first-class mail
was constitutionally sufficient. The Court of Appeals of Kansas
noted that where "fundamental rights are involved, substantial dili-
gence is required [to provide notice]," but where "less significant
rights are involved . . . less effort is required . . . to provide notice that
is adequate for due process purposes."

The Second Circuit held in Weigner v. City of New York that no-
tice of a tax foreclosure action sent by ordinary first-class mail to a
nonresident pursuant to the City's Administrative Code is all that the
Constitution requires. The court recounted all of the advantages
that certified mail has over ordinary first-class mail, but concluded
that "means of notice beyond those reasonably calculated to reach in-
terested parties are not required by due process."

consideration of the diminutive typeset, the published notice was not reasonably calculated
to apprise interested parties of the pendency of the action. Id. at 584-85. Miles differs from
Miserandino in one significant aspect: The Board's notice in Miles did not comply with the
applicable statute, which required that notice to the owner of the condemned property be
sent by registered or certified mail. Id. at 585.

50. Id. at 585.
51. Id.
52. 953 P.2d 1016 (Kan. 1998).
53. Id. at 1026-27.
1016 (Kan. 1998).
55. 852 F.2d 646 (2d Cir. 1988).
56. Id. at 648. Ms. Weigner resided in Florida and had acquired 14 vacant parcels of
land in Queens, New York. Id. The City of New York instituted a tax foreclosure action
after Weigner had failed to pay property taxes for over four years. Id. at 651. Notice of the
action was sent to Weigner at her residence in Florida by ordinary first-class mail pursuant
to New York Administrative Code § 11-417. Id. at 648.
57. Id. at 650-51. Several facts peculiar to this case influenced the court's holding. First,
presentation of the foreclosure notice in three New York sources, and posting in the
Queens County Courthouse accompanied the mailed notice. Id. at 651. Additionally, the
court noted that Weigner's own failure to pay property tax should have alerted her to the
possibility of a foreclosure. Id.
lated to reach the out-of-state defendant, and that certified mail would have been in excess of what the Constitution required.

3. The Court's Reasoning.—The constitutional adequacy of the method used to notify the defendants in *Miserandino* posed a divisive question for the Court of Appeals, reflected in the narrow four-to-three margin. Even though the method used by the plaintiff satisfied Virginia's statutory requirements for service of process on a non-resident defendant, the court held that the Virginia procedure violated due process.

The court stated that one of the factors to be considered when determining what constituted due process was the nature of the action being brought. The court recognized that some actions, such as Maryland estate and tax sale proceedings and federal bankruptcy proceedings, allow service of process by first-class mail, but other actions, such as proceedings under Federal Rule of Civil Procedure 4, do not. The court noted that, under Maryland law, service by first-class mail would not have been sufficient in this case.

The majority observed the precedent for using mail without a signed return receipt, or waiver of service, to obtain personal jurisdiction in Federal Bankruptcy Rule 7004. The court distinguished the rule in bankruptcy proceedings from state civil proceedings on two grounds. First, the notice requirements pursuant to Federal Bankruptcy Rule 7004 satisfy procedural due process requirements, but

58. *Miserandino*, 345 Md. at 46, 68, 691 A.2d at 209, 220. Before deciding the notice issue, the Court of Appeals dispensed with the issue of whether the Virginia court could assert personal jurisdiction over the defendants. *Id.* at 50, 691 A.2d at 211. The court said that this was a case of specific jurisdiction because the cause of action arose out of the defendants' contacts with Virginia, and that this was a sufficient basis for the exercise of personal jurisdiction. *Id.* Furthermore, the court stated that because the defendants waived any attack they may have had against the assertion of personal jurisdiction under the Virginia long-arm statute for the purposes of the circuit court hearing, it would not be further considered by the court. *Id.* at 51, 691 A.2d at 212.

59. *Id.* at 67, 691 A.2d at 220.

60. *Id.* at 53, 691 A.2d at 213.

61. *Id.* at 63, 691 A.2d at 218. Federal Rule of Civil Procedure 4, as amended in 1983 and 1993, provided no suggestion to the court that the use of ordinary first-class mail alone was a sufficient method to serve process. *Id.* at 61, 691 A.2d at 216. A 1993 amendment to Rule 4 allows the use of first-class mail, not to achieve service of process, but to allow the recipient to waive his right to service, thereby permitting the action to go forward. Fed. R. Civ. P. 4(d).

62. *Miserandino*, 345 Md. at 56, 691 A.2d at 214. The court observed that this fact was of no consequence because the question was only whether the method of service under the Virginia statute satisfies due process. *Id.* There is no requirement that Virginia's method of service be as good as Maryland's chosen method in the hierarchy of service methods. *Id.*

63. *Id.* at 68, 691 A.2d at 218.
they must be interpreted in light of Federal Rule of Civil Procedure 55(c), which requires that a default judgment be set aside upon a showing of a meritorious defense if the defendant failed to receive actual notice. Second, the unique nature of bankruptcy proceedings warrants special requirements to justify a "more expeditious and less costly means of service" than ordinary civil cases. Among the unique features cited by the court were the increasingly large number of bankruptcy cases filed each year, and the probability that the interests of many parties will be at stake.

Finally, the court determined that the only state interest applicable to this case that could justify the use of "the significantly less certain procedure of first-class mail" was that the defendants were not residents of Virginia. This justification failed to persuade the court that traditional methods of service were not required. The court articulated a three-pronged test to establish guidelines for measuring the constitutional sufficiency of a proposed method of substitute service. The test requires that the method adopted: (1) be "a reliable means of acquainting interested parties of the fact that their rights are before the courts," (2) be a "means . . . such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and (3) be reasonable in comparison "to the "feasible and customary" alternatives and supplements to the form of the notice chosen." The court held that the method adopted by the Virginia legislature fails this test, thus violating the defendants' due process rights.

4. Analysis.—Miserandino presents a clear question: Does service of process by ordinary first-class mail on a nonresident defendant satisfy the due process requirements of notice? The Court of Appeals held that initial and original service of process by ordinary first-class

64. Id. at 64, 691 A.2d at 218.
65. Id.
66. Id. at 64-65, 691 A.2d at 218.
67. Id. at 65-66, 691 A.2d at 219.
68. Id. at 67, 691 A.2d at 219-20.
69. Id., 691 A.2d at 219 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).
70. Id. (quoting Mullane, 339 U.S. at 315) (ellipses in original).
72. Id. The court stated "this test" in the penultimate paragraph of the opinion without expressly applying it to the facts in Miserandino. Id. See infra notes 90-97 and accompanying text for an explanation of why Virginia's statute failed the three-part test.
73. See Miserandino, 345 Md. at 52, 691 A.2d at 212.
mail is not constitutionally sufficient to confer personal jurisdiction over a nonresident defendant in a long-arm jurisdiction case.\textsuperscript{74}

This result accords with an intuitive response to the question; the added burden of serving process by certified mail seems slight compared to the greater risk that a defendant may suffer a default judgment because he failed to receive notice of the action. Several obstacles, however, belie this cursory conclusion. First, it is the nature of the action that determines whether service of process is permitted by ordinary first-class mail.\textsuperscript{75} Some Fourth Circuit federal and state proceedings permit service by ordinary first-class mail.\textsuperscript{76} Second, the principles laid down by the Supreme Court on the sufficiency of substitute methods of service stop short of requiring that a defendant receive actual notice of process.\textsuperscript{77} As long as the substitute method satisfies constitutional standards, it is sufficient irrespective of whether the defendant receives actual notice. Applying the Fourth Circuit’s test to the circumstances of \textit{Miserandino} diffuses these counterarguments, and justifies the holding that the use of ordinary first-class mail for the service of process on a nonresident defendant in a long-arm jurisdiction case is unconstitutional.

\textbf{a. Obstacles to Holding Notice by Ordinary First-Class Mail Unconstitutional.}—Certain state and federal proceedings allow service of process by ordinary first-class mail.\textsuperscript{78} One might argue that it is incongruous to say that notice by ordinary first-class mail is constitutional in one proceeding, but unconstitutional in another. However, reliance on the notice requirements for one class of proceedings ipso facto to justify service by first-class mail in all proceedings is misguided because it fails to account for the “practicalities and peculiarities” of the different proceedings.\textsuperscript{79} For example, bankruptcy cases are substantially different from “the normal adversarial model of plaintiff versus defendant,”\textsuperscript{80} and can be distinguished from ordinary civil cases on the ground that they require “more expeditious and less costly means

\textsuperscript{74} Id. at 67, 691 A.2d at 220.
\textsuperscript{75} Id. at 53, 691 A.2d at 213.
\textsuperscript{76} See supra notes 60-66 and accompanying text.
\textsuperscript{77} See infra note 86 and accompanying text.
\textsuperscript{78} See, e.g., \textit{Miserandino}, 345 Md. at 63, 691 A.2d at 218 (noting that \textit{Fed. Bankr. R. 7004 permits service by first-class mail}); see also \textit{Md. Code Ann., Est. & Trusts} § 1-103(a) (1997) (stating that “first notice . . . is sufficient if deposited as first-class mail”).
\textsuperscript{79} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (stating that among the “general principles” of the “elementary and fundamental requirement of due process” is “due regard for the practicalities and peculiarities of the case”).
For instance, the great number of bankruptcy proceedings filed each year, and the number of persons likely affected by the adjudication of each proceeding, are characteristics peculiar to bankruptcy proceedings. Providing notice to each creditor in a bankruptcy proceeding likely "entails enormous expense and often cannot be accomplished within the financial resources of the bankruptcy estate." Furthermore, the Bankruptcy Code, rules, and case law currently "confuse[] issues of notice . . . fail[ing] to craft these laws into a whole," and are thus an unlikely source for guidance. The nature of bankruptcy proceedings justifies an expeditious and inexpensive means of service likely to achieve actual notice in a large volume of cases, and it warrants a relaxed standard of service. As suggested by this bankruptcy model, the inherent differences in proceedings account for the differences in the quality of notice that satisfies due process.

In State v. Lewis, the Kansas Court of Appeals offered the most compelling counterargument to Miserandino when it said:

The procedural safeguards of the Due Process Clause are designed to prevent erroneous deprivation of important interests by the government. To achieve this end, however, the Due Process Clause does not require perfect procedures.

"[T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations."

The Lewis court conceded that ordinary first-class mail is not one hundred percent effective, but that it cannot be unconstitutional simply because it fails to give notice in every case. Ordinary first-class mail does not fail in Miserandino because it is imperfect; certified mail may

81. Miserandino, 345 Md. at 64, 691 A.2d at 218.
82. Id.
83. Lawless, supra note 80, at 1218.
84. Id. at 1237.
85. Miserandino, 345 Md. at 64-65, 691 A.2d at 218.
87. Id. at 1076 (alteration in original) (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)).
also fail to reach its recipient. Rather, ordinary first-class mail fails because it does not meet the constitutional requirements of adequate notice. The Court of Appeals packaged these requirements into a test, hereafter referred to as the Miserandino test.

b. The Miserandino Test.—In reference to the constitutional standards of adequate notice, the Supreme Court has said that it “has not committed itself to any formula,” nor has it “determin[ed] when constructive notice may be utilized or what test it must meet. . . . But a few general principles stand out in the books.” The Court of Appeals assembled these principles into a functional assay, the Miserandino test. The test requires that the method of service be (1) a reliable means, (2) of the type that a person would use if she actually desired to inform the defendant, and (3) reasonable “with reference provided to the ‘feasible and customary’ alternatives and supplements to the form of notice chosen.” The court placed the test at the end of the opinion and failed to apply it to the facts. This implied that the application of the test was unwieldy, thus causing the court to shy away from it. This left the test vulnerable to criticism by the dissent, which found the test “at best vague and uncertain.”

Criticism of the test comes as no surprise. The first prong, reliability, is cumbersome in this context. A study of the reliability of ordinary first-class mail requires courts to draw conclusions from empirical data of postal efficiency. The dissent argued that courts should defer to legislatures in the absence of conclusive empirical data. The inability of the majority to find empirical data on the rate of success of the United States Postal Service in delivering first-class mail supports the dissent’s conviction that the test is untenable.

88. See Note, supra note 4, at 387-90 (noting that refused, unclaimed, and unforwardable mail present problems for the person attempting service by certified mail). Refused mail may indicate that the party to be served knew what the contents of the mailing were, and thus received the notice he was due. Unclaimed mail poses a more serious threat that the party to be served was unable to pick up the letter from the post office, as in the case of the employee whose work hours conflict with the hours of operation of the post office.


90. Miserandino, 345 Md. at 67, 691 A.2d at 219-20 (citations omitted).

91. Id. at 75, 691 A.2d at 223 (Chasanow, J., dissenting).

92. Id. at 74, 691 A.2d at 223; see also Arthur F. Greenbaum, The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Greene v. Lindsey, 33 Am. U. L. Rev. 601, 619-20 (1984). The counterargument made by the courts is that they are particularly well-qualified to address such fundamental matters as procedural due process, a matter relating to court operations and one in which the courts have expertise. Id. at 621 n.125.

93. Miserandino, 345 Md. at 62-63, 691 A.2d at 217. The court obtained performance data on the average days of delivery for overnight, two-day, and three-day mail service;
The test, however, is not wholly unworkable. The second and third prongs of the test support its utility. Service of process on the Secretary of the Commonwealth, followed by mailing the service to the last known address of the defendant, as used in *Miserandino*, is not a method a plaintiff actually desirous of informing the defendant might reasonably adopt. This method does generate a record of dispatch, because the plaintiff delivers the service to an impartial state official, whose function is to mail the notice to the defendant and to file a certificate of compliance with the papers in the action. However, it creates no way of confirming receipt by the person to be served. Service is deemed complete on the date that the certificate of compliance is filed with the court, whether or not the defendant receives the service.

The second prong demands that the greater the significance of the notice being sent, the more stringent the method of sending becomes for the sender who is actually desirous of informing his recipient. Ordinary first-class mail sufficiently effects routine transactions, but more important transactions require the certainty of receipt offered by certified mail. An example illustrates the point. A person sending a Christmas greeting may well desire that his addressee receive it, but probably is satisfied with using ordinary first-class mail. Conversely, a conditional permanent resident filing a petition for permanent residency with the Immigration and Naturalization Service (INS) would more likely choose registered or certified mail, which would enable him to document his compliance with INS procedures by procuring receipts for delivery at his post office and receipt by the INS. This choice reflects the greater significance of the interest at stake with the petition for permanent residency compared to the less important, albeit sincere, interest reflected by the Christmas greeting.

Similarly, adjudications that determine the disposition of important property interests mandate a method of service of process to the parties whose interests are at stake by a means more certain than first-class mail in order to satisfy the constitutional requirement that the method chosen is one which a plaintiff actually desirous of informing the defendant might reasonably adopt. The action originally filed by Resort Properties in the Warren County General District Court in Virginia sought damages in excess of $4000. Therefore, the pro-

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95. *Id.*
96. See *supra* note 9 and accompanying text.
ceeding was one in which important property interests were at stake, and the corresponding method that Resort Properties should have adopted as a plaintiff actually desirous of informing its recipient was something more than ordinary first-class mail.

The third prong of the test is most damaging to Resort Properties on the facts of this case. Using the obvious, feasible, and customary alternative to ordinary first-class mail service—i.e., certified mail—would have placed an insubstantial burden on the plaintiff or the Secretary of the Commonwealth. The current cost of sending a letter by certified mail is nominal.97 The only additional burden is that the sender must go to the post office to send the notice, rather than merely affixing the appropriate postage and dropping it in a mailbox. This is not an onerous burden.

c. Other Considerations.—Under Federal Rule of Civil Procedure 55(c), a defendant who does not receive service of process may, upon a showing of good cause, have a default judgment set aside.98 This rule ensures that a defendant who does not receive notice may nonetheless be heard. The problem with allowing a method of service that offers no assurances of receipt is that it increases the likelihood that the defendant will have to go into court to have a default judgment set aside. In Virginia, the burden on the defendant is even greater because it follows a more rigid common law rule, which permits the court to set aside a default judgment only when the defendant has acted without negligence regarding the receipt of process.99 Choosing a method more certain to ensure actual receipt would keep the responsibility of serving process on the plaintiff, thereby preserving the defendant's procedural due process rights by preventing him from having to defend his rights in a collateral action.

97. U.S. POSTAL SERVICE, GET MORE FROM YOUR POST OFFICE 2-5 (1997). At the time of this writing, a fee of $1.35 is charged in addition to the regular postage for sending an article via certified mail. Id. at 2. Return receipt requested at the time of mailing showing the recipient's signature, the date, and the delivery address costs an additional $1.10. Id. at 3-4. Restricted delivery ensuring that the mail is delivered only to a specific addressee or the addressee's authorized agent costs $2.75. Id. at 5. The total bill for certified mail and return receipt with restricted delivery is $5.20 more than the postage for ordinary first-class mail. Id.

98. FED. R. CIV. P. 55(c).

99. See Powell v. Beneficial Fin. Co., 194 S.E.2d 742, 744-45 (Va. 1973) (stating that "at an earlier date in our jurisprudence," default judgments could be set aside in the event of a mistake or accident, but that presently these grounds would not entitle a person to this equitable relief because the "increase in litigation and the advanced complexities of a modern day business world . . . requir[e] that there be a high degree of finality to judgments").
Furthermore, Virginia’s legislature left no record of why it changed the notice requirements for nonresident defendants in 1987, eliminating the registered and certified requirements for service of process by mail.¹⁰⁰ Service by ordinary first-class mail is not among the enumerated methods of substituted service available to a Virginian initiating a suit against another Virginian.¹⁰¹ This creates an inconsistency in which nonresidents are treated differently than residents. By comparison, Maryland law requires the same service on residents and nonresidents, except when service on nonresidents is made under a method prescribed by a foreign jurisdiction if that method is reasonably calculated to give actual notice.¹⁰² It is noteworthy that Maryland asks no more of a Virginia resident suing a Maryland resident than the Virginia resident receives from a Maryland resident suing him. Thus, the Court of Appeals’s holding in Miserandino is consistent with the procedural requirements of Maryland law.¹⁰³

5. Conclusion.—Actions at law fall within a spectrum of classes along which the constitutionality of the methods of service of process vary. Analyzing whether the method used satisfies procedural due process for each type of action entails an evaluation of fairness that often precludes the construction of generic black letter rules. The competing interests of affording actual notice and permitting needed adjudications to go forward without undue expense and complication challenge the ideals of procedural due process. The Court of Appeals has concluded that service of process by ordinary first-class mail on a nonresident defendant is not a constitutionally acceptable method of service. The Court of Appeals correctly reconciled inconsistency between the standard of service for in-state and out-of-state defendants, holding that a civil suit against a nonresident was not the type of action that warranted use of a method of substitute service less certain to provide actual notice.

THOMAS BEACH

¹⁰⁰. Telephone interview with Robie Ingram, Attorney, Virginia Legislative Services (Oct. 8, 1997).
¹⁰¹. See VA. CODE ANN. § 8.01-296 (Michie 1992). The statute prescribes four modes of service: (1) personal service, (2) service on a person at the abode of the person to be served, (3) posting service at the abode of the party to be served, and (4) publication. Id.
¹⁰². Maryland Rule 2-121(a) states in pertinent part: “Service of process may be made within this State or outside this State when authorized by the law of this State... Service outside the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.” Md. R. 2-121(a).
¹⁰³. But see supra note 62 and accompanying text.
B. Reconciling Maryland's Pleading Requirements with Its Stringent Standards for Recovering Punitive Damages

In Scott v. Jenkins, the Court of Appeals reversed a Court of Special Appeals decision and struck down a punitive-damage award that was not expressly pleaded in the complaint. In so doing, the court reaffirmed that modern pleadings still serve the crucial function of providing notice to the defendant of the alleged tortious conduct and of the relief sought. The court also reaffirmed that punitive damages are an exceptional form of relief that mandate a higher standard of conduct and proof.

This Note traces the history of punitive damages and pleading requirements in Maryland and argues that Scott was a consistent application of both lines of precedent. Because punitive damages are appropriate only when the defendant acts with "actual malice," the Scott court's holding that a plaintiff seeking punitive damages must request such damages specifically in the complaint effectively reconciles Maryland's procedural requirements of pleadings with its very exacting standards for recovering punitive damages.

1. The Case.—Terry Napoleon Jenkins claimed that he witnessed an assault and battery that occurred on December 28, 1989. When Corporal Robert Scott and Officer C. Richardson sought to arrest a person suspected of the crime, Jenkins tried to convince them that they were arresting the wrong person. After the Prince George's County police officers told Jenkins to leave the scene, Jenkins continued to insist that the detained suspect had not committed the crime.

The dispute between Jenkins and the officers escalated, for reasons that are unclear. According to Scott, Jenkins became "irate" when the police did not immediately release the suspect. Scott fur-

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1. 345 Md. 21, 690 A.2d 1000 (1997).
3. Scott, 345 Md. at 37, 690 A.2d at 1008.
4. Id.
5. Id. at 25, 690 A.2d at 1001; Amended Complaint for Damages at 2, Jenkins v. Scott (Md. Cir. Ct. Prince George's County 1994) (No. CAL 90-23661). The suspect was a juvenile who was accused of throwing snowballs at a woman. Id. Jenkins claimed that he observed the incident while he was outside of his home, washing the windows of his truck. Id.
6. Amended Complaint for Damages at 2, Jenkins (No. CAL 90-23661).
7. Id.
8. Scott, 345 Md. at 25, 690 A.2d at 1001-02 (noting that the underlying reasons for the conflict between Scott and Jenkins are still "disputed by the parties").
ther stated that Jenkins's anger led him to swing his fist at the officer, resulting in Jenkins's arrest for assault.\textsuperscript{10}

Jenkins contended that the conflict occurred differently. According to Jenkins, Scott became "verbally abusive" when Jenkins would not leave the scene of the incident.\textsuperscript{11} Jenkins claimed that Scott committed battery by "taking his finger and placing it in [Jenkins's] nostril."\textsuperscript{12} Jenkins further asserted that Scott then "hit [Jenkins] in the left eye with his fist knocking [him] to the ground."\textsuperscript{13}

On December 28, 1990, Jenkins filed an amended complaint and jury demand in the Circuit Court for Prince George's County, Maryland.\textsuperscript{14} Jenkins's amended complaint alleged that Corporal Scott was liable for false arrest,\textsuperscript{15} false imprisonment,\textsuperscript{16} assault,\textsuperscript{17} slander,\textsuperscript{18} and intentional infliction of emotional distress.\textsuperscript{19} For each count, Jenkins demanded judgment against Scott for $500,000 in damages, interest, and "such other and further relief as the court may deem just and proper."\textsuperscript{20} The amended complaint did not specifically seek punitive damages.\textsuperscript{21}

Nonetheless, at the close of all evidence at trial, Jenkins requested the submission of a punitive-damage instruction to the jury.\textsuperscript{22} Scott objected to the punitive-damage submission and argued that such an instruction should not be given to the jury because a request for punitive damages was not pleaded in the amended complaint.\textsuperscript{23} The trial judge overruled the objection, reasoning that because Jenkins had generally requested damages in the amount of $500,000 for each count and had not alleged compensatory damages "that even

\textsuperscript{10} Id. at 1-2.
\textsuperscript{11} Amended Complaint for Damages at 2, Jenkins (No. CAL 90-23661).
\textsuperscript{12} Id.
\textsuperscript{13} Id. at 2-3.
\textsuperscript{14} Id. at 6. Jenkins filed his initial complaint and jury demand on October 11, 1990. Brief of Appellant and Joint Record Extract at 2, Scott (No. 1896).
\textsuperscript{15} Amended Complaint for Damages at 2-3, Jenkins (No. CAL 90-23661).
\textsuperscript{16} Id. at 3-4.
\textsuperscript{17} Id. at 4.
\textsuperscript{18} Id. at 4-5.
\textsuperscript{19} Id. at 5.
\textsuperscript{20} Id. at 6.
\textsuperscript{21} Scott, 345 Md. at 26, 690 A.2d at 1002 ("Jenkins' Amended Complaint neither made a specific claim for punitive damages, nor did it allege that Scott acted with actual malice.").
\textsuperscript{22} Id.
\textsuperscript{23} Id. In making his objection at trial, Scott's counsel claimed that the jury instruction took him by surprise and that the "first time" he had heard of punitive damages was when the lawyers "were talking about jury instructions." Reporter's Official Transcript of Proceedings, Trial on the Merits, Volume II at 23-24, Jenkins v. Scott (Md. Cir. Ct. Prince George's County 1994) (No. Civil Action Law 90-23661).
closely approximated" that amount, it was improbable that Scott was "taken by surprise" by the punitive-damage jury instruction.\textsuperscript{24}

The jury was asked to decide whether Scott was liable to Jenkins for battery\textsuperscript{25} and false arrest.\textsuperscript{26} The jury found Scott liable for both torts and awarded Jenkins $150 in compensatory damages and $1000 in punitive damages.\textsuperscript{27} The verdict sheet that the jury used did not indicate whether the award of punitive damages was based on battery or on false arrest.\textsuperscript{28}

Scott appealed the punitive-damage judgment to the Court of Special Appeals, asking the court to decide the issue of whether the trial court "err[ed] in instructing the jury on and entering punitive damages when the relief had not been properly prayed" in the amended complaint.\textsuperscript{29} On appeal, Scott argued that the trial court's decision was inconsistent with Maryland Rule 2-303(b), which states that pleadings must "contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense."\textsuperscript{30} Scott further argued that the trial court's decision was contradictory to Maryland Rule 2-305, which provides that pleadings must "contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought."\textsuperscript{31} According to Scott, Maryland courts had interpreted these rules as requiring a pleading to include a claim for relief with sufficient specificity that it would provide notice to the opposing party of the claim's nature.\textsuperscript{32}

\textsuperscript{24} Reporter's Official Transcript of Proceedings, Trial on the Merits, Volume II at 24, Jenkins (No. Civil Action Law 90-23661).

\textsuperscript{25} Scott, 345 Md. at 26 n.2, 690 A.2d at 1002 n.2 (containing a reprint of the trial court's verdict sheet). The definition that the court used for the battery claim on the verdict sheet was whether "Scott intentionally and unlawfully touch[ed] ... Jenkins in a harmful or offensive manner." \textit{Id}. In addition, during his verbal instructions to the jury concerning battery, the judge indicated that a "police officer is not responsible if the police officer inflicts an injury on a person who is being lawfully arrested unless the officer acts with malice toward that person." Reporter's Official Transcript of Proceedings, Trial on the Merits, Volume II at 10, Jenkins (No. Civil Action Law 90-23661). The judge further described "malice" as "exist[ing] when [an] officer intends to inflict an injury or [when an] officer intends to act from improper motivations or with ill will." \textit{Id}. at 11 (emphasis added).

\textsuperscript{26} Scott, 345 Md. at 26 n.2, 690 A.2d at 1002 n.2. The definition that the court used for the false arrest claim was whether "Scott detain[ed] ... Jenkins for purpose of prosecution for misdemeanor battery without probable cause." \textit{Id}.

\textsuperscript{27} \textit{Id}. at 26, 690 A.2d at 1002.

\textsuperscript{28} \textit{Id}.

\textsuperscript{29} Brief of the Appellant and Joint Record Extract at 2, Scott (No. 1896).

\textsuperscript{30} Md. R. 2-303(b).

\textsuperscript{31} Md. R. 2-305.

\textsuperscript{32} Brief of the Appellant and Joint Record Extract at 3-4, Scott (No. 1896). Scott relied principally on Fletcher v. Havre de Grace Fireworks Co., 229 Md. 196, 177 A.2d 908, modified, 229 Md. 196, 183 A.2d 386 (1962), and Campbell v. Welsh, 54 Md. App. 614, 460 A.2d 76
Scott argued that Jenkins's amended complaint violated these rules because its general request for damages "gave no clue that anything but compensatory damages were being requested."\(^{33}\)

The Court of Special Appeals agreed with Scott in that Maryland Rules 2-303(b) and 2-305 were dispositive of this issue.\(^{34}\) Moreover, the court stated that, according to the Rules and relevant case law, it was clear that the principal requirement of a complaint is to "provid[e] notice to the other side."\(^{35}\) The court stated that a party who seeks punitive damages "must allege facts in his complaint which show that the defendant acted with actual malice."\(^{36}\) In considering what constitutes "actual malice," the court used the *Owens-Illinois, Inc. v. Zenobia*\(^{37}\) definition that "actual malice" is "'conduct characterized by evil motive, intent to injure, ill will, or fraud.'"\(^{38}\) The court found, however, that while the amended complaint did not specifically mention the phrase "actual malice," it did allege facts sufficient to support a punitive-damage claim because the amended complaint "alleged that Scott placed his finger in Jenkins’s nostril, that Scott was verbally abusive to Jenkins, that Scott beat Jenkins, and that Jenkins acted with due care at all times and did nothing to provoke such abusive behavior."\(^{39}\) Consequently, the court upheld the punitive-damage claim against Scott and held that "when allegations sufficient to support a punitive-damages claim are coupled with a general request for dam-

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\(^{33}\) Brief of the Appellant and Joint Record Extract at 3-4, *Scott* (No. 1896). *Fletcher* held that the Maryland Rules require the plaintiff "to state the subject matter of a claim in the declaration with such reasonable accuracy as will show what is at issue between the parties, so that . . . the defendant may be apprised of the nature of the complaint he is required to answer and defend." 229 Md. at 200, 177 A.2d at 909-10. *Campbell* held that an action against an estate "must give the personal representative reasonable notice of the nature of the claim . . . [including] what relief is being sought." 54 Md. App. at 631, 460 A.2d at 86.

34. See *Scott*, 107 Md. App. at 442, 668 A.2d at 959 ("Maryland Rules 2-303(b) and 2-305 are applicable to the disposition of this case *sub judice*.").

35. *Id.* at 443, 668 A.2d at 959 (citing Smith v. Shiebeck, 180 Md. 412, 420, 24 A.2d 795, 800-01 (1942) (holding that the plaintiff's suit for injunctive relief against the defendant's fence-building activities was sufficiently pleaded because the complaint alleged facts to "apprise the defendant of the nature of the claim brought against him"); Fischer v. Longest, 99 Md. App. 368, 380, 637 A.2d 517, 523 (1994) (holding that the appellant's malpractice suit was not sufficiently pleaded because it did not provide notice to the appellees "of the nature of the complaint [they were] required to answer and defend")).

36. *Id.* (internal quotation marks omitted).


39. *Id.*
ages, a defendant has adequate notice” that the plaintiff will seek punitive damages at trial.\textsuperscript{40}

In support of its decision that punitive-damage awards are permissible when the complaint includes sufficient facts to support a finding for punitive damages and an unspecified damage request, the court indicated that in this respect it viewed punitive and consequential damages as comparable.\textsuperscript{41} The court noted that when certain damages were the “natural, necessary, and logical consequence” of the defendant’s actions, those damages “need not be specifically requested in the complaint.”\textsuperscript{42} The court then found the defendant to be on sufficient “notice” that such damages would be sought at trial.\textsuperscript{43} In holding that punitive damages were like consequential damages in the manner in which they can be pleaded—with allegations and a general request for damages—the court further explained that it was adopting a rule that was similar to that of many other jurisdictions.\textsuperscript{44}

Scott appealed the Court of Special Appeals’s decision to the Court of Appeals, which granted certiorari to “consider the adequacy of Jenkins’ ‘claim’ for punitive damages.”\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{40} Id. at 444, 668 A.2d at 960.
\item \textsuperscript{41} Id. The court stated that “[t]he rationale for [the punitive-damage recovery] rule is the same as the rationale for the consequential damages [recovery] rule.” Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 444-45, 668 A.2d at 960.
\item \textsuperscript{44} Id. at 444, 668 A.2d at 960. The court cited cases from Oklahoma, California, Georgia, Idaho, and New Jersey. See Alexander v. Jones, 29 F. Supp. 690, 693 (E.D. Okla. 1939) (holding that an Oklahoma resident’s demand for punitive damages from the defendant corporations’ alleged negligence did not amount to a separate cause of action because a request for “punitive damages [is] incidental or collateral to [a] demand for actual damages”); Turner v. Whittel, 38 P.2d 835, 837 (Cal. Dist. Ct. App. 1934) (per curiam) (holding that allegations in a California plaintiff’s complaint for assault and battery were sufficient because punitive damages need not “be demanded by name if facts justifying their recovery were pleaded, nor need they be segregated from the actual damages allowed either in the findings or verdict” (citation omitted)); Hall v. Browning, 24 S.E.2d 392, 398 (Ga. 1943) (holding that a complaint alleging that a defendant shot a pistol into a Georgia plaintiff’s property was not subject to dismissal as claiming no recoverable damages because punitive damages need not be claimed by that name, and all that need be pleaded is a stated amount and circumstances that may be considered as an aggravation); Harrington v. Hadden, 202 P.2d 236, 237 (Idaho 1949) (holding that an Idaho complaint alleging mutual combat was adequate because although special damages must be grounded upon aggravations from other averments of the complaint, exemplary damages may be recovered under a claim for damages generally); Eatley v. Mayer, 154 A. 10, 11 (N.J. Cir. Ct. 1931) (refusing to strike from a complaint a New Jersey plaintiff’s request for punitive damages against his negligent dentist because “[i]t is a general rule of pleading that it is not necessary to claim exemplary damages by name”), aff’d, 158 A. 411 (N.J. Super. Ct. 1932).
\item \textsuperscript{45} Scott, 345 Md. at 27, 690 A.2d at 1003.
\end{itemize}
2. Legal Background.—

a. Punitive Damages.—In Davis v. Gordon, the Court of Appeals gave a clear indication that it considered punitive damages to be exceptional relief that required an exceptional wrongdoing by the defendant. The plaintiff in Davis asked the court to affirm a punitive-damage award in a motor vehicle tort where the defendant was held liable for hitting two pedestrians with his car, killing one of them, and not stopping at the scene of the accident. The defendant’s conduct also violated certain driver safety statutes. In examining the trial court’s reasoning for permitting a jury instruction for punitive damages, the Court of Appeals concluded that the lower court must have believed “that the negligence of [the] defendant was so gross and wanton as to justify such an instruction.”

However, the Davis court overturned the punitive-damage award because it found that the appellant lacked the requisite intent. Citing nineteenth century precedent, the court held that in order for a plaintiff to be entitled to punitive damages, “‘there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act.’” The court further explained that punitive damages are permitted only in those cases where they can be awarded “‘as a punishment for the evil motive or intent with which the act is done.’” Finding “no suspicion of a motive, and no intention to do injury,” the Davis court concluded that the punitive-damage award was improper and, consequently, overturned it.

The court significantly modified the standard by which punitive damages may be recovered in Smith v. Gray Concrete Pipe Co. The Smith case involved a motor vehicle tort where a minor was killed by a truck driver because the truck driver failed to respond properly when

47. Id. at 133, 36 A.2d at 701.
48. Id. at 131-32, 36 A.2d at 700.
49. While the Davis court did not recount all of the driver safety statutes that the defendant violated, the court noted that the plaintiff based his argument for punitive damages solely on the finding that the defendant did not stop at the scene of the accident as required by statute. Id. at 133, 36 A.2d at 701.
50. Id. at 132-33, 36 A.2d at 700-01.
51. Id. at 134, 36 A.2d 701.
53. Davis, 183 Md. at 133, 36 A.2d at 701 (quoting Hoeflich, 62 Md. at 307).
54. Id. (quoting Hoeflich, 62 Md. at 307) (emphasis added).
55. Id. at 134, 36 A.2d at 701.
his hood flew up while driving. 57 The plaintiff’s complaint alleged a cause of action against the truck driver and his employer for “wrongful death due to negligent operation” and a cause of action against the employer for “negligent entrustment.” 58 In considering the threshold question of whether punitive damages could be awarded in motor vehicle negligence claims, the court recounted the Davis court’s holding that punitive damages are recoverable only in actions that demonstrate a form of malicious intent. 59 The court noted, however, that the case presented an opportunity for “further interpretation” of the issue. 60

The Smith court reasoned that when an individual operates a motor vehicle with a “wanton or reckless disregard for human life” and with knowledge of the risks associated with such conduct, that person’s state of mind is the “legal equivalent” of the type of malice necessary to support an award of punitive damages. 61 The court defined wanton, reckless disregard for human life as “such conduct as would carry an implication of malice or . . . from which one might determine the existence of actual malice.” 62 Thus, the Smith court concluded that a party may recover punitive damages in an automobile negligence case upon a showing of implied, rather than actual, malice. 63 The court, therefore, extended punitive damages to negligence actions where the defendant’s state of mind is not alleged to be entirely willful or intentional. 64

In creating a punitive-damage standard that identified conduct of an “extraordinary [or outrageous] character” as the legal equivalent of “actual malice,” the court noted some concern that a more lenient standard could result in misuse. 65 The court recognized the “danger of formulating a test which may be so flexible that it can become virtually unlimited in its application.” 66 Therefore, the court insisted upon

57. Id. at 152, 169, 297 A.2d at 725, 732-34.
58. Id. at 152, 297 A.2d at 723.
59. Id. at 160, 297 A.2d at 728.
60. Id. at 162, 297 A.2d at 728.
61. Id. at 168, 297 A.2d at 731 (internal quotation marks omitted).
62. Id. at 167, 297 A.2d at 731 (quoting St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 239, 278 A.2d 12, 35 (1971)).
63. Id. at 173, 297 A.2d at 734.
64. Id. at 165-66, 297 A.2d at 730.
65. Id. at 166, 297 A.2d at 730-31 (alteration in original).
66. Id., 297 A.2d at 731. Indeed, in applying this modified punitive-damage standard to the action against the truck driver, the court determined that the truck driver’s alleged conduct did not demonstrate a state of mind that could warrant punitive damages. Id. at 171, 297 A.2d at 733. The court noted that the driver’s “failure to respond properly under exigent circumstances underscores the very distinction [the court] make[s] between a situation reflecting ‘mere’ negligence, for which compensatory damages are available, and
a demanding standard in pleading as well as proving "implied malice." The court noted favorably that the plaintiff's complaint described the allegations "in considerable detail" and that "[s]uch particularity may well serve as a benchmark for pleading a case of exemplary damages... No bald or conclusory allegations of 'wanton or reckless disregard for human life' or language of similar import, shall withstand attack on grounds of insufficiency." 68

In H & R Block, Inc. v. Testerman, 69 the court considered extending Smith's "implied malice" standard to a negligence action arising out of a contractual relationship, but declined to do so. 70 The plaintiffs in Testerman, who were sole proprietors of a service station, sued H & R Block in both tort and contract, claiming that H & R Block had "negligently, wantonly, maliciously and intentionally" prepared their income tax returns incorrectly. 71 After the trial court ruled that the plaintiffs could not recover punitive damages because H & R Block's actions amounted to "mere negligence," the Court of Special Appeals reversed the decision. 72 Relying on Smith v. Gray Concrete Pipe Co., the intermediate appellate court determined that punitive damages were recoverable because H & R Block had prepared the tax returns knowing that it had insufficient information and, consequently, acted in a way that "reckless[ly] disregard[ed]... the rights of others." 73 This state of mind was the "legal equivalent" of actual malice. 74

The Court of Appeals reversed the Court of Special Appeals's decision. 75 Noting the lower court's heavy reliance on Smith, the Tes-
termen court limited Smith by explaining that its holding was "confined to a wanton or reckless disregard for human life, and to the operation of a motor vehicle."76 For torts arising out of a contractual relationship, "actual malice" was still required in order to recover punitive damages.77 Moreover, the court defined "actual malice" more stringently as "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff."78

In Wedeman v. City Chevrolet Co.,79 the Court of Appeals refined its Testerman decision. In Wedeman, the plaintiff, a car buyer, received a punitive-damage award based on a finding that the car dealership had fraudulently misrepresented the condition of her automobile before she purchased it.80 Relying on Testerman, the Court of Special Appeals reversed the judgment because it found that the tort in question, fraud, arose out of a contractual relationship.81 As a result, the plaintiff had the burden of proving that the defendant acted with actual malice.82

In reversing the lower court's decision, the Court of Appeals explained that it was correct that "actual malice" must be shown to recover punitive damages for a tort arising out of a contractual relationship.83 However, it continued, punitive damages may be recovered based on findings of "implied malice," or conduct characterized by a wanton or reckless disregard for the rights of others, where the tortious conduct precedes the formation of a contract.84 In this case, the court found that the defendant's fraud had induced the plaintiff to enter into the contract for purchasing the car.85 Therefore, the court permitted a punitive-damage award on a finding of "implied malice" because the tortious act preexisted the forming of the contract.86

Taken together, Testerman and Wedeman created a standard based on when the tortious conduct arose in relation to the formation of the contract. If the conduct warranting punitive damages occurred prior

76. Id. at 47, 338 A.2d at 54.
77. Id.
78. Id. at 43, 338 A.2d at 52.
80. Id. at 525, 366 A.2d at 8-9.
81. Id. at 527-28, 366 A.2d at 10.
82. Id.
83. Id. at 528, 366 A.2d at 10.
84. Id. at 530-31, 366 A.2d at 11-12.
85. Id. at 529-30, 366 A.2d at 11.
86. Id.
to the formation of the contract, then "implied malice" was required. If the conduct occurred after the formation of the contract, however, then "actual malice" was required.87

A plurality of the court reaffirmed the Testerman-Wedeman "arising out of contract" distinction in Schaefer v. Miller.88 In a concurring opinion, however, Judge Eldridge, joined by Judges Chasanow and Cole, indicated that the Testerman-Wedeman standard should be rejected, in part, because the rule "has no relation whatever to the purposes of punitive damages."89 Judge Eldridge explained that punitive damages served a dual purpose "as punishment for outrageous conduct and to deter future transgressions."90 Rather than focusing on the "heinousness of the defendant's conduct" in determining whether punitive damages are warranted, Judge Eldridge's concurrence criticized the Testerman-Wedeman rule for placing its emphasis on "when that conduct occurs relative to a contract between the parties" (i.e., whether the tort influenced the contract, or whether the contract preexisted the tort).91

Relying heavily on Judge Eldridge's concurring opinion in Schaefer, the Court of Appeals overruled the Testerman-Wedeman standard in Owens-Illinois, Inc. v. Zenobia.92 Zenobia involved a plaintiff who alleged injuries caused by asbestos-containing products manufactured by the defendant.93 The Court of Appeals opined that the Zenobia case "directly raise[d] the problem of what basic standard of wrongful conduct should be used for the allowance of punitive damages in negligence actions generally, and in products liability actions based on either negligence or on strict liability."94 In considering the proper standard for punitive-damage awards, the court first held that the Testerman-Wedeman approach was inappropriate because its inquiry focused on the timing of the tortious act in relation to the formation of a contract.95 Using the reasoning in Judge Eldridge's Schaefer concurrence, the court held that the proper inquiry into whether punitive

88. 322 Md. 297, 587 A.2d 491 (1991) (plurality opinion).
89. Id. at 321, 587 A.2d at 503 (Eldridge, J., concurring in judgment).
91. Id.
93. Id. at 428, 601 A.2d at 636-37.
94. Id. at 451, 601 A.2d at 648.
95. Id. at 453, 601 A.2d at 649.
damages were appropriate related exclusively to "the heinous nature of the defendant’s tortious conduct." 96

The court then held that in negligence actions, or products liability actions alleging either negligence or strict liability, the conduct must evidence "actual malice." 97 In other words, the plaintiff must prove that "the defendant’s conduct was characterized by evil motive, intent to injure, ill will, or fraud." 98 In so holding, the Zenobia court explicitly overruled Smith v. Gray Concrete Pipe Co., which held that punitive damages could be imposed in certain negligence actions based on "implied malice." 99

The Zenobia court changed not only the standard of conduct required for obtaining punitive damages, but the standard of proof as well. 100 Noting that the policy behind punitive damages was "penal" in nature, the court held that the standard for proving the intent necessary for an award of punitive damages should be higher than the standard for compensatory damages. 101 Therefore, the court declared that a plaintiff must prove "actual malice" by "clear and convincing evidence" rather than by a mere "preponderance of the evidence." 102 Yet, although it stated that the clear and convincing standard for punitive damages applies to "any tort case," the Zenobia court refused to apply the underlying "actual malice" standard to intentional tort cases. 103

The court’s application of the "actual malice" standard to intentional torts came three years later in Ellerin v. Fairfax Savings, F.S.B. 105 In Ellerin, the court considered the appropriate standard for the availability of punitive damages in a tort action where the defendant allegedly committed fraud. 106 The Ellerin court made a distinction between fraud where the defendant acted with "reckless indifference" as to the truthfulness of the representation and fraud where the defendant had "actual knowledge of the falsity" at the time of the misrepresentation. 107 The court held that while in the former instance the defendant did not have sufficient mens rea to justify an award of

96. Id. at 454, 601 A.2d at 649.
97. Id. at 460, 601 A.2d at 652 (internal quotation marks omitted).
98. Id.
99. Id. at 459-60, 601 A.2d at 652.
100. Id. at 469, 601 A.2d at 657.
101. Id.
102. Id. (internal quotation marks omitted).
103. Id.
104. Id. at 460 n.21, 601 A.2d at 653 n.21.
106. Id. at 219, 652 A.2d at 1118.
107. Id. at 235, 652 A.2d at 1126.
punitive damages, the latter circumstance demonstrated the existence of "actual malice" and, consequently, could warrant a punitive-damage award.\textsuperscript{108}

In \textit{Montgomery Ward v. Wilson},\textsuperscript{109} the court expanded on \textit{Zenobia} and \textit{Ellerin} and broadly held that "[w]ith respect to both intentional and non-intentional torts, . . . an award of punitive damages generally must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."\textsuperscript{110}

\textit{Montgomery Ward} involved an employee, arrested by the store for credit card fraud, who filed an action for the intentional torts of malicious prosecution and false imprisonment.\textsuperscript{111} The trial court permitted an award of punitive damages for both torts, and the Court of Special Appeals affirmed the judgment.\textsuperscript{112}

Reviewing the intermediate appellate court's decision, the Court of Appeals dismissed the false imprisonment claim\textsuperscript{113} and then considered whether punitive damages were appropriate for the malicious prosecution claim.\textsuperscript{114} The court conceded that punitive damages had been recoverable in past malicious prosecution claims when "malice" could be inferred because the defendant acted without probable cause.\textsuperscript{115} However, the court indicated that it had recently "modified the standards for the allowability of punitive damages in tort cases."\textsuperscript{116} The standard for both intentional and non-intentional torts was that a punitive-damage award must be based on "actual malice" or "conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud."\textsuperscript{117} Moreover, the court reaffirmed \textit{Zenobia}'s

\begin{footnotes}
\item[108] \textit{Id.} However, the \textit{Ellerin} court recognized that it was making a subtle distinction concerning the law of fraud as it related to punitive damages. \textit{Id.} at 241, 652 A.2d at 1129. Because the defendant had preserved at trial his objections to the punitive-damages award, the court remanded the case for a new trial on the issue of punitive damages. \textit{Id.}
\item[110] \textit{Id.} at 733, 664 A.2d at 932.
\item[111] \textit{Id.} at 705-06, 664 A.2d at 918.
\item[112] \textit{Id.} at 712, 664 A.2d at 921.
\item[113] \textit{Id.} at 727, 664 A.2d at 929. The \textit{Montgomery Ward} court held that the instruction for false imprisonment was improper because the plaintiff had alleged only that the defendant had wrongfully procured a warrant for her arrest. \textit{Id.} Because the arrest was made by an officer with a valid warrant, the court explained that the plaintiff's false imprisonment claim was actually a malicious prosecution claim. \textit{Id.}
\item[114] \textit{Id.} at 732, 664 A.2d at 931.
\item[115] \textit{Id.}
\item[116] \textit{Id.} at 733, 664 A.2d at 932.
\item[117] \textit{Id.}
\end{footnotes}
holding that such intent must be established by "clear and convincing evidence" applied to all torts, intentional as well as non-intentional.118

b. Pleading a Claim.—

(1) Alleging a Cause of Action.—Maryland Rule 2-305 requires that "[a] pleading that sets forth a claim for relief... shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought."119 Read Drug & Chemical Co. v. Cotwill Construction Co.120 is a seminal case illustrating how the Court of Appeals has interpreted the requirements imposed by Maryland Rule 2-305.121 In Read Drug, the court considered whether a complaint in a negligence action sufficiently included "a clear statement of facts necessary to constitute a cause of action."122 The case involved two questions—whether the defendant, a construction company, had a duty to warn pedestrians about the dangers posed by wooden planks left on the street, and whether the defendant's acts proximately caused the plaintiff's injury.123 The court found that the plaintiff had pleaded her causes of action insufficiently because she did not include facts that were dispositive as to the two issues.124

In finding that the plaintiff had insufficiently pleaded the "facts" that constituted her "cause of action" of negligence, the Read Drug court made a crucial distinction between "simple factual situation[s]" and "more complex factual situations."125 The court indicated that pleadings involving simpler factual situations can be more general in

118. Id.
119. Md. R. 2-305.
121. See JOHN A. LYNCH, JR. & RICHARD W. BOURNE, MODERN MARYLAND CIVIL PROCEDURE § 6.4(a), at 362 (1993). At the time Read Drug was decided, Maryland Rule 2-305 was Maryland Rule 301(c). See Md. R. 2-305.
122. Read Drug, 250 Md. at 412, 243 A.2d at 552 (quoting former Md. R. 301(c)).
123. Id. at 416-17, 243 A.2d at 555.
124. Id. Specifically, the court found that:

There [were] no allegations in regard to the size of the board or the specific nature of the danger allegedly involved. There [were] no allegations that danger existed because the board projected from other boards, or because it was placed on an angle, or because there was a difference in level between the ground and the surface of the board, or because the board was of such a nature that it would slip and slide when a person walked on it. Nor [was] there any allegation that the defendants placed the board in such a position as would cause it to slip or wobble or otherwise cause a person walking on the board to lose her footing and fall.

Id.
125. Id. at 413, 243 A.2d at 553.
their allegations. However, cases presenting more complicated situations must include facts sufficient to "inform[ ] the court, whose duty it is to declare the law arising upon these facts" as well as "to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it."  

More recently, the Court of Appeals has reaffirmed that a complaint must include facts sufficient to fulfill all of the elements of the cause of action. In Anderson v. Meadowcroft, the daughter of a decedent filed an action against an attorney who had both drafted the decedent's will and received a bequest from it. The court noted that it did not need to consider the merits of the plaintiff's action for fraud because she had not provided sufficient facts in her complaint to allege "undue influence," an essential element of the cause of action. Citing the Rule 2-305 requirement that a "pleading that sets forth a claim for relief ... shall contain a clear statement of the facts necessary to constitute a cause of action," the court further noted that the presence of the word "coerce" in the daughter's complaint was inadequate because it was "a conclusory allegation [that was], without supporting facts, insufficient to state a cause of action."  

(2) Alleging Damages.—While the Maryland Rules mandate the pleading of facts sufficient to support a cause of action, common law has defined the degree of specificity required in pleading damages. The landmark case of Ellicott v. Lamborne established a distinction between those damages that are "the necessary consequences of the act complained of" and those that "do not necessarily result from the main fact alleged." Ellicott held that the latter classification of

126. Id. at 413-14, 243 A.2d at 553-54. The court noted in dicta that those "simple and specialized situations" may be limited to cases like "motor vehicle and carrier passenger cases." Id. at 414, 243 A.2d at 554.
127. Id. at 414, 243 A.2d at 554 (quoting Gent v. Cole, 38 Md. 110, 113 (1873)).
129. Id. at 221, 661 A.2d at 727.
130. Id. at 229, 661 A.2d at 731. The court stated that the daughter had not alleged in her complaint any of the circumstances that the court has previously recognized as constituting "undue influence":
She neither alleged that the decedent's mental abilities had deteriorated such that he would have been extraordinarily susceptible to his attorney's suggestions, nor that [his attorney] used force or fear to coerce the decedent into changing the will, nor that the decedent was especially dependent on [his attorney] to meet his physical needs.
Id. at 230, 661 A.2d at 731-32.
131. See supra text accompanying note 119.
133. 2 Md. 131 (1852).
134. Id. at 136.
damages, called "special damages," must be pleaded with specificity in the plaintiff's complaint.\textsuperscript{135} The \textit{Ellicott} court established this requirement to "prevent a surprise upon the defendant" regarding the damages that were being requested.\textsuperscript{136}

In \textit{Weiller v. Weiss},\textsuperscript{137} the court reaffirmed \textit{Ellicott}'s distinction between special and general damages. Yet, the \textit{Weiller} court held that in causes of action alleging personal injury, the plaintiff could recover damages that were a consequence of the original injury even though those consequential damages were not specifically pleaded in the complaint.\textsuperscript{138} In other words, "consequential damages" were classified as "general damages" and were recoverable upon an unspecified allegation of damages in the complaint.\textsuperscript{139}

Fifty years later, \textit{Nicholson v. Blanchette}\textsuperscript{140} reaffirmed the \textit{Weiller} holding that a claim for general damages was adequate, for purposes of pleading, for all damages that were consequential to the action. The \textit{Nicholson} court noted that in an automobile tort, a general allegation that a husband "suffered and continues to suffer damages because of the injuries caused his wife" was sufficient to allege that the husband had suffered loss of consortium.\textsuperscript{141} In so doing, the court held that when certain damages are the natural and logical conse-

\begin{footnotesize}
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  \item 135. \textit{Id.} The \textit{Ellicott} court drew a distinction between damages resulting from the manufacturing of paper and those resulting from the preparation of paper. \textit{Id.} at 135. While the plaintiff, a paper mill owner, had pleaded damages that resulted from his inability to manufacture paper, he had not pleaded damages resulting from his inability to prepare the paper. \textit{Id.} at 135-36. The \textit{Ellicott} court held that the latter group of damages were "special damages" because they did not "necessarily" result from the former group of damages. \textit{Id.} at 136.
  \item 136. \textit{Id.} at 136.
  \item 137. 124 Md. 461, 92 A. 1028 (1915).
  \item 138. \textit{Id.} at 465, 92 A. at 1029. The \textit{Weiller} court addressed a situation in which an automobile collided with a prized race horse, and the plaintiff filed a declaration alleging that the horse was "seriously and permanently injured about her body and limbs." \textit{Id.} at 464, 92 A. at 1028. At trial, the plaintiff produced evidence showing that "before the accident, the mare was levelheaded, quite fearless of objects, a bold racer, and easy to handle; but that, since, she was highly excitable and nervous, easily frightened, timid in her racing, and valueless as a race horse because of that condition." \textit{Id.}, 92 A. at 1029.
  \item 139. While the \textit{Weiller} court noted that the "declaration did not allege injury to the nervous system," the court concluded nonetheless that "[t]he declaration apprised the defendant that the injured animal was valuable because [the complaint indicated that it was] a racing mare" and it was "common knowledge" that racing horses that had been hurt physically or had been "badly frightened" have greatly diminished value. \textit{Id.} at 465, 467, 92 A. at 1029-30.
  \item 139. \textit{See id.} at 466, 92 A. at 1029 ("The rule adopted by this court... is that, in suits for personal injuries, it is not necessary to state specially any matters which are the legal and natural consequences of the injury inflicted.").
  \item 141. \textit{Id.} at 181, 210 A.2d at 739 (internal quotation marks omitted).
\end{itemize}
\end{footnotesize}
quence of the alleged acts and injury, those damages need not be specifically requested in the complaint.142

3. The Court's Reasoning.—Judge Karwacki, writing for the court, began the analysis in Scott v. Jenkins by examining the importance that pleadings play in modern litigation.143 The court noted that while "Maryland abandoned the formalities of common law pleading long ago," pleadings still play a crucial role in litigation.144 The court was particularly concerned with the manner in which the pleading provides "notice to the parties as to the nature of the claim or defense."145 The court then reviewed previous holdings where it had found that non-intentional and intentional torts were not pleaded properly because the pleadings did not include all of the elements of the offense.146

The court then traced its evolving jurisprudence concerning the "necessary prerequisites" to a punitive-damage award and concluded that "actual malice" must be demonstrated for both intentional and non-intentional torts.147 Moreover, the court reaffirmed the Zenobia court's holding that "actual malice" must be demonstrated by conduct "characterized by evil motive, intent to injure, ill will or fraud."148 The court also reaffirmed the Zenobia court's requirement of proving "actual malice" by "clear and convincing evidence" as opposed to the more lenient standard of preponderance of evidence.149

The Court of Appeals suggested that it had cast aside the more forgiving "implied malice" standard because it did not serve the underlying purposes behind punitive damages: "to punish and deter particularly reprehensible conduct motivated by a conscious and evil

142. Id.
143. Scott, 345 Md. at 27-28, 690 A.2d at 1003.
144. Id.
145. Id. (emphasis added) (citing LYNCH & BOURNE, supra note 121, § 6.1, at 343). In addition to notice, the court recognized that Maryland pleadings serve three other "distinct roles in our system of jurisprudence." Specifically, the pleading "states the facts upon which the claim or defense allegedly exists," it "defines the boundaries of litigation," and it "provides for the speedy resolution of frivolous claims and defenses." Id. at 28, 690 A.2d at 1003. The court maintained, however, that of those four roles, the requirement of notice was "paramount." Id.
146. Id. at 28-29, 690 A.2d at 1003. Specifically, the court cited Read Drug & Chemical Co. v. Colwill Construction Co., 250 Md. 406, 243 A.2d 548 (1968), where the court struck down a negligence award because the pleading party had not alleged with certainty facts sufficient to support a negligence award. Scott, 345 Md. at 28, 690 A.2d at 1003.
147. Scott, 345 Md. at 28-29, 690 A.2d at 1003-04.
148. Id. at 31, 690 A.2d at 1005.
149. Id. at 29, 690 A.2d at 1004.
motive." Implied malice may have "reached conduct that was perhaps reprehensible," but the court found that it also reached conduct that was "otherwise free of the ill will appropriately targeted by a punitive damages award."

In addition, the court noted that Montgomery Ward extended the "actual malice" requirement to intentional as well as non-intentional torts. In so doing, the court cited Heinze v. Murphy for the proposition that for the intentional tort of false imprisonment, a police officer "who acts in good faith in making an arrest is absolved from punitive or exemplary damages" unless there are demonstrated "circumstances upon which bad faith or malice may be attributed to him in making the arrest." The Scott court continued, "where damages beyond compensation, to punish the party guilty of a wrongful act, are asked, the evidence must show wanton or malicious motive, and it must be actual and not constructive or implied."

Having described the punitive-damages precedent, Judge Karwacki then indicated that the nature of punitive damages required that specific facts be alleged in the complaint in order to support the award. The Scott opinion interpreted Smith v. Gray Concrete Pipe Co. as imposing "a strict pleading requirement in punitive or exemplary damages cases" because the Court of Appeals has not accepted "bald or conclusory allegations," instead requiring "far greater specificity."

Moreover, the Court of Appeals in Scott criticized the Court of Special Appeals for analogizing the punitive damages Jenkins was awarded to consequential damages. First, because punitive damages require a "higher standard of proof, . . . a more detailed factual allegation is necessary to put the other party on notice that such damages are being sought." Second, the Scott court noted that punitive damages do not "necessarily flow" from an injury in a way similar to

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150. Id. at 32, 690 A.2d at 1005.
151. Id.
152. See supra notes 110-117 and accompanying text.
153. 180 Md. 423, 24 A.2d 917 (1942).
154. Scott, 345 Md. at 33, 690 A.2d at 1005 (quoting Heinze, 180 Md. at 430, 24 A.2d at 920).
155. Id., 690 A.2d at 1006 (quoting Heinze, 180 Md. at 434, 24 A.2d at 922-23).
156. Id. at 34-35, 690 A.2d at 1006.
158. Id. at 35, 690 A.2d at 1006.
159. Id.
consequential damages.\textsuperscript{160} Whereas consequential damages are "related to the loss suffered by the plaintiff," punitive damages "depict the degree of defendant's culpability and his ability to pay."\textsuperscript{161}

For these reasons, the Court of Appeals noted that the intermediate appellate court's decision was "flawed."\textsuperscript{162}

Next, the court indicated that the varying purposes of punitive damages suggest that they are "different in nature" and, consequently, should be pleaded specifically in the complaint.\textsuperscript{163} Thus the court held that:

[I]n order to properly plead a claim for punitive damages, a plaintiff must make a specific demand for that relief in addition to a claim for damages generally, as well as allege, in detail, facts that, if proven true, would support the conclusion that the act complained of was done with "actual malice." Nothing less will suffice.\textsuperscript{164}

Applying this sweeping holding to the facts of the case, the court noted that "[e]ven assuming that [Jenkins's] Amended Complaint specifically and sufficiently alleged facts that would have supported the conclusion that Scott acted with the requisite 'actual malice' to support a punitive damages award," Jenkins's pleading would still be inadequate because it "failed to make a specific claim for such damages" and because "[h]is prayer for damages and general relief [was] simply insufficient to inform Scott of the extraordinary nature of the additional relief sought against him."\textsuperscript{165}

4. Analysis.—Scott v. Jenkins can be understood as a merging of two different lines of Maryland jurisprudence: punitive damages and pleading requirements. The decision is an appropriate application of both precedents because past courts have established strict standards for recovering punitive damages\textsuperscript{166} and for pleading causes of action.\textsuperscript{167} In holding that a complaint requesting punitive damages must make a specific claim for such damages and include facts sufficient to allege that the defendant was motivated by "actual malice,"\textsuperscript{168}

\textsuperscript{160} Id. at 36, 690 A.2d at 1007.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 35, 690 A.2d at 1006.
\textsuperscript{163} Id. at 37, 690 A.2d at 1007.
\textsuperscript{164} Id., 690 A.2d at 1008.
\textsuperscript{165} Id. at 38, 690 A.2d at 1008.
\textsuperscript{166} See supra notes 97-118 and accompanying text.
\textsuperscript{167} See supra notes 124-132, 135-142 and accompanying text.
\textsuperscript{168} Scott, 345 Md. at 38, 690 A.2d at 1008.
the *Scott* decision effectively completes the picture of what a plaintiff hoping to recover punitive damages needs to allege and prove.

a. Punitive Damages Must Be Plead Specifically as Special Damages.—Maryland law has consistently required that all damages except those that "necessarily result from the main fact alleged" be plead with particularity in the complaint.\(^{169}\) While damages that were the "natural and logical" consequences of that main fact are classified as "general damages" and can be pleaded as an unspecified allegation of damages, damages that are not the "natural and logical" consequence of the main fact are considered to be "special damages" and are required to be pleaded specifically in the complaint.\(^{170}\) Under this approach, the *Scott* court was perfectly appropriate in classifying punitive damages as special damages.

Since *Zenobia*, the court has steadily maintained that punitive damages serve a categorically different purpose than other damages. Unlike other types of damages, punitive damages have a particularly "penal nature."\(^{171}\) The distinctly "penal nature" of punitive damages can be seen in at least two respects. First, the requirement of malicious intent or "actual malice" is a distinct part of any cause of action alleging punitive damages. Second, the heightened standard of proof that a plaintiff must meet (i.e., "clear and convincing evidence") is also particular to punitive damages. The existence of a higher standard of conduct and proof indicates that the court has, at least since *Zenobia*, not considered punitive damages to flow naturally from other types of damages.

Therefore, the Court of Appeals was justified in noting that the Court of Special Appeals erred in analogizing punitive damages to consequential damages.\(^{172}\) The Court of Special Appeals had held improperly that "[t]he rationale for [the recovery of punitive damages] rule is the same as the rationale for the [recovery of] consequential damages [because] when allegations sufficient to support a punitive damages claim are coupled with a general request for damages, a defendant has adequate notice that the plaintiff may seek such [punitive]

\(^{169}\) See *Ellicott v. Lamborne*, 2 Md. 131, 136 (1852).

\(^{170}\) See *Nicholson v. Blanchette*, 239 Md. 168, 181, 210 A.2d 732, 739 (holding that a husband could recover for loss of consortium in a case where he alleged only that he "suffer[s] damages because of the injuries caused his wife" because loss of consortium was a logical and natural consequence to the injuries alleged (internal quotation marks omitted)), supplemented by 239 Md. 168, 213 A.2d 71 (1965).


\(^{172}\) *Scott*, 345 Md. at 35-36, 690 A.2d at 1007.
damages at trial." Yet the cases upon which the Court of Special Appeals relied in making the proposition are from jurisdictions that have a more permissive view toward punitive damages. These jurisdictions require a lower standard of conduct for awarding punitive damages; none require a finding of "actual malice" as defined by Maryland. As a result, it would be much more likely that the defendant's notice of punitive damages could be inferred from a more general claim of damages.

Maryland law concerning punitive damages is unlike the law in jurisdictions cited by the Court of Special Appeals and more like Virginia law, which was cited by the Court of Appeals. Like Maryland, Virginia requires that punitive damages be predicated on the defendant's acting with a mens rea comparable to "actual malice." The Supreme Court of Virginia has held that punitive damages are unlike compensatory damages in that they must be pleaded with a certain degree of specificity. While Virginia's highest court has not provided an extensive explanation as to why punitive damages must be plead specially, it is probable that Virginia's reasoning is comparable to that of Maryland; because punitive damages result from a higher allegation of conduct, a defendant does not have sufficient notice that they are being requested unless they are pleaded specially.

Thus, while consequential damages can be foreseen by the defendant from the nature of the original injury, punitive damages cannot be foreseen because they serve a fundamentally different purpose. As the Court of Appeals noted in Scott, punitive damages have "no necessary relation to the loss suffered by the plaintiff, but rather depict[ ] the degree of the defendant's culpability." Because punitive damages do not inherently flow from any other form of recovery, the Court of Appeals was consistent with precedent in implicitly classifying them as more like "special damages."

b. Pleading Facts Sufficient to Allege That the Defendant's Motivation Was 'Actual Malice.'—Maryland's jurisprudence concerning plead-

173. Scott, 107 Md. App. at 444, 668 A.2d at 960 (emphasis added).
174. See supra note 44 (listing the states cited by the Court of Special Appeals, and describing their holdings).
175. Scott, 345 Md. at 37, 690 A.2d at 1007 (citing Harrell v. Woodson, 353 S.E.2d 770, 773 (Va. 1987)).
177. See Harrell, 353 S.E.2d at 773 ("[W]e hold that punitive damages may only be recovered where the plaintiff has made an express claim for them in the prayer for relief . . . sufficient to put the defendant on notice that an award of punitive damages is sought apart from, and in addition to, the compensatory damages claimed.").
178. Scott, 345 Md. at 36, 690 A.2d at 1007.
The court has consistently interpreted Maryland Rule 2-305 as meaning that the facts pleaded must effectively satisfy every element of the cause of action. In instances where the plaintiff has failed to plead in the complaint facts proving a necessary element of the cause of action, the Court of Appeals has not hesitated to uphold dismissals of the plaintiff's action.

Therefore, it is perfectly consistent with the court's interpretation of Maryland Rule 2-305 and of its precedent concerning punitive damages to require a complaint alleging punitive damages to include facts suggesting that the defendant was motivated by "actual malice." Previous courts have made clear that a determination of "actual malice" is a separate inquiry into the mens rea of the defendant. "Actual malice" is a determination that the defendant acted with an "evil motive" or an "ill will" that is above and beyond the conduct that satisfies many torts based on negligence. Moreover, the "actual malice" inquiry has been understood to be something beyond that which is required to satisfy the intent requirement of many intentional torts. Thus,


As scholars have noted, the language of Maryland Rule 2-305 differs significantly from its parallel rule in the federal system, Federal Rule 8(a). LYNCH & BOURNE, supra note 121, § 6.1, at 344. Whereas the Maryland Rules indicate that "facts" must be plead sufficient to constitute a "cause of action," Rule 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). The two rules differ in that while the federal pleading rule functions almost exclusively to provide "notice" to the defendant of the general type of litigation involved, the Maryland pleading rule imposes a greater burden on the plaintiff to define the issues with the pleadings. LYNCH & BOURNE, supra note 121, § 6.1, at 343-45.

Because the federal rules allow for more generality in pleading the elements of a claim, the disposition of Jenkins's case would have been very different had he been able to plead it in federal court. Had Jenkins had a federal claim based on either diversity or federal jurisdiction, his complaint would almost certainly have been sufficient in federal court.

180. See supra notes 122-142 and accompanying text.

181. See, e.g., Anderson v. Meadowcroft, 339 Md. 218, 229, 661 A.2d 726, 731 (1995) (refusing to consider the merits of the plaintiff's case for fraud because her complaint did not allege facts sufficient to show that the defendant acted with "undue influence"); Read Drug, 250 Md. at 418, 243 A.2d at 556 (dismissing the plaintiff's action for negligence because she did not include facts in her complaint that suggested that the defendant had a duty to warn or that the defendant's conduct proximately caused her injury).

182. See supra notes 98, 105-110 and accompanying text.


184. See Ellerin v. Fairfax Sav., F.S.B., 337 Md. 216, 241, 652 A.2d 1117, 1129 (1995) (upholding the trial court's determination that the defendant had the requisite intent for fraud, but remanding the case for a new trial on whether the defendant demonstrated the intent necessary to allow the plaintiff to recover punitive damages).
the Scott court was correct in concluding that Jenkins's amended complaint did not allege that Scott had the requisite intent for "actual malice" simply because it described facts that would make Scott liable to Jenkins for battery and false imprisonment. 185

The court has also consistently maintained that the level of specificity required in alleging the cause of action may depend on the complexity of the factual situation. 186 In other words, the plaintiff generally needs to include more facts in the complaint in circumstances where the cause of action is more complicated. In interpreting this standard, some scholars have suggested that "in all but the simplest traffic accident cases . . . the pleader should probably err on the side of providing greater detail with respect to the crucial elements of the cause of action which establish liability of the defendant." 187

This approach supports the court's holding in Scott. A cause of action alleging punitive damages is more complicated than an intentional tort claim for only compensatory damages because of the additional requirement of "actual malice." Because "actual malice" is a separate element of a more intricate cause of action, the Court of Appeals was justified in requiring that Jenkins's amended complaint pleaded sufficient facts to warrant a finding that Scott was motivated by a malicious intent. In this respect, the Scott decision was well supported by precedent. With regard to pleadings, Maryland law has provided that a complaint must include sufficient detail of all of the facts to support each requisite cause of action. 188 With regard to punitive damages, post-Zenobia Maryland law has mandated that punitive damages are appropriate only when the defendant's conduct demonstrates a maliciousness amounting to "actual malice." 189 These two lines of precedent support Scott's holding that an action requesting punitive damages must plead facts alleging that the defendant's motivation was "actual malice."

c. Scott: Completing the Picture of the Requisites for Punitive Damages.—In its synthesis of pleadings and punitive-damages law, the Scott court finished painting what had previously been a work in progress concerning the requirements that a plaintiff must satisfy to re-

185. See supra notes 11-13 and accompanying text (describing the facts in Jenkins's Amended Complaint for Damages that would warrant a finding that Scott was liable for battery and false imprisonment).
186. See, e.g., Read Drug, 250 Md. at 413, 243 A.2d at 553.
187. See LYNCH & BOURNE, supra note 121, § 6.4(a), at 362.
188. See Md. R. 2-305.
189. See supra notes 105-118 and accompanying text.
ceive a punitive-damage award. After Scott, it is clear that to receive punitive damages a plaintiff must: (1) plead punitive damages specifically in the complaint, (2) allege facts sufficient to prove every element of the cause of action including "actual malice," and (3) prove that the defendant acted with "actual malice" by a standard of "clear and convincing evidence." While the third requirement was previously established, the court in Scott provided the former two elements and effectively completed the picture of how a plaintiff can obtain an award of punitive damages in tort claims.

As a result, it is easy to understand why the court's decision in Scott was sufficiently uncontroversial to be filed without dissenting or concurring opinions. Indeed, all the members of the court endorsed the opinion except for Chief Judge Bell, who concurred in judgment only. Although Chief Judge Bell did not write an opinion explaining his reasoning for not joining the court's opinion in Scott, one can imagine that his lack of endorsement in Scott results from his disagreement with the court's conclusion that punitive damages should be awarded only when a defendant's conduct demonstrates "actual malice" as evidenced by a finding of "clear and convincing evidence." Indeed, Judge Bell dissented from the court's opinion in Zenobia and argued that such a standard of conduct and proof should not be necessary for a plaintiff to receive a punitive-damage award. Therefore, one can see why Judge Bell would be unwilling to join Scott, a case that codifies Zenobia and its progeny by applying their holdings back to the pleadings stage.

5. Conclusion.—In Scott v. Jenkins, the Court of Appeals reaffirmed many of its previous holdings. The court maintained that punitive damages could only be granted by a showing of malicious intent or "actual malice." Moreover, the court once again indicated that a pleading must allege facts sufficient to constitute a cause of action and that damages that do not flow naturally from the alleged action, such as punitive damages, must be plead specially. In this sense, there is little decided in Scott that is new. However, by considering the procedural requirements of pleadings in a case involving the substantive

190. The court held in Zenobia that in negligence and strict liability actions, the defendant's conduct must be demonstrated by "actual malice." The Ellerin court extended the "actual malice" requirement to intentional torts. The Zenobia court also held that the standard of proof required for recovering punitive damages was "clear and convincing evidence." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 469, 601 A.2d 633, 657 (1992).

191. Scott, 345 Md. at 38, 690 A.2d at 1008.

192. Zenobia, 325 Md. at 481-82, 601 A.2d at 663 (Bell, J., dissenting) (explaining that the Zenobia holding "simply goes too far").
requirements of punitive damages, Scott provided explicit guidance for the future as to what is required in pleading a claim involving punitive damages.

ROBERT A. GAUMONT
XI. Torts

A. Restricting the Scope of Negligent Entrustment by Exempting Donors and Sellers from Liability

In Broadwater v. Dorsey, the Court of Appeals considered for the first time whether the parents of an adult child who sell or give their child an automobile can be subject to liability for harm suffered by a third party through the child’s negligent use of that automobile, when the parents were aware of the child’s previous reckless conduct. The court concluded that “parents who sell or give an automobile to an adult child are not responsible for damages when they lack the power to control the child or the automobile” and that “the chattel [must be] under the control of the supplier at the time of the accident.” In so ruling, the court cited support from Maryland case law, cases from other jurisdictions, other secondary authority, and the Restatement (Second) of the Law of Torts. A number of these authorities considered the specific issue debated in Broadwater: whether the entrustor’s negligence should be measured at the time of the accident or at the time of the entrustment. Contrary to the decision in this case, nearly all other courts and commentators have concluded that liability for negligent entrustment should hinge on the initial act of entrustment and not the entrustor’s control of the instrumentality at the time of the accident. Thus, Maryland stands virtually alone among its sister states in severely restricting the scope of negligent entrustment by exempting donors and sellers from liability.

1. The Case.—Ronald L. Broadwater, Jr. “was, to say the least, not a highly motivated person.” He was born in June 1965; “[a]fter graduating high school . . ., he attended three different colleges for varying periods but, despite five or six years of effort, had not graduated from any of them and had not even earned sufficient credits for an A.A. degree.” He continued to live at home or with friends and

2. Id. at 550, 688 A.2d at 437.
3. Id.
4. Id. at 558, 688 A.2d at 441.
5. Id. at 554-62, 688 A.2d at 439-43.
6. See infra notes 90-107, 210-215 and accompanying text.
8. Id. Many of the facts regarding Ronald are uncertain. The intermediate appellate court gave “scant attention” to the evidence supporting the defense because the jury had implicitly rejected it at trial. Id. The intermediate court noted that “[t]his is particularly important in this case [because] [m]ost of the evidence presented in their defense came
"was almost totally supported by his parents." Although he worked part-time for his father for a period of time, he never held a steady job.

In 1980, at age 15, Ronald was involved in a motorcycle accident, and his father was later sued for having negligently entrusted the motorcycle to his son. By October 1989, Ronald had accumulated seven citations for failing to obey traffic signals or speeding, resulting in ten points on his driving record. In October 1990, Ronald was involved in another accident in which he ran into a concrete bridge. His mother paid a number of the fines for these violations, and she retained an attorney to represent him on one or more of these occasions.

In September 1991, Dr. and Mrs. Broadwater filed a petition with the District Court for Baltimore County for an emergency evaluation of Ronald because they believed he had a drug problem. In their petition, they noted that Ronald had a history of drug abuse dating back to 1980, and they implied that between 1989 and 1991 he had been taking cocaine intravenously in both arms. The court granted

from the testimony of Dr. and Mrs. Broadwater, who were called by the plaintiff and who were very reluctant witnesses." Id. at 62 n.2, 666 A.2d at 1284 n.2. The court further noted that Dr. Broadwater "seemed confused even as to when his son was born; they could not agree on what year he graduated high school; and they both seemed to have no knowledge of where he lived, what his telephone number was, how to reach him, or what he did." Id.

9. Id. at 63, 666 A.2d at 1284. For a brief period, Ronald lived in an apartment paid for by his parents while he was attending college. Id. at 62-63, 666 A.2d at 1284.

10. Id. at 63, 666 A.2d at 1284.

11. Id., 666 A.2d at 1285. "The case was apparently settled." Id.

12. Id., 666 A.2d at 1284.

13. Id., 666 A.2d at 1285.

14. Id., 666 A.2d at 1284-85. As a result of these various accidents and traffic violations, State Farm, the Broadwaters’ insurance company, informed Dr. and Mrs. Broadwater that it was unwilling to renew the insurance on their five other vehicles unless they excluded Ronald from their policy. Id., 666 A.2d at 1285. The Broadwaters initially protested State Farm's decision, but finally accepted the terms and signed an agreement in August 1991 that excluded Ronald from coverage. Id.

15. Id., 666 A.2d at 1285. It was also alleged that during the month of September, Ronald's mother filed charges against her son for the "unauthorized taking" of her Mercedes and that one week later, she filed charges against him for the "theft" of a 1989 Ford and a jet ski, as well as for assault and battery. Brief for Respondents at 5, Broadwater v. Dorsey, 344 Md. 548, 688 A.2d 436 (1997) (No. 6). At trial, however, Mrs. Broadwater testified that she could not recall whether these charges had been filed. Broadwater, 107 Md. App. at 64, 666 A.2d at 1285.

the petition, and Ronald was committed for evaluation, remaining hospitalized for four to six weeks.17

In December 1991, Ronald's mother purchased a 1982 Mazda RX7 sports car and gave the vehicle to her son about two months later.18 Ronald subsequently retitled the vehicle in his own name.19 Significantly, before Mrs. Broadwater gave him the car, Ronald had received three additional speeding tickets.20 The Broadwaters also paid for Ronald's insurance with the Maryland Automobile Insurance Fund, enabling him to carry the minimum required insurance coverage.21

On October 2, 1992, eight months after having received the car from his mother, Ronald drove his car across the center line of Falls Road in Baltimore County and collided head-on into a car driven by Matilda Dorsey, causing her serious injuries.22 Dorsey and her husband brought suit in the Circuit Court for Baltimore County, alleging that Dr. and Mrs. Broadwater had

negligently entrusted the automobile to Ronald, Jr., their adult son, by purchasing the vehicle and giving it to Ronald, Jr., knowing at the time they gave the vehicle to Ronald, Jr. it was likely, because of his driving record and drug abuse problems, that he would drive the vehicle recklessly and pose an unreasonable risk of physical harm to others.23

In response to this suit, the Broadwaters filed a motion for summary judgment on the grounds that they "had no power to control the use of the vehicle at the time of the accident, and . . . lacked sufficient knowledge to put them on notice that their son posed an unreasonable risk of harm to others."24 The circuit court denied their motion and, following trial, entered judgment on a jury verdict in favor of the

17. Id. at 64, 666 A.2d at 1285. The record is unclear as to the length of Ronald's hospitalization. See Brief for Respondents at 5-6, Broadwater (No. 6); Brief of Appellants at 4, Broadwater v. Dorsey, 344 Md. 548, 688 A.2d 436 (1997) (No. 6).
19. Id. On February 2, 1993, four months after the accident in question and exactly one year after having received the car from his mother, Ronald signed an "Agreement of repayment," in which he promised to repay his parents for the car when he obtained his college degree. Id. However, as of July 1994, no payments had been made on that promise. Id. at 65, 666 A.2d at 1285.
20. Id. at 64, 666 A.2d at 1285.
21. Id.
22. Broadwater, 344 Md. at 550, 688 A.2d at 437.
23. Id. at 551, 688 A.2d at 437. The complaint also included a claim against Ronald, alleging that he had "breached his duty to drive his vehicle in a safe, reasonable, and non-negligent manner." Id. at 550, 688 A.2d at 437.
24. Id. at 551, 688 A.2d at 437.
The trial court had erred in finding that they could be liable on a theory of negligent entrustment because "a sine qua non for liability is the ability to prohibit the use of the chattel." The Court of Special Appeals affirmed the jury verdict. The court stated that because the tort is founded upon an entrustment—the supply of a chattel by the defendant to another person—control must be viewed in terms of whether the defendant had a choice to supply the chattel or not. The court concluded that this "negligence must, of necessity, be viewed as of the time of the entrustment, not as of the time the entrustee improperly uses the entrusted chattel." As support for its position, the Court of Special Appeals stated:

A person who negligently places a chattel in the hands of another under the circumstances stated in Restatement § 390 cannot escape liability by deliberately putting it beyond his power to redress that negligence—by effectively relinquishing all practical ability thereafter to prohibit or limit the use of the chattel by the entrustee. It would be wholly inconsistent with the public policy underlying the tort to regard such an act as providing a greater advantage to the supplier than if he retained the power of control but declined to exercise it.

The court suggested that were it to hold otherwise, the effect would be to provide relief for one who gives a chattel to another with dangerous propensities and relinquishes control over it, while imposing liability on one who retains some control over the chattel but neglects to exercise that control. The court concluded that "the continuing ability...

25. Id.
26. Id.
27. Broadwater, 107 Md. App. at 61, 666 A.2d at 1284, 1287.
28. Id. at 61, 666 A.2d at 1284.
29. Id. at 67, 666 A.2d at 1287.
30. Id. The court relied heavily on the Court of Appeals's decision in Kahlenberg v. Goldstein, 290 Md. 477, 431 A.2d 76 (1981), refusing to accept the Broadwaters' contention that Kahlenberg was distinguishable because of the entrustee's status as a minor in that case. Broadwater, 107 Md. App. at 68-69, 666 A.2d at 1287.
32. Id. The court also addressed the knowledge requirement of the tort. The Broadwaters contended that as long as the State was content to allow Ronald to drive, then his parents should not be liable for providing him the means to do so. Id. at 70-71, 666 A.2d at 1288. They argued that they should be allowed to rely on the fact that the State Motor Vehicle Administration (MVA) had not suspended or revoked Ronald's license as evidence that they did not have the requisite knowledge of Ronald's dangerous driving habits. Id. at 70, 666 A.2d at 1288. The court responded that "[t]he exercise or non-exercise of that authority has no direct bearing, however, on the civil liability of persons for..."
to control the chattel is not required for a \textit{prima facie} case of negligent entrustment; control need only exist at the time of the entrustment.\textsuperscript{33}

In his dissent, Judge Cathell disagreed with the majority on the scope and application of the doctrine of negligent entrustment.\textsuperscript{34} He suggested that the better position for the court to adopt would be a more limited application of the doctrine that would, "in a sales context, require the transferor to retain the legal right to control the instrumentality or have a legal responsibility to control the buyer."\textsuperscript{35} Judge Cathell reasoned that otherwise, liability for negligent entrustment would be too expansive and would subject all vendors to liability long after the vendor had relinquished control over the chattel.\textsuperscript{36}

The Court of Appeals granted certiorari to consider "whether the parents of an adult child, who with knowledge of their child's incompetence, give or sell that child an automobile are to be considered 'suppliers' for purposes of §390 of the Restatement,"\textsuperscript{37} and "whether the supplier's control over the chattel should be measured at the time of the 'entrustment' or at the time of the negligent act of the 'entrustee' resulting in injury."\textsuperscript{38}

2. Legal Background.—

a. Development of the Doctrine of Negligent Entrustment in Maryland.—The Court of Appeals adopted the doctrine of negligent entrustment into the common law of Maryland in its 1934 decision in \textit{Rounds v. Phillips}.\textsuperscript{39} In \textit{Rounds}, the plaintiff sued the father of a minor child who, driving a car purchased by his parents, collided with a car driven by Robert Lee Rounds.\textsuperscript{40} Rounds died as a result of injuries he received in the car crash.\textsuperscript{41} The plaintiff, Rounds's mother and administratrix of his estate, alleged that the defendant's son drove negligently and recklessly, causing the death of Rounds.\textsuperscript{42} The plaintiff

\textsuperscript{33} Broadwater, 344 Md. at 555, 688 A.2d at 439 (citing Broadwater, 107 Md. App. at 67, 666 A.2d at 1287).

\textsuperscript{34} Broadwater, 107 Md. App. at 74-90, 666 A.2d at 1290-98 (Cathell, J., dissenting).

\textsuperscript{35} Id. at 75, 666 A.2d at 1291.

\textsuperscript{36} Id. at 87, 666 A.2d at 1296-97. Judge Cathell declined to discuss the knowledge requirement or acknowledge the limitations it already imposes on the doctrine.

\textsuperscript{37} Broadwater, 344 Md. at 554, 688 A.2d at 439.

\textsuperscript{38} Id. at 555, 688 A.2d at 439.

\textsuperscript{39} 166 Md. 151, 166, 170 A. 532, 538 (1934).

\textsuperscript{40} Id. at 158, 170 A. at 534.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 153, 170 A. at 532-33.
argued that the defendant should be held liable for his son's conduct because he gave his son the car knowing of his reckless propensities, and took no action to prohibit his son from using the automobile.\textsuperscript{43}

The theory of liability advanced by the plaintiff did not rest on vicarious liability or negligence imputed to the parents as owners of the vehicle.\textsuperscript{44} Rather, the theory of liability advanced was based solely on the primary negligence of the defendant father in giving the car to his son and allowing him to continue driving it when he knew, at the time of the gift, of the son's recklessness and incompetence as a driver.\textsuperscript{45}

In an effort to determine whether the use of the car by the minor son would likely create an unreasonable risk of danger to other persons, the court looked to section 260 of the tentative draft of the \textit{Restatement of the Law of Torts},\textsuperscript{46} which states:

One who supplies directly or through a third person a chattel for use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.\textsuperscript{47}

In considering this new theory of liability advanced by the plaintiff, the court thoroughly examined pertinent case law in other jurisdictions "in order to demonstrate the authority upon which the quotation from the \textit{Restatement of the Law of Torts} is founded."\textsuperscript{48} These cases generally held that while automobiles are not dangerous instrumentalities per se, they have the ability to be dangerous when used by

\textsuperscript{43} \textit{Id.} at 159-60, 170 A. at 535. The minor son had previously received a speeding ticket and had been convicted of reckless driving and driving under the influence of alcohol. \textit{Id.} at 153-54, 170 A. at 533. As a result, his driver's license was suspended for a period of time. \textit{Id.}

\textsuperscript{44} \textit{Id.} at 160, 170 A. at 535.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.} at 160-61, 170 A. at 535.

\textsuperscript{47} \textit{Restatement of the Law of Torts} § 260 (Tentative Draft No. 5, 1930). Section 260 of the \textit{Restatement} (Tentative Draft) later became section 390 of the \textit{Restatement of the Law of Torts} and the \textit{Restatement (Second) of the Law of Torts}. \textit{Restatement (Second) of the Law of Torts} § 390 (1964); \textit{Restatement of the Law of Torts} § 390 (1934). The language of these two provisions is substantially the same. \textit{See infra} note 109 and accompanying text.

\textsuperscript{48} \textit{Rounds}, 166Md. at 166, 170 A. at 538.
incompetent persons. Thus, an owner of an automobile has a duty to withhold his consent and refrain from entrusting his car to another whom he knows to be either inexperienced or incompetent to drive it without bringing harm to others. The court concluded that the principle expressed in the Restatement constituted "a fair and accurate statement of the rule, deduced from opinions representing the great weight of authority in this country."

The court in Rounds defined the scope of liability to include not only owners of automobiles or other vehicles, but also those with any right to permit or prohibit the use of a vehicle. The defendant father in Rounds had argued that he should escape liability because the car was titled in his wife's name at the time of the accident, rather than in his own name. The court found this distinction insufficient to relieve him from liability, reasoning that "the father, as the controlling head of the family, had the authority and power to permit the use by the son of the mother's automobile, or to prohibit it." Because his son was a minor, the father was deemed to have had the power to control his son's activities, including his use of the car, even if he did not have the power to control the car itself. The court therefore concluded that it "[did] not think that the title to the automobile... is conclusive, but that the principle applies not only to the owner of an automobile, but to anyone who has the right to permit and the power to prohibit the use thereof." The court did not specify when the power to permit or prohibit must be exercised, but given that the

49. *Id.* at 161-66, 170 A. at 535-37; *see, e.g.*, Rocca v. Steinmetz, 214 P. 257, 260 (Cal. Dist. Ct. App. 1923) (holding that consideration for the safety of others requires one to withhold her consent and refrain from allowing another who is reckless or careless to use an automobile); Tyree v. Tudor, 111 S.E. 714, 716 (N.C. 1922) (holding that a parent who entrusted an automobile to his 16-year-old son, knowing his reckless character, could be held liable); Elliot v. Harding, 140 N.E. 338, 339 (Ohio 1923) (holding that an automobile may become a dangerous instrumentality when one entrusts its use to another who is unskilled or inexperienced); Raub v. Donn, 98 A. 861, 862 (Pa. 1916) (holding that one has a duty to ensure that his automobile is not operated by a careless, reckless person); Allen v. Bland, 168 S.W. 35, 36 (Tex. Civ. App. 1914, writ ref'd) (holding that a parent who permitted his 11-year-old son to drive an automobile, knowing the boy was reckless, careless, and inexperienced, could be held liable).

50. *Rounds*, 166 Md. at 166, 170 A. at 538.

51. *Id.* The court noted that "[o]f course, there are, and must be, limitations upon the application of the rule," but went no further in illuminating what those limitations might be. *Id.* at 166-67, 170 A. at 538.

52. *Id.* at 168, 170 A. at 538.

53. *Id.* at 167, 170 A. at 538.

54. *Id.*

55. *Id.*

56. *Id.* at 168, 170 A. at 538.
son was still a minor, William Rounds, Sr., would have had continuing control over his son and the car.\textsuperscript{57}

For the next fifty years, Maryland appellate courts periodically revisited the doctrine of negligent entrustment with respect to automobiles and other motor vehicles. However, these courts considered the doctrine in the context of a loan or bailment of a vehicle, as opposed to a gift as in \textit{Rounds}.\textsuperscript{58} Thus, ownership and continuing control of the chattel itself was directly maintained and did not present an issue for decision in these cases.\textsuperscript{59}

In 1981, almost fifty years after the \textit{Rounds} decision, the Court of Appeals was confronted with a negligent entrustment claim strikingly

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\textsuperscript{57} A year later, the court again reviewed the \textit{Rounds} case on appeal from a directed verdict in favor of the defendants. \textit{Rounds} v. Phillips, 168 Md. 120, 177 A. 174 (1935). The issue on appeal was whether sufficient evidence existed to prove that the parents knew of their son's recklessness when they entrusted him with the car. \textit{Id.} at 121, 177 A. at 174. Although the parents admitted that they knew that their son's license had been revoked, they apparently made no effort to ascertain whether he could be safely entrusted with a renewal of his driving privileges. \textit{Id.} at 126, 177 A. at 176. The court stated that the renewal of his license, "is not a sufficient ground for relieving the defendants of their duty to restrict their son in the use of the automobile." \textit{Id.} The court asserted that the revocation of his license should have prompted an investigation by the parents as to whether their son was qualified to drive. \textit{Id.} Thus, the court found that the facts implied that the parents should have known of the unreasonable risk involved in their son's use of the car and were thus not entitled to a directed verdict in their favor. \textit{Id.} at 126-27, 177 A. at 176-77.

\textsuperscript{58} Many of these cases involved the entrustment of a vehicle by an employer to an employee, where the employer, as owner of the vehicle, was charged with negligently permitting an employee to use the vehicle. \textit{See}, e.g., \textit{Morrell} v. \textit{Williams}, 279 Md. 497, 504, 366 A.2d 1040, 1043-44 (1976) (concluding that an employer could not be liable for negligent entrustment because he was unaware that the employee did not have a valid driver's license or that the employee's use of the company truck would involve any unreasonable risk of physical harm); \textit{Curley} v. \textit{General Valet Serv.}, 270 Md. 248, 266, 311 A.2d 231, 240-41 (1973) (concluding that the employer entrusted the company van to its employee seven days a week when the employer knew that the employee's habitual failure to heed traffic signals rendered him an incompetent driver who posed an unreasonable risk of physical harm to others); \textit{Snowhite} v. \textit{State ex rel. Tennant}, 243 Md. 291, 300, 221 A.2d 342, 347 (1966) (concluding that the employer was liable for allowing his employee to drive the company gasoline tank truck and had either actual or constructive notice that the employee was unfit to drive); \textit{Houlihan} v. \textit{McCall}, 197 Md. 130, 140, 78 A.2d 661, 666 (1951) (concluding that the employer could not be held liable because he had no actual or constructive knowledge of his employee's driving record); \textit{Morris} v. \textit{Weddington}, 74 Md. App. 650, 658-59, 539 A.2d 1145, 1149 (1988) (holding that the owners of a van were liable because they failed to prohibit their adult son-in-law's use of their van when they knew or should have known the full extent of his driving habits), \textit{rev'd on other grounds}, 320 Md. 674, 579 A.2d 762 (1990).

\textsuperscript{59} The bailor's or lessor's direct control of the chattel in bailment cases is similar to the parent's indirect control over the chattel, through control of the user of the chattel, in the parent/minor-child context. Because the bailor, like the parent of a minor child, has a right to control the chattel or its use, both at the time of the initial entrustment and the time of the accident, the courts would not have had to determine the point in time that the negligent act by the entrustor occurred.
similar to the one in Rounds. In Kahlenberg v. Goldstein, Bernard Goldstein had purchased an automobile for his son, Lawrence, as a gift. Prior to the purchase of the car, Lawrence, a minor, had received a number of moving violations and his driver’s license had been revoked. Just days after receiving the car from his father, Lawrence was involved in a single-car accident that injured the plaintiff, Lynn Kahlenberg, a passenger in the car.

As a result of the accident, Kahlenberg brought suit “on the theory that [Bernard] was negligent in supplying the vehicle to his son,” and a jury ultimately found Bernard Goldstein liable for negligently entrusting the car to Lawrence. Bernard appealed, contending first, that he had not supplied the car to Lawrence, and second, that he had no power to permit or prohibit the vehicle’s use by Lawrence. The Court of Appeals accepted the plaintiff’s theory, holding that liability can be imposed “where a gift of an automobile is made to a member of the donor’s immediate family.” In so ruling the court reasoned that

the principal features of the tort lie in the knowledge of the supplier concerning the dangerous propensities of the entrustee and in the foreseeability of harm. If one who gives an automobile to a member of his immediate family has the requisite knowledge, and the other elements of the tort are satisfied, we can see no reason for denying liability exclusively on the basis that title is transferred in addition to possession.

61. Id. at 485, 431 A.2d at 81. At trial, there was conflicting testimony as to whether Lawrence had purchased the car with his own funds or whether Bernard had purchased the car for Lawrence as a gift. Id. at 484, 431 A.2d at 81. The Court of Appeals found that the evidence, when viewed in a light most favorable to the plaintiff, indicated that Bernard had purchased the car for Lawrence as a gift. Id. at 484-85, 431 A.2d at 81.
62. At the time of the accident, December 18, 1971, Lawrence was 20 years old. Id. at 479, 431 A.2d at 78. The age of majority was not lowered to 18 years until 1973. Id. at 479 n.1, 431 A.2d at 78 n.1.
63. Id. at 482, 431 A.2d at 80. In order for Lawrence to have his license reinstated, Bernard endorsed his applications, certifying that he was fully aware of why Lawrence’s driving privileges were revoked. Id. Lawrence’s license was reinstated in April 1970, and he received an additional four violations between 1970 and 1971. Id. at 482-83, 431 A.2d at 80.
64. Id. at 479, 484, 431 A.2d at 78, 80-81.
65. Id. at 480, 431 A.2d at 78.
66. Id. at 480-81, 431 A.2d at 78. The Court of Special Appeals reversed on the ground that the plaintiff had assumed the risk as a matter of law. Id.
67. Id. at 484-85, 431 A.2d at 81.
68. Id. at 489, 431 A.2d at 83.
69. Id. at 488, 431 A.2d at 83.
Thus, the court made no distinction between liability premised on the transfer of ownership of the car, as with a gift or a sale, and liability premised on the transfer of possession. The court was careful to qualify its holding, noting that "[t]he holding in this case goes no further than to recognize that the principle expressed in § 390 [of the Restatement (Second) of the Law of Torts] applies where a gift of an automobile is made to a member of the donor's immediate family." 70

Addressing whether Bernard had the right to permit or prohibit the use of the vehicle by Lawrence, the court found that

since a donor would ordinarily relinquish any right to permit and power to prohibit the use of the chattel upon its delivery to the donee . . . , the right to permit and the power to prohibit the use of the chattel, after the transfer and at the time of the injury, would not ordinarily be a sine qua non of liability. 71

The court further explained that "[t]he negligence of the supplier consists of furnishing the chattel with the requisite knowledge." 72 Thus, the court found that at the time Bernard supplied the vehicle to Lawrence, "he had the requisite knowledge of Lawrence's propensities . . . [and] the plaintiff was not required to go further and demonstrate that Bernard retained, and should have exercised, a power to prohibit any use by Lawrence of the completed gift." 73

Ten years later, in Neale v. Wright, 74 the court considered whether the joint ownership of an automobile, purchased together by a husband and wife, could form the basis for negligent entrustment by the wife when the husband negligently used the vehicle, colliding with and injuring the plaintiffs. 75 The wife had joined with her husband in purchasing and obtaining registration for the vehicle even though she was aware that he had been excluded from their insurance policy under the named driver exclusion provision because of his driving habits. 76

Looking to the precedent set forth in Rounds and Kahlenberg, the Court of Appeals determined that in order for the wife to have supplied the car to her husband, thereby subjecting herself to liability for negligent entrustment, she must have had the power to permit or pro-

70. Id. at 489, 431 A.2d at 83.
71. Id.
72. Id.
73. Id. at 491, 431 A.2d at 84.
75. Id. at 10, 585 A.2d at 197.
76. Id. at 13-15, 585 A.2d at 198-99.
hibit her husband from using the vehicle.\textsuperscript{77} Such power "could emanate from a superior right to control the operation of the car or from a special relationship between the 'entrustor' and the driver, such as a parent-child relationship."\textsuperscript{78} The court concluded that because the wife never had any superior rights to the car, she did not have the power to permit or prohibit her husband from using it.\textsuperscript{79} Consequently, the wife was not liable for negligent entrustment because she could not have supplied the car to her husband.\textsuperscript{80}

The doctrine of negligent entrustment, as developed by Maryland courts prior to \textit{Broadwater}, stood for the proposition that one who owned or had a superior right to control a vehicle and provided that vehicle to another person, whether by way of a loan or a gift, could be held liable for that person's negligent use of the vehicle if the owner or controller of the vehicle knew of the other person's incompetence or knew that the other person was likely to use the vehicle in such a way as to harm a third person.\textsuperscript{81}

\textbf{b. The Doctrine of Negligent Entrustment in Other Jurisdictions.}—Courts in other jurisdictions that recognize the doctrine of negligent entrustment have generally focused their analysis on whether an actual entrustment of the vehicle occurred and whether the entrustor had knowledge of the entrustee's dangerous propensities. In most cases where liability was not imposed, the court was unable to find that an entrustment had occurred—either the alleged entrustor did not actually purchase the vehicle or she never had a superior right to control the vehicle.\textsuperscript{82} Without such control or ownership, there can be no entrustment.

For example, in \textit{Lopez v. Langer},\textsuperscript{83} the Supreme Court of Idaho found that the father of a nineteen-year-old son had not entrusted the vehicle to his son.\textsuperscript{84} Despite the fact that the car was titled in the

\textsuperscript{77.} \textit{Id.} at 19, 585 A.2d at 201.
\textsuperscript{78.} \textit{Id.} (citation omitted).
\textsuperscript{79.} \textit{Id.}
\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{See supra} notes 39-80 and accompanying text.
\textsuperscript{82.} \textit{See infra} notes 138-187 and accompanying text. In some cases, courts have refused to impose liability because the plaintiff was unable to satisfy the knowledge requirement of the tort. \textit{See, e.g.}, Mullins \textit{v. Harrell}, 490 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1986) (holding that the defendant had no "basis or suspicion to foresee that [the entrustee] was unreliable, dishonest or incompetent in any way"); Mejia \textit{v. Erwin}, 726 P.2d 1032, 1035 (Wash. Ct. App. 1986) (holding that the passage of 11 years between the time the defendant parent first obtained knowledge of his son's recklessness and the time of the accident was sufficient to preclude liability for negligent entrustment).
\textsuperscript{83.} 761 P.2d 1225 (Idaho 1988).
\textsuperscript{84.} \textit{Id.} at 1228.
father's name at the time of the accident, the car had been purchased with the son's own money and the father had never had any control over the car.\textsuperscript{85} Because the father neither owned the car nor had control over it, there was no entrustment and, thus, the father could not be liable for the son's negligent driving.\textsuperscript{86} In \textit{Peterson v. Halsted},\textsuperscript{87} the Colorado Supreme Court refused to impose liability on the parents of a twenty-six-year-old daughter because the parents were not suppliers of the vehicle.\textsuperscript{88} The mere co-signing of a loan by the father, which facilitated the daughter's purchase of the vehicle, was not sufficient to constitute an entrustment.\textsuperscript{89}

Only a handful of cases have considered the narrow issue decided in \textit{Broadwater}: whether control over the vehicle must exist at the time of the entrustee's negligent act in order to impose liability on the entrustor. Of those that have specifically considered the issue, nearly all have found that control at the time of the accident is not required—it is the entrustment itself that constitutes the negligent act. For example, in \textit{Green v. Texas Electrical Wholesalers, Inc.},\textsuperscript{90} an employer permitted an employee to use a company vehicle to make a delivery, and the employee, while using the vehicle outside the scope of his employment, collided with another car, causing injury to its passenger.\textsuperscript{91} The Texas Court of Appeals found that it was error to have instructed the jury that the controlling event of the entrustment was the time of the accident.\textsuperscript{92} The court concluded that "[t]he controlling event of the case was the entrustment of the vehicle to [the employee] the day before the accident, when he was instructed to carry out an assignment for his employer."\textsuperscript{93}

Similarly, in \textit{Huggins v. Tri-County Bonding Co.},\textsuperscript{94} the West Virginia Supreme Court of Appeals considered whether exclusionary language in a homeowner's insurance policy foreclosed coverage for a negligent entrustment action brought against a father who loaned a car to his eighteen-year-old son. In answering this question, the court found that

\begin{flushright}
85. \textit{Id.} at 1226; \textit{see also infra note 175.}
86. \textit{Lopez}, 761 P.2d at 1229.
87. 829 P.2d 373 (Colo. 1992) (en banc).
88. \textit{Id.} at 377.
89. \textit{Id.} at 377-78; \textit{see also Zedella v. Gibson}, 650 N.E.2d 1000, 1003 (Ill. 1995) (holding that a father who co-signed a loan neither gave nor sold the car to his son and thus there was no entrustment).
90. 651 S.W.2d 4 (Tex. Ct. App. 1982, writ dism'd by agr.).
91. \textit{Id.} at 5-6.
92. \textit{Id.} at 7.
93. \textit{Id.}
\end{flushright}
the critical element . . . is the initial improper loaning of the vehicle—improper in the sense that it is given to a person who is known to be likely to cause an unreasonable risk of harm to others . . . Thus, the driver's negligent operation is not the critical factor in a negligent entrustment action, although it is necessary to complete the causal connection between the original negligent act (the entrustment) and the ultimate injury.95

In Vince v. Wilson,96 a passenger who was seriously injured in an automobile accident brought suit against the driver's relative and against the seller of the vehicle.97 The Vermont Supreme Court rejected the line of cases cited by the defendant that limited recovery to situations in which the defendant is the owner or has the right to control the car entrusted.98 The court noted that such decisions have been "severely criticized."99 The court further explained that "'[i]t is the negligent entrusting which creates the unreasonable risk; and this is none the less when the goods are conveyed.'"100 The court concluded that "'[t]he key factor is that '[t]he negligent entrustment theory requires a showing that the entrustor knew or should have known some reason why entrusting the item to another was foolish or negligent.'"101

In Pugmire Lincoln Mercury, Inc. v. Sorrells,102 children brought a wrongful death action for the death of their father against an automobile dealer whom they alleged sold a vehicle to a drunken driver who later collided with the car driven by the father.103 The Georgia Court of Appeals refused to impose liability on the auto dealer because the plaintiffs failed to present evidence sufficient to show that the dealer

95. Id. at 17 (citations omitted).
96. 561 A.2d 103 (Vt. 1989).
97. Id. at 103.
98. Id. at 104-05.
99. Id. at 105 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 104, at 718 (5th ed. 1984)); see, e.g., C. Gibson Downing, Note, 43 Ky. L.J. 178, 183 (1954) ("[M]ere passing of title does not change the character of the negligence of the defendant, and . . . the law should not operate to relieve him of his responsibility for the natural and probable consequences of his own negligent act."); J.P. Leonard, Recent Decision, 32 CHI.-KENT L. REV. 237, 239 (1954) ("[L]iability in these cases arises not from ownership or agency but from the combined negligence of the owner in entrusting the vehicle to the incompetent driver and of the driver in carelessly operating the same.").
100. Vince, 561 A.2d at 105 (quoting PROSSER AND KEETON ON THE LAW OF TORTS, supra note 99, § 104, at 718).
101. Id. (quoting Mullins v. Harrell, 490 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1986)).
103. Id. at 114.
know that the driver was drunk.\textsuperscript{104} In an addendum to the majority opinion, Judge Deen emphasized that negligent entrustment may be a viable theory of recovery against a seller with actual knowledge of the buyer's incompetence existing at the time of the sale.\textsuperscript{105} Moreover, Judge Deen stated "there is no requirement that the defendant \textit{have} ownership at the time of the driver's negligence so long as he \textit{had} ownership or control at the time he himself was negligent in turning the vehicle over to a driver actually known to be incompetent."\textsuperscript{106} Judge Deen therefore concluded that as long as the seller has actual knowledge of a buyer's incompetence at the time of the sale, the seller may be liable for the buyer's subsequent negligent act that causes harm.\textsuperscript{107} Thus, in other jurisdictions, donors and sellers alike are liable for negligent entrustment when the knowledge requirement is satisfied and a causal connection is established between the entrustor's negligent act of supplying a vehicle and the entrustee's negligent driving.

c. \textit{The Restatement (Second) of the Law of Torts.}—Courts in Maryland and other jurisdictions have consistently looked to the \textit{Restatement (Second) of the Law of Torts}, sections 390 and 308, for guidance on the principles that form the doctrine of negligent entrustment.\textsuperscript{108} Section 390 of the \textit{Restatement} provides that:

\begin{quote}
One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.\textsuperscript{109}
\end{quote}

Comment a to section 390 explains that the rule "determines the liability of one who supplies a chattel for another to use," regardless of whether it is used for the supplier's or user's interests.\textsuperscript{110} Comment a further provides that "[t]he rule stated applies to anyone who supplies

\begin{footnotes}
\item 104. \textit{Id.} at 114-15.
\item 105. \textit{Id.} at 116.
\item 106. \textit{Id.}
\item 108. \textit{See supra} notes 46-51 and accompanying text; \textit{infra} notes 139, 173, 192 and accompanying text.
\item 110. \textit{Id.} § 390 cmt. a.
\end{footnotes}
a chattel for the use of another. It applies to sellers, lessors, donors or lenders, and to all kinds of bailors.”

Comment b to section 390 explains that the rule deals with supplying a chattel to a person incompetent to use it safely, and notes that “the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so.” Four of the illustrations following Comment b provide examples of agency, bailment, and rental situations that constitute negligent entrustment, while the remaining two illustrations provide examples of negligent entrustment concerning donors and sellers. Illustration 6 provides the most pertinent example of the negligent entrustment at issue in Broadwater:

A sells or gives an automobile to B, his adult son, knowing that B is an epileptic, but that B nevertheless intends to drive the car. While B is driving he suffers an epileptic seizure, loses control of the car, and injures C. A is subject to liability to C.

Section 390 makes no explicit distinction between those who retain control and those who relinquish control of the chattel after entrustment to the user.

Section 308 of the Restatement is closely related to the principles of law expressed in section 390. Comment b to section 390, in fact, notes that the rule stated in section 390 is a “special application” of the rule stated in section 308. Section 308 of the Restatement (Second) of the Law of Torts provides that:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Comment a to section 308 explains that “[t]he words ‘under the control of the actor’ . . . indicate that the third person is entitled to possess or use the thing . . . only by the consent of the actor, and that the

111. Id.
112. Id. § 390 cmt. b.
113. Id.
114. Id. § 390 cmt. b, illus. 6.
115. Id. § 390.
116. Id. § 390 cmt. b.
117. Id. § 308.
actor has reason to believe that by withholding consent he can prevent the third person from using the thing.” The Restatement makes no explicit mention in section 308 of a requirement that the chattel be “under the control of the actor” at the time the chattel is misused by the entrustee.

3. The Court’s Reasoning.—The Court of Appeals granted certiorari in Broadwater to consider “whether the parents of an adult child who sell or who make a gift of an automobile to their adult child, with knowledge of the child’s reckless conduct, may be held answerable in damages to a third person subsequently injured by the son’s negligent operation of the automobile.” In order to answer this question, the court had to determine whether a parent must have control over either the vehicle or the child at the time of the accident. The court concluded that “parents who sell or give an automobile to an adult child are not responsible for damages when they lack the power to control the child or the automobile.”

In reaching its decision, the court examined the doctrine of negligent entrustment as stated in the Restatement (Second) of the Law of Torts section 390 and adopted in Maryland. The court first questioned whether the parents in this case should be considered “suppliers” for purposes of section 390 of the Restatement. The court noted that “a ‘supplier’ . . . must have the right to control the chattel.” Significantly, the court decided that as a prerequisite to imposing liability under the doctrine of negligent entrustment, the parents must have had control over the vehicle at the time of the negligent act, not merely at the time of the entrustment.

In discussing why control of the vehicle must be maintained at the time of the accident, the court looked to sections 390 and 308 of the Restatement (Second) of the Law of Torts, its own previous decisions in Rounds, Kahlenberg, and Neale, and decisions in other jurisdictions. The court acknowledged that it had adopted the doctrine of negligent entrustment in Rounds, as set forth in section 390 of the Restatement,

118. Id. § 308 cmt. a.
119. Id. § 308.
120. 344 Md. at 550, 688 A.2d at 437.
121. Id.
122. Id.
123. See id. at 554, 688 A.2d at 439.
124. See id. (citing RESTATEMENT (SECOND) OF THE LAW OF TORTS § 390).
125. Id. at 554-55, 688 A.2d at 439.
126. Id.
127. See id. at 557-62, 688 A.2d at 440-43.
and noted that section 390 is a "special application" of section 308.\[128\] As such, the court reasoned that the two sections are *in pari materia* and should be read together.\[129\] The court further deduced that when read together, "[section] 308's reference to a 'thing or . . . activity which is under the control of the actor' limits § 390's broad reference to 'one who supplies . . . a chattel for the use of another.'"\[130\] Based on this limitation, the court concluded that the doctrine is generally limited to situations in which the supplier has a right to control the chattel at the time of the accident.\[131\]

The court noted that in *Rounds* it established that "the basis for liability under the doctrine of negligent entrustment is the power to permit and prohibit the use of the entrusted chattel."\[132\] The court also cited *Neale*, in which it held that a co-owner of a vehicle "lacks the right to control the use of the co-owned property" and thus is not liable for damages caused by the other co-owner's negligent use of the vehicle.\[133\]

The respondents relied on *Kahlenberg* for the proposition that "control at the time of the accident is not a prerequisite for liability under the doctrine of negligent entrustment."\[134\] However, the *Broadwater* court distinguished *Kahlenberg* based on the fact that *Kahlenberg* involved a minor child.\[135\] The court emphasized that "[t]he father in *Kahlenberg*, like the father in *Rounds*, had the right to control his minor son's use of the car, even if he did not have the right to control the car directly."\[136\] Accordingly, the court decided that it had "intended to limit the application of *Kahlenberg* to those cases involving a parent/minor-child relationship."\[137\]

The court cited additional support for its position from its "sister states," which have "concluded that 'the paramount requirement for liability . . . is whether or not the defendant had a right to control the vehicle.'"\[138\] The court noted that "[a]mong the states that have de-

\[128\] Id. at 557, 688 A.2d at 440.
\[129\] Id. at 558, 688 A.2d at 441.
\[130\] Id. (quoting *RESTATEMENT (SECOND) OF THE LAW OF TORTS §§ 308, 390* (1964)).
\[131\] Id.
\[132\] Id. at 559, 688 A.2d at 441.
\[133\] Id.
\[134\] Id. at 560, 688 A.2d at 441.
\[135\] Id., 688 A.2d at 442.
\[136\] Id.
\[137\] Id.
\[138\] Id. (quoting Lopez v. Langer, 761 P.2d 1225, 1227 (Idaho 1988)); accord Alioto v. Marnell, 520 N.E.2d 1284, 1286 (Mass. 1988) (finding that the plaintiff must show that the defendant owned or controlled the vehicle and gave the driver permission to use it); Mills v. Continental Parking Corp., 475 P.2d 673, 674 (Nev. 1970) (finding that the doctrine of
vised cases involving a parent’s sale or gift of an automobile to an adult child, nearly all reach the same conclusion as we do today.”

The court found only one case that reached a contrary result. In **Golembe v. Blumberg**, the appellate division of the Supreme Court [of New York] held parents liable for having purchased a car for their adult, epileptic son who then had an epileptic seizure while driving the car, injuring the passengers.” The **Broadwater** court, however, found **Golembe** unpersuasive, citing three subsequent cases that had reached the opposite conclusion. Consequently, the Court of Appeals found that the authority of the **Golembe** holding had been completely undermined.

Finally, the court turned to the facts of the instant case and reasoned that because a parent’s legal responsibility ends when the child reaches the age of majority, the legal right to control the actions of

cf. **Casebolt v. Cowan**, 829 P.2d 352, 360 (Colo. 1992) (en banc) (concluding that control by the entrustor at the time the chattel is supplied is sufficient to impose liability).

139. **Broadwater**, 344 Md. at 561, 688 A.2d at 442; see **Shipp v. Davis**, 141 So. 366, 367 (Ala. Ct. App. 1932) (stating that one who is not the owner and is not in control of the chattel is not liable for negligence with respect to such property); **Peterson v. Halsted**, 829 P.2d 373, 379 (Colo. 1992) (en banc) (stating that “[c]ontinuing control, or its absence, is a factor in determining the existence of a duty when time has elapsed between supplying a vehicle to a user and the occurrence of an injury-causing accident”); **Zedella v. Gibson**, 650 N.E.2d 1000, 1004 (Ill. 1995) (finding that co-signing a loan to enable another to buy a car did not constitute an entrustment); **Tosh v. Scott**, 472 N.E.2d 591, 592 (Ill. App. Ct. 1984) (stating that “an essential element of a negligent entrustment cause of action is the defendant’s ownership or right to control the vehicle”); **Estes v. Gibson**, 257 S.W.2d 604, 607-08 (Ky. 1953) (stating that the doctrine of negligent entrustment should not extend to a defendant who is not the owner of the vehicle nor to a person who had no control over the vehicle); **Fischer v. Lunt**, 557 N.Y.S.2d 220, 221 (App. Div. 1990) (mem.) (finding that because an adult son’s use of a vehicle was not subject to his father’s control, the father could not be held liable for negligent entrustment); **Rosenfeld v. Tisi**, 542 N.Y.S.2d 762, 763 (App. Div. 1989) (mem.) (declining to find a negligent entrustment where the defendant mother neither owned the vehicle nor had any control over her daughter’s driving); **Brown v. Harkleroad**, 287 S.W.2d 92, 96 (Tenn. Ct. App. 1955) (refusing to extend liability for negligent entrustment in light of the “paucity” of authority).

142. 344 Md. at 562, 688 A.2d at 442-43 (citing **Fischer**, 557 N.Y.S.2d at 221; **Rosenfeld**, 542 N.Y.S.2d at 763 (holding that a mother who neither owned the vehicle nor had control over her daughter could not be liable for damages caused by the daughter’s negligent driving); **Harkleroad**, 287 S.W.2d at 96 (refusing to impose liability due to the scarcity of authority on the issue)); see infra notes 187-190 and accompanying text.

143. **Broadwater**, 344 Md. at 562, 688 A.2d at 443.

144. Id.
the child ends as well.\textsuperscript{145} Thus, the court ultimately found that because the Broadwaters had no legal right to control either their son or the car at the time of the accident, they could not be held liable for negligent entrustment.\textsuperscript{146}

4. Analysis.—In \textit{Broadwater v. Dorsey}, the Court of Appeals held that "the doctrine of negligent entrustment is generally limited to those situations in which the chattel is under the control of the supplier at the time of the accident," and that "[o]rdinarily, without the right to permit or prohibit use of the chattel at the time of the accident, an individual cannot be liable for negligent entrustment."\textsuperscript{147} Such a temporal restriction is not supported by the precedent cited by the Court of Appeals in \textit{Broadwater}, or by case law from other jurisdictions. In effect, the court has exempted all donors and sellers from liability for negligent entrustment in Maryland, a result that is contrary to the principles of law expressed in the \textit{Restatement (Second) of the Law of Torts}. Finally, the restriction is unwarranted because it further limits a legal doctrine that is sufficiently confined by a demanding "knowledge" requirement.

\textit{a. The Court's Reliance on Maryland Case Law.}—The court supported its holding in \textit{Broadwater} by citing to several of its earlier decisions, but failed to acknowledge their limited applicability in this case. None of the prior Maryland cases specifically addressed whether control by the entrustor at the time of entrustment would be sufficient to trigger potential liability, or whether control continuing until the moment of the accident would be required.\textsuperscript{148} The temporal requirement established by the court in \textit{Broadwater}, mandating that the parents have the right to control the chattel at the time of the accident, was not at issue in \textit{Rounds}, nor did the \textit{Rounds} court make any reference to when control must exist.\textsuperscript{149} Liability in \textit{Rounds} was predicated solely on the father's negligence in refusing to exercise parental authority over his minor child, and thus the child's use of the vehicle.\textsuperscript{150}

Similarly, the court claimed support from \textit{Neale v. Wright}.\textsuperscript{151} In \textit{Neale}, the court held that a co-owner of an automobile may not be

\textsuperscript{145} \textit{Id.} at 562-63, 688 A.2d at 443.  
\textsuperscript{146} \textit{Id.} at 563, 688 A.2d at 443.  
\textsuperscript{147} \textit{Id.} at 558, 688 A.2d at 441.  
\textsuperscript{148} See \textit{supra} notes 39-81 and accompanying text.  
\textsuperscript{149} See \textit{Broadwater}, 344 Md. at 558-59, 688 A.2d at 441.  
\textsuperscript{150} \textit{Rounds v. Phillips}, 166 Md. 151, 168, 170 A. 532, 538 (1934).  
\textsuperscript{151} \textit{Broadwater}, 344 Md. at 559, 688 A.2d at 441 (citing \textit{Neale v. Wright}, 322 Md. 8, 585 A.2d 196 (1991)).
found liable for the other co-owner’s negligent use of the automobile when one co-owner lacks the exclusive right to control either the other co-owner or the other co-owner’s use of the automobile. The wife, as a co-owner of the car with her husband, never had exclusive ownership of the car, nor did she ever have a superior right to control the car. Without the existence of a superior right to control the car, there can be no entrustment under any definition of the rule. Thus, the Neale court could never have reached the issue of when control must be exercised.

Likewise in Snowhite v. State ex rel. Tennant, there was no need to consider whether the negligence of the entrustor should be measured at the time of the entrustment or the time of the accident. Snowhite, a bailment case, is factually distinguishable from Broadwater, because in bailment cases, as with entrustments to minor children, the power to permit and prohibit the use of the chattel exists naturally both at the time of the entrustment and the time of the accident. The court’s reference to Snowhite thus provides no more support for the Broadwater decision than does Rounds or Neale.

In an apparent effort to show steadfast adherence to Maryland precedent, the court looked finally to Kahlenberg v. Goldstein, a case strikingly similar to Rounds in that both involved a father's gift of a car to his minor son. Yet, unlike its discussion of Rounds, the Broadwater court found Kahlenberg “distinguishable . . . because Kahlenberg involved a minor child.” The significance given to this distinguishing fact, though apparently of little significance when considering Rounds, permitted the court to ignore its more recent statement in Kahlenberg that

at the time [the father] supplied the chattel, he had the requisite knowledge of [his son’s] propensities . . . . Under the facts of this case the Plaintiff was not required to go further and demonstrate that [the father] retained, and should have

152. Neale, 322 Md. at 19, 585 A.2d at 201.
153. Id.
155. See id. at 295-300, 221 A.2d at 344-47. In Snowhite, the defendant employer was held liable for negligently entrusting a gasoline tank truck to his employee because the employer knew that the employee was a habitual drinker and frequently drank while driving on the job. Id.
157. See id. at 484, 431 A.2d at 81; Rounds v. Phillips, 166 Md. 151, 154-55, 170 A. 532, 533 (1934).
158. Broadwater, 344 Md. at 560, 688 A.2d at 442 (citing Kahlenberg, 290 Md. at 479 n.1, 431 A.2d at 78 n.1).
exercised, a power to prohibit any use by [his son] of the completed gift.\textsuperscript{159}

Though neither case clearly controls \textit{Broadwater} due to Ronald’s adult status, the Court of Appeals chose not to rely on \textit{Kahlenberg}, the most recent, and arguably the most pertinent, Maryland decision on negligent entrustment. Instead, the court found clearer support from its earlier, and equally distinguishable, decision in \textit{Rounds} than the text of that opinion justified.

Finally, unlike the \textit{Broadwater} court, the \textit{Kahlenberg} court recognized the importance of the demanding knowledge requirement as an existing limitation on the doctrine of negligent entrustment.\textsuperscript{160} The \textit{Kahlenberg} court stated that

the principal features of the tort lie in the knowledge of the supplier concerning the dangerous propensities of the entrustee and in the foreseeability of harm . . . . Liability is not based upon continued ownership, but upon the negligent entrustment when it operates as a concurrent cause with the negligence of the entrustee.\textsuperscript{161}

Under the \textit{Restatement} definition of negligent entrustment, a supplier must be one who “knows or has reason to know” that misuse of the chattel is “likely.”\textsuperscript{162} The term “likely” may be defined as “probable and having [a] better chance of existing or occurring than not.”\textsuperscript{163} Knowledge, under the \textit{Restatement} expression of negligent entrustment, therefore entails actual or constructive knowledge that an “unreasonable risk of physical harm” has a better chance of existing than not. The \textit{Kahlenberg} court found liability based upon this sort of initial entrustment sufficiently limiting.\textsuperscript{164} However, the \textit{Broadwater} court concluded that such a tort would “subject all vendors to liability long after the vendor had relinquished control over the chattel.”\textsuperscript{165} Yet, the court failed to acknowledge that only a very few vendors would have the requisite knowledge to incur liability under \textit{Kahlenberg} and the \textit{Restatement}.

Without controlling Maryland precedent, the \textit{Broadwater} court could have limited the doctrine of negligent entrustment by further emphasizing the demanding knowledge requirement. The court also

\begin{itemize}
  \item \textsuperscript{159} \textit{Kahlenberg}, 290 Md. at 491, 431 A.2d at 84.
  \item \textsuperscript{160} \textit{Id.} at 488, 431 A.2d at 83.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} \textit{Restatement} (Second) OF THE Law OF Torts § 390 (1964).
  \item \textsuperscript{163} \textit{Black’s Law Dictionary} 925 (6th ed. 1990).
  \item \textsuperscript{164} 290 Md. at 489, 431 A.2d at 83.
  \item \textsuperscript{165} 344 Md. at 556, 688 A.2d at 440.
\end{itemize}
could have simply considered *Kahlenberg*, noted that its pronouncements on the timing of a supplier's control were dicta, and explicitly overruled *Kahlenberg* where inconsistent with *Broadwater*. Instead, it distinguished the clearly unfavorable reasoning in *Kahlenberg*, and stated that it found support from nearly every remaining source.

b. The Court's Reliance on Decisions in Other Jurisdictions.—

(1) The Right to Control the Vehicle.—In an effort to bolster support for its decision, the court relied on decisions in other jurisdictions, claiming that it "agree[d] with our sister states that have concluded that 'the paramount requirement for liability under a theory of negligent entrustment is whether or not the defendant had a right to control the vehicle.'"\(^{166}\) While the cases it cited do, in fact, support this proposition, by finding that control must exist at some point in time before an entrustment can occur, they provide little support for the court's ultimate conclusion that control must exist at the time of the accident rather than merely at the time of the entrustment.\(^{167}\)

For instance, the Court of Appeals relied on the opinion of the Supreme Court of Colorado in *Casebolt v. Cowan*\(^{168}\) for support when, in fact, *Casebolt* directly contradicts the holding in *Broadwater*.\(^{169}\) In *Casebolt*, one of the issues specifically before the court was "whether the supplier must have the right and ability to exercise control at the time of the negligent act of the entrustee resulting in injury or whether control at the time the chattel is supplied is sufficient."\(^{170}\) Citing *Kahlenberg* and three other cases for support,\(^{171}\) the Supreme Court of Colorado stated that "[c]ases from other jurisdictions measure control at the time the chattel is supplied, the initial moment of entrustment."\(^{172}\) Relying on sections 308 and 390 of the *Restatement*, the *Casebolt* court overruled two earlier decisions by the intermediate appellate court, "[t]o the extent that [they] require subsequent con-

166. *Id.* at 560, 688 A.2d at 442 (quoting Lopez v. Langer, 761 P.2d 1225, 1227 (Idaho 1988)).
167. See infra notes 168-175 and accompanying text.
169. *Casebolt* specifically "reject[ed] subsequent control as an essential element of negligent entrustment." *Id.* at 360. In *Casebolt*, an employer was sued for negligent entrustment when an employee borrowed the employer's vehicle and was later killed in a collision after consuming alcoholic beverages. *Id.* at 353.
170. *Id.* at 359.
172. *Id.*
trol," and concluded that "[w]e are persuaded by the approach of other jurisdictions that we need look no further than the initial point of entrustment to determine whether a supplier acted negligently." Consequently, the Broadwater court’s inclusion and citation to Casebolt as support appears to be a mischaracterization of the case’s holding.

The court claimed similar support for the proposition that the defendant must have a right to control the vehicle when it quoted from section 4:10 of The American Law of Torts, which states that "'[t]he gist of the negligent entrustment is the right of control of the entrustor over the vehicle or instrumentality entrusted.'" The court misread the thrust of the text when it took this quote out of context. The text continues by stating that:

As to donors of cars, the authorities are split. Some cases, of dubious propriety at the very least, have denied liability of a donor—such as the instance of the doting mother who gave

173. Id. at 360.
174. Id.; see also Peterson v. Halsted, 829 P.2d 373, 378 n.5 (Colo. 1992) (en banc) (reiterating its holding in Casebolt that "the relevant time for assessing negligent entrustment is the time at which the chattel is supplied to the entrustee").
175. The court cited three other cases in support of the proposition that the paramount requirement for liability is a right to control the vehicle: Lopez v. Langer, 761 P.2d 1225, 1227 (Idaho 1988), Alioto v. Marnell, 520 N.E.2d 1284, 1286 (Mass. 1988), and Mills v. Continental Parking Corp., 475 P.2d 673, 674 (Nev. 1970). In Lopez, the issue was whether a father could grant his 19-year-old adult son permission to use a car when the car was purchased with the son’s money. 761 P.2d at 1226-27. Although the title was registered in the father’s name at the time of the accident, the court held that "[n]o meaningful permission can be given by one without the right to control, or in possession of, the vehicle." Id. at 1228-29. Because the car had been purchased with the son’s money, the father, who was not the owner or the possessor of the car, could not have entrusted the vehicle to his son. Id. at 1229.

In Alioto, the issue was whether the father had granted permission to his 19-year-old adult son to use the car after the son had been drinking alcohol, and whether the father was, in fact, the true owner of the car. 520 N.E.2d at 1285-86. Because the plaintiff was unable to provide sufficient evidence to show that the father had indeed given permission to his son to drive the car, the court found that control, at any time, was lacking as a matter of law. Id. at 1286.

In Mills, a bailment case, a parking lot attendant was sued for relinquishing control over a car parked in its lot when the owner returned, clearly inebriated, and demanded the keys. Mills, 475 P.2d at 674. The parking attendant returned the keys to the drunken owner, who thereafter hit and killed a pedestrian. The defendant had no legal right to refuse to return the car without risking a penalty for conversion. Id.

In none of these cases was an entrustment found to have occurred because none of the defendants could claim control or ownership of the car sufficient to permit or prohibit its use. Without an entrustment, these courts had no need to reach the temporal issue.
176. Broadwater, 344 Md. at 561, 688 A.2d at 442 (quoting 1 Stuart M. Speiser et al., The American Law of Torts § 4:10, at 594 (1983)).
an automobile to her adult son knowing that he was both an alcoholic—an inebriate—and a drug addict.\(^ {177} \)

Rather than discussing any split of authority that may exist, or the uncertain status of donor liability for negligent entrustment in other jurisdictions, the court focused almost exclusively on those authorities from which it could muster support for its decision, even when that support was tenuous.

(2) Cases Refusing to Impose Liability.—In addition to cases requiring that an entrustment be predicated on the defendant's right to control the chattel, the court proffered another line of cases that purportedly support its ultimate decision to limit liability. The court claimed that "[a]mong the states that have decided cases involving a parent's sale or gift of an automobile to an adult child, nearly all reach the same conclusion as we do today."\(^ {178} \) However, rather than focusing on the judgment and analysis that underlie these decisions, the court focused solely on the outcome—the decision not to impose liability.

For example, the court briefly discussed *Peterson v. Halsted*,\(^ {179} \) in which the Colorado Supreme Court refused to impose liability on a defendant for negligent entrustment.\(^ {180} \) The *Broadwater* court held *Peterson* out as refusing to find liability because the parents had "no con-
trol over the driving activities of their adult daughter."\textsuperscript{181} However, liability did not lie in Peterson because "[t]he Petersons did not give their daughter the Bronco or provide her with funds to purchase it."\textsuperscript{182} The Colorado Supreme Court found that the mere co-signing of a loan did not render the father a "supplier" of the vehicle because he never had control or possession of the car, and therefore, could never have entrusted the vehicle to his daughter.\textsuperscript{183} Moreover, in Peterson, the Colorado Supreme Court reiterated its holding in Casebolt that "the relevant time for assessing negligent entrustment is the time at which the chattel is supplied to the entrustee."\textsuperscript{184} Despite the ultimate refusal to impose liability, the Colorado Supreme Court’s conclusion with respect to when control over a vehicle is measured directly contradicts the conclusion espoused in Broadwater.

The Broadwater court maintained that it found only one case, Golembe v. Blumberg, in which parents were held liable\textsuperscript{185} for damages resulting from their adult child’s negligent use of an automobile that the parents had supplied.\textsuperscript{186} The court found Golembe "unpersuasive," stating merely that "[t]wo subsequent New York cases reach an opposite conclusion and undermine the authority of this holding."\textsuperscript{187} The court focused solely on the outcome of the cases, the refusal to im-

\begin{footnotesize}
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\item \textsuperscript{181} Broadwater, 344 Md. at 561, 688 A.2d at 442.
\item \textsuperscript{182} Peterson, 829 P.2d at 377.
\item \textsuperscript{183} Id. at 377-78; see also Zedella v. Gibson, 650 N.E.2d 1000 (Ill. 1995). In Zedella, another case cited by Broadwater that is factually similar to Peterson, no liability was imposed on the father of a 23-year-old son when the father merely "facilitated the purchase of a vehicle by cosigning a purchase money loan." Id. at 1003-04. The court concluded that the defendant father neither gave nor sold the car to his son and that the father’s action “was merely a link in the chain that facilitated [the son’s] acquisition . . . and use, of the vehicle, but did not itself constitute an entrustment.” Id. at 1004. Despite the Illinois court’s refusal to find the father liable, the case is significantly distinct from Broadwater and provides little, if any, support for the Broadwater holding that control of the vehicle or its use must exist at the time of the accident.
\item \textsuperscript{184} Peterson, 829 P.2d at 378 n.5.
\item \textsuperscript{185} The court in Broadwater erroneously concluded that the parents in Golembe were held liable, when in fact, based on the reported opinion, the court held that the complaint stated a cause of action and it was error to have been dismissed. Broadwater, 344 Md. at 562, 688 A.2d at 442; Golembe v. Blumberg, 27 N.Y.S.2d 692, 692 (App. Div. 1941) (mem.).
\item \textsuperscript{186} Broadwater, 344 Md. at 562, 688 A.2d at 442.
\item \textsuperscript{187} Id., 688 A.2d at 443. Neither Fischer v. Lunt, 557 N.Y.S.2d 220 (App. Div. 1990) (mem.), nor Rosenfeld v. Tisi, 542 N.Y.S.2d 762 (App. Div. 1989) (mem.), the two New York cases cited by Broadwater, specifically overruled or rejected the Golembe decision, nor did either case make reference to Golembe. It is likely that neither court considered the cases factually similar to Golembe or the rule of law applicable. Moreover, in neither case did the parents at any time ever own or have control over the vehicle in question—in both cases, the child had attained the age of majority and was the registered owner of the vehicle. Fischer, 557 N.Y.S.2d at 220; Rosenfeld, 542 N.Y.S.2d at 763. As such, the parents never had the power to permit or prohibit their children’s use of the cars.
\end{itemize}
\end{footnotesize}
pose liability, rather than on the rationale used to support them. The court in Broadwater erroneously assumed that because of the New York courts' refusal to impose liability in these two cases, these decisions undermine the authority of Golembe. These decisions, however, were premised on grounds wholly unrelated to the temporal issue in question here.

As further support of its position that the Golembe decision is "unpersuasive," the Broadwater court cited Brown v. Harkleroad, which it claims "reject[ed] Golembe." After reviewing the handful of cases that had addressed similar issues, including Golembe, the Tennessee Court of Appeals concluded that in light of the "paucity of authorities on this interesting question" and because "[t]he legislature has not seen fit to impose any such liability[,] [w]e think it would be judicial legislation if we undertook to go past that now recognized by existing holdings." The Harkleroad court thus refused to impose liability in light of the few cases that had considered the issue at that time. Significantly, the authority of the Harkleroad decision has been severely undermined by the most recent decision from that jurisdiction, Nichols v. Atnip. In Nichols, the Tennessee Court of Appeals pointed

188. Broadwater, 344 Md. at 562, 688 A.2d at 443. In Harkleroad, J.E. Brown, father of 26-year-old James Brown, accompanied his son to buy a car. The son, less than four months later, collided with the Harkleroad car while driving drunk. 287 S.W.2d 92, 93-94 (Tenn. Ct. App. 1955). The Harkleroads brought suit alleging that the father was negligent in purchasing the car for use by a known habitually reckless and drunken driver. Id. at 93.

Contrary to the Broadwater court's claim, however, Harkleroad did not "reject" Golembe. The Harkleroad court merely noted that it was difficult to reconcile the Golembe decision with the later decision in Bugle v. McMahon, 37 N.Y.S.2d 540 (App. Div. 1942). See Harkleroad, 287 S.W.2d at 96. In Bugle, the Supreme Court of New York, Appellate Division granted the defendant's motion to dismiss on the grounds that the complaint "fail[ed] to allege any causal connection between the accident and any act or conduct of the appellant." 37 N.Y.S.2d at 541. The plaintiff was thereafter granted leave to serve a new complaint. Id. Because the dismissal in Bugle was due to deficient pleadings, the court never reached the substantive issue regarding negligent entrustment. The Harkleroad court apparently misread the Bugle decision as a refusal to impose liability based on negligent entrustment rather than a mere dismissal for failure to properly plead causation. Harkleroad, 287 S.W.2d at 96. As a result, the Harkleroad court apparently considered the rule of law applied in Bugle and in Golembe subject to some uncertainty. Id.

189. Harkleroad, 287 S.W.2d at 96.

190. Prior to the Harkleroad decision in 1955, only a few cases had addressed the issue of whether parents of an adult child could be liable for negligent entrustment. See Shipp v. Davis, 141 So. 366, 367 (Ala. Ct. App. 1932) (holding that a father who purchased a car for his adult son, but never had possession or ownership of the car or exercised any control over the car, could not be liable); Estes v. Gibson, 257 S.W.2d 604, 607-08 (Ky. 1953) (holding that the mother of a drug addict and inebriate was not liable for giving her son a car); Bugle, 37 N.Y.S.2d at 541 (dismissing a negligent entrustment claim for failure to plead causation); Golembe, 27 N.Y.S.2d at 692 (holding that the parents of an adult, epileptic child who purchased a car for him could be liable for negligent entrustment).

out that "the Harkleroad decision is contrary to [the] Restatement (Second) of [the Law of] Torts § 390 (1964) and has been criticized by many courts and legal scholars." Thus, while Harkleroad may have "rejected Golembe," it appears that Nichols has rejected Harkleroad.

Along with Harkleroad, legal scholars have extensively criticized both Shipp v. Davis\textsuperscript{193} and Estes v. Gibson,\textsuperscript{194} the two earliest cases that refused to impose liability on defendant parents.\textsuperscript{195} In Estes, a four-to-three majority of judges relied on Shipp v. Davis in refusing to impose liability and held that the doctrine ought not to extend to those who had no control over the vehicle when "the other party actually committing the injurious wrong was the owner."\textsuperscript{196} In Estes, the mother of an adult son, whom she knew to be an inebriate and drug addict, nevertheless bought her son a car and titled it in his name.\textsuperscript{197} Because the record did not show what time period had intervened between the son's receipt of the car and his negligent use of it, the court found that the son could have been driving for a year or more without having an accident.\textsuperscript{198} The court stated that "[t]o impose legal liability there must always be a reasonably close causal connection between an act and the resulting injury."\textsuperscript{199} Here, however, the court found that the causation was too tenuous and too remote, that there were "too many probable and imponderable intervening events and conditions between the gift of the car and its negligent operation by the owner-driver" to impose liability.\textsuperscript{200}

Justice Duncan, joined by Justices Stewart and Milliken, wrote a strong dissent asserting that one who transfers ownership and control of a car is more negligent than one who merely lends his car to another on one specific occasion, because in the former instance the entrustor knowingly has given an incompetent driver the power to use the car at

\textsuperscript{192} Id. at 660 (citing Prosser & Keeton on the Law of Torts, supra note 99, § 104, at 718; Talbott v. Csakany, 245 Cal. Rptr. 136, 139 (Ct. App. 1988); Kahlenberg v. Goldstein, 290 Md. 477, 431 A.2d 76, 83 (1981); Vince v. Wilson, 561 A.2d 103, 105 (Vt. 1989)).
\textsuperscript{193} 141 So. 366 (Ala. Ct. App. 1932).
\textsuperscript{194} 257 S.W.2d 604 (Ky. 1955).
\textsuperscript{195} "[A]ccording to Professor Prosser, [these cases] 'look definitely wrong.'" Talbott, 245 Cal. Rptr. at 139 (quoting Prosser & Keeton on the Law of Torts, supra note 99, § 104, at 718). Other cases that have noted such criticism include Nichols, 844 S.W.2d at 660, which stated that "the Harkleroad decision is contrary to [the] Restatement... and has been criticized by many courts and legal scholars," and Vince, 561 A.2d at 105, which stated that cases that "restrict the rule to situations where the defendant is the owner or has the right to control the instrumentality have been severely criticized."
\textsuperscript{196} Estes, 257 S.W.2d at 607-08.
\textsuperscript{197} Id. at 604-05.
\textsuperscript{198} Id. at 607.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 608.
all times, thus creating a long-term risk to third parties.\textsuperscript{201} The dissent further asserted that the majority had erroneously assumed that liability is dependent on some legal relationship such as agency or bailment.\textsuperscript{202} According to the dissent, "[t]he authorities make it clear that liability in such instances does not rest upon the fact of ownership but upon the combined negligence of the owner in entrusting the machine to an incompetent and reckless driver and of the driver in its operation."\textsuperscript{203} Given the closeness of the vote in the opinions and the nearly five decades of subsequent, contrary jurisprudence, the strength of \textit{Estes} as support for the \textit{Broadwater} decision is questionable.

The \textit{Estes} decision has also provoked considerable criticism from the academic community.\textsuperscript{204} J.P. Leonard criticized the \textit{Estes} decision as not "sustained in principle for the authorities generally are in accord with the proposition that the owner's liability is not based upon the fact of his ownership but upon his concurrent negligence in entrusting his car to an incompetent driver."\textsuperscript{205} Leonard added that the decision in \textit{Estes} to absolve the donor parent of liability was "unsupported by logic or reason."\textsuperscript{206} Leonard asserted that it was "unreasonable to conclude that a mere transfer of title to a child, of whatever age, should excuse a parent's negligence in placing an automobile in the hands of one who is not only a user of intoxicating liquor to excess but who is, in addition, a narcotic addict."\textsuperscript{207}

George Belsky has argued that the distinction made by the \textit{Estes} court between agency and bailment is "illogical, \textit{i.e.} it is considered negligent to give a limited chance to cause harm, as in bailment, but it is not negligent to present an unlimited opportunity to cause harm, as in the principal case."\textsuperscript{208} He concluded that "the result achieved seems to be: the greater wrong will incur the lesser liability."\textsuperscript{209}

\textbf{(3) Cases Specifically Considering the Temporal Issue.}—Like the Colorado Supreme Court in \textit{Casebolt} and \textit{Peterson}, other jurisdictions have expressly addressed the temporal aspect of an entrustor's negligence. Of the few that have specifically considered the issue, nearly

\begin{itemize}
\item \textsuperscript{201} \textit{Id.} (Duncan, J., dissenting).
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{See} George M. Belsky, Comment, 33 B.U. L. Rev. 538 (1953); Downing, \textit{supra} note 99; Leonard, \textit{supra} note 99.
\item \textsuperscript{205} Leonard, \textit{supra} note 99, at 242.
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} Belsky, \textit{supra} note 204, at 539.
\item \textsuperscript{209} \textit{Id.}
\end{itemize}
all have concluded that the negligent act is the entrustment itself; control at the time of the accident is not required. The Broadwater court overlooked at least five jurisdictions in which courts have asserted that the initial entrusting of the vehicle is the point in time when the negligent act occurs.

In Huggins v. Tri-County Bonding Co., the West Virginia Supreme Court found improper the initial lending of the vehicle to one who is known to be likely to cause an unreasonable risk of harm to another.\(^{210}\) In Green v. Texas Electrical Wholesalers, Inc., the Texas Court of Appeals found that the lower court had erred in instructing the jury that the controlling event of the entrustment was the time of the accident.\(^{211}\) A Florida court in Mullins v. Harrell asserted that "[s]ome negligence in the initial entrusting process is necessary to make the subsequent damage foreseeable."\(^{212}\)

At least two jurisdictions have stated that even a seller can be liable for negligent entrustment based on the initial sale of the vehicle to an incompetent driver.\(^{213}\) In Vince v. Wilson, the Vermont Supreme Court found that a seller could be liable for negligent entrustment if it could be shown that he knew or should have known at the time of the sale some reason why entrusting the vehicle to the buyer was negligent.\(^{214}\) In Pug'mire Lincoln Mercury, Inc. v. Sorrells, the Georgia Court of Appeals asserted that an auto dealer could be held liable if the seller had actual knowledge of the buyer's incompetence at the time of the sale.\(^{215}\) Thus, in these jurisdictions, courts have found that it is negligent to entrust a vehicle to another when the entrustor knows, at the time of the entrustment, that the entrustee is incompetent to drive or likely to use the vehicle to create an unreasonable risk of danger to others.

The Broadwater opinion falls short in providing independent reasoned analysis, and relies instead on cursory readings of cases from other jurisdictions. The court made little effort to address the relevance of these decisions or their applicability to the instant case.

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\(^{210}\) 337 S.E.2d 12, 17 (W. Va. 1985); see also supra notes 94-95 and accompanying text.
\(^{211}\) 651 S.W.2d 4, 7 (Tex. Ct. App. 1982, writ dism'd by agr.); see also supra notes 90-93 and accompanying text.
\(^{212}\) 490 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1986).
\(^{213}\) In addition to Vermont and Georgia, California courts have also held that a seller who meets all the elements of the tort may be liable for negligent entrustment. See, e.g., Johnson v. Casetta, 17 Cal. Rptr. 81 (Dist. Ct. App. 1961).
\(^{214}\) 561 A.2d 103, 105 (Vt. 1989); see also supra notes 96-101 and accompanying text.
\(^{215}\) 236 S.E.2d 113, 116 (Ga. Ct. App. 1977); see also supra notes 102-107 and accompanying text. In this case, the court refused to impose liability because the plaintiffs were unable to prove that the seller had actual knowledge that the buyer was drunk at the time of the sale. Sorrells, 236 S.E.2d at 115.
Though the cases cited may have refused to impose liability on parents of adult children or other donors of chattel, in many instances, the rationale expressed for refusing to impose liability contradicts the reasoning of *Broadwater*. None of the cases cited in *Broadwater* mandate control by the entrustor at the time of the accident, and of the few cases that specifically address the temporal aspect of control, nearly all support a contrary approach.

### c. A Restatement of the Restatement (Second) of the Law of Torts.

The principles of law expressed in the *Restatement (Second) of the Law of Torts* also conflict with the notion that control must exist at the time of the accident. The *Broadwater* court first looked to the *Restatement* for a definition of the term "supplier," explicitly seeking to determine "whether the parents of an adult child, who . . . give or sell that child an automobile are to be considered 'suppliers' for purposes of § 390 of the *Restatement*."217

The *Restatement* does not specifically define the requirements for one who "supplies." Under the plain meaning of the *Restatement*, the Broadwaters could be considered to have supplied the car to their son because they purchased the car and transferred title to him shortly thereafter. According to comment a to section 390, "[t]he rule stated applies to anyone who supplies a chattel for the use of another. It applies to sellers, lessors, donors or lenders, and to all kinds of bailors . . . ."218 Moreover, illustration 6 provides an example of the doctrine's specific applicability to donors wherein a parent sells or gives his adult son a car knowing the son is epileptic: the parent is subject to liability when the son loses control of the car during a seizure and injures a third party.219

Yet, the court failed to apply either the language in comment a or the illustration, focusing instead on comment b,220 specifically, that section 390 "is a 'special application' of § 308."221 As such, the court concluded, the two sections must be read together such that "§ 308's
reference to a 'thing or ... activity which is under the control of the actor' limits § 390's broad reference to 'one who supplies ... a chattel for the use of another.'

Although one who supplies a chattel to another must at some point exercise control over the chattel, neither section 308 nor section 390 of the Restatement provides an explicit requirement for when that control must be exercised. The court took a giant leap when it reasoned that the limiting phrase from section 308, "under the control of the actor," means, in effect, continuing control. Thus, using the court's reasoning, in order to be a supplier one must have a continuing right to control the chattel.

As such, the court has read into the Restatement a definition of supplier that excludes donors and sellers from liability, regardless of whether they had knowledge of the donees' or buyers' dangerous propensities at the time of the transfer. In so doing, the court has contradicted the intent of the Restatement, which explicitly extends liability to both sellers and donors. Once the applicability of the doctrine is restricted to only those with control over the chattel at the time of the accident, donors and sellers simply drop out of the set of potential defendants, because these groups generally relinquish all control over the vehicle after the transfer. By refusing to find these two classes of defendants potentially liable under the doctrine of negligent entrustment, the court effectively extinguished a plaintiff's chances of recovery.

The court confined its discussion of the Restatement to the definition of supplier, electing to ignore altogether the doctrine's demanding knowledge requirement. This requirement, which imposes liability only on those with either actual knowledge or a reason to know that the entrustee is incompetent to use the chattel and is likely to cause harm to others, already sufficiently restricts the doctrine's application. The rule imposes a foreseeability element under which the entrustor of the chattel must not only know of the entrustee's dangerous propensities or reckless habits, a difficult hurdle in itself, but the entrustor must also know that it is likely that the entrustee will use the chattel in such a way as to harm others. The court refused to

222. Id. at 558, 688 A.2d at 441.
223. See Restatement (Second) of the Law of Torts §§ 308, 390.
224. Id. § 390 cmt. a.
225. Id. § 390; see supra notes 162-163 and accompanying text.
226. See Restatement (Second) of the Law of Torts § 390. In a commercial sales context, satisfying this demanding knowledge requirement would be quite difficult—the plaintiff would be required to prove that the seller had actual or constructive knowledge that the buyer was incompetent or had a poor driving record at the time of the sale and
acknowledge this demanding requirement, and the restrictions thereby imposed, in favor of a more rigid, almost categorical exclusion of donors and sellers.

5. Conclusion.—In Broadwater, the Court of Appeals required that entrustors of property retain the power to permit or prohibit the use of the chattel before liability under the doctrine of negligent entrustment can be found.\textsuperscript{227} Despite the Restatement's clear intention to impose liability on all suppliers of chattel, including donors and sellers,\textsuperscript{228} despite the already demanding knowledge requirement of section 390 of the Restatement,\textsuperscript{229} despite severe criticism of similar decisions by legal scholars,\textsuperscript{230} and despite contrary authority from other jurisdictions,\textsuperscript{231} the Court of Appeals has restricted the doctrine of negligent entrustment by requiring continuing control over the chattel, thereby excluding virtually all donors and sellers from the scope of the doctrine in Maryland. In so doing, the court provided only blemished support for its conclusion and failed to acknowledge that, of the jurisdictions that have considered whether an entrustor's negligence should be measured at the time of the entrustment or at the time of the accident, nearly all have reached a contrary result. As a result, the court has made it difficult, if not impossible, for plaintiffs to recover when they have been injured by the negligent giving or selling of cars to incompetent drivers.

Beth N. Beam

B. Parent-Child Immunity and Motor Vehicle Torts: Defending the Minority View

In Renko v. McLean\textsuperscript{1} the Court of Appeals held: (1) the parent-child immunity doctrine prevents an adult child from suing a parent for injuries that occurred during the child's minority; (2) there is no exception to the parent-child immunity doctrine for motor vehicle torts; and (3) the parent-child immunity doctrine, as applied, does not violate the Due Process or Equal Protection Clauses of the Maryland

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\textsuperscript{227} 344 Md. at 558, 688 A.2d at 441.
\textsuperscript{228} Restatement (Second) of the Law of Torts § 390 & cmt. a.
\textsuperscript{229} Id. § 390.
\textsuperscript{230} See supra notes 99, 193-209 and accompanying text.
\textsuperscript{231} See supra notes 90-107, 210-215 and accompanying text.
\textsuperscript{1} 346 Md. 464, 697 A.2d 468 (1997).
or United States Constitutions. For almost seventy years, Maryland, with few exceptions, has adhered to the parent-child immunity doctrine. The doctrine bars tort suits between parents and their minor children. Although a majority of jurisdictions have either partially or totally abrogated the doctrine, the Renko decision is yet another reflection of Maryland's steadfast commitment to parent-child immunity. While other jurisdictions have created new exceptions to the doctrine, particularly in the area of motor vehicle torts, Renko foreshadows the dim prospects in Maryland of future exceptions to parent-child immunity.

1. The Case.—On December 8, 1992, Natasha Renko was seriously injured when her biological mother, Theresa Kaylor McLean, negligently drove the vehicle they were both occupying into the rear of another car. At the time of the accident, Renko was seventeen years old. Following her eighteenth birthday, Renko filed a complaint in the Circuit Court for Anne Arundel County seeking $100,000 in damages for the injuries she sustained in the accident. The complaint named Theresa McLean and her husband Robert McLean, Natasha's stepfather, as defendants. Both parents filed motions to dismiss the action based on parent-child immunity.

2. Id. at 471, 697 A.2d at 471.
3. Id. at 468, 697 A.2d at 470.
4. Id. at 468-69, 697 A.2d at 470.
5. Id. at 474, 697 A.2d at 473.
6. Id. at 483, 697 A.2d at 478 (noting that "the doctrine well serves the citizens of this State").
7. See infra notes 112-114 and accompanying text.
8. Renko, 346 Md. at 467, 697 A.2d at 469.
9. Id.
10. Id.
11. Id., 697 A.2d at 469-70.
12. Id. at 468, 697 A.2d at 470. Robert McLean would not have been entitled to parental immunity because while this action was pending, the Court of Appeals held that parent-child immunity does not bar suits between children and stepparents. Warren v. Warren, 336 Md. 618, 628, 650 A.2d 252, 257 (1994). However, Robert McLean subsequently filed an independent motion for summary judgment based on a lack of agency between himself and the driver, Theresa McLean. Renko, 346 Md. at 468, 697 A.2d at 470; see also Record Extract at E.24-25, Renko v. McLean, 346 Md. 452, 697 A.2d 468 (1997) (No. 77) (stating that the basis of Mr. McLean's motion for summary judgment was a lack of agency).
13. Record Extract at E.27, Renko (No. 77). Renko set forth two hypotheticals to demonstrate the inherent unfairness of the doctrine: (1) a situation in which the state
court, by granting the defendants' motions to dismiss, refused to create a new exception to the doctrine. Renko appealed the judgment entered in favor of her mother, and the Court of Appeals granted certiorari before consideration by the Court of Special Appeals.

2. Legal Background.—

a. Maryland's Adoption of Parent-Child Immunity.—The parent-child tort immunity doctrine is a judicially created defense. The doctrine originated in the Mississippi case of *Hewellette v. George*. *Hewellette* held that a minor could not sustain a civil action against a parent for personal injuries resulting from the parent's actions. In reaching this decision, the court relied heavily on a societal policy interest in promoting peace and harmony within families. The court reasoned that the state, through its criminal laws, would protect children from abuses and parental wrongdoing.

In 1930, the Maryland Court of Appeals adopted the parent-child immunity doctrine in *Schneider v. Schneider*. The *Schneider* opinion established a broad reciprocal immunity, which bars parents and chil-

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15. Id. *Renko* did not appeal the judgment entered in favor of Robert McLean. Id. at 468 n.3, 697 A.2d at 470 n.3.
17. 9 So. 885 (Miss. 1891). In *Hewellette*, a minor daughter alleged that her mother wrongfully committed her to an insane asylum, causing her to suffer personal and emotional injuries. Id. at 887.
18. Id. at 887. This opinion did not distinguish negligent acts from intentional torts, nor did it cite any judicial precedent or authority for its holding. See *Frye*, 305 Md. at 545, 505 A.2d at 828 (commenting on the *Hewellette* court's creation of parent-child immunity).
19. *Hewellette*, 9 So. at 887. The *Hewellette* court stated:  
The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.
20. *Id.*
21. 160 Md. 18, 23, 152 A. 498, 500 (1930) (holding that a mother could not maintain a tort action against her minor son). In *Schneider*, a mother sued her minor son for injuries she sustained as a passenger in an automobile accident that occurred while her son was driving. *Id.* at 19-20, 152 A. at 498. By the time Maryland adopted parent-child immunity, a majority of states had held that minors could not maintain tort actions against their parents. *Id.* at 22, 152 A. at 499; see also *Frye*, 305 Md. at 545, 505 A.2d at 828 (stating that for 40 years, the *Hewellette* decision was followed blindly by many courts throughout the country).
dren from asserting claims for civil redress against one another. The court explained that an apparent conflict arises when a parent occupies the roles of both a minor's guardian and a plaintiff seeking recovery from that same minor. The court reasoned that such adversarial roles jeopardize the family relationship and that "[b]oth natural and politic law, morality, and the precepts of revealed religion alike demand the preservation of this relation in its full strength and purity." Preservation of the family relationship became the justification for the doctrine that would resound through the history of Maryland law.

b. Maryland's Limited Exceptions to Parent-Child Immunity.—Since its holding in Schneider, the Court of Appeals has created three exceptions to the parent-child immunity doctrine. The court established the first exception in Mahnke v. Moore. In Mahnke, a child brought suit against her father's estate to recover for personal injuries caused by her father's atrocious acts. The Court of Appeals held that, while parents are ordinarily immune from tort liability to their minor children, "child[ren] shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs." The court explained that parent-child immunity is intended to protect the parent-child relationship by


23. Schneider, 160 Md. at 22-23, 152 A. at 499-500. The court also compared an action between a parent and child with the bar on suits between guardians and wards. Id., 152 A. at 499. Because guardians are committed to the care and protection of the wards' interests, it is inconsistent to permit guardians to seek judgments against wards and their property. Id.

24. Id. at 23-24, 152 A. at 500 (internal quotation marks omitted).

25. See, e.g., Smith v. Gross, 319 Md. 138, 145-46, 571 A.2d 1219, 1222 (1990) ("The rationale of the rule is that it is founded upon the relation in which the parent and the unemancipated minor child stand to each other. The reciprocal dependence and entitlement of that relationship promotes a public policy which the rule reflects." (quoting Frye, 305 Md. at 548, 505 A.2d at 829)). The Frye court provided additional justification for the doctrine: It is clear that for over half a century this Court has recorded its belief in the importance of keeping the family relationship free and unfettered. Our primary concern with regard to matters involving the parent-child relationship was the protection of family integrity and harmony and the protection of parental discretion in the discipline and care of the child.

Frye, 305 Md. at 551, 505 A.2d at 831.

26. See Warren, 336 Md. at 625, 650 A.2d at 255.

27. 197 Md. 61, 77 A.2d 923 (1951).

28. Id. at 63, 77 A.2d at 923. In Mahnke, a father shot the child's mother in the child's presence, kept the mother's body with them for a week, and then committed suicide in the child's presence. Id., 77 A.2d at 924.

29. Id. at 68, 77 A.2d at 926.
barring suits arising out of traditional parental duties. The court reasoned that because the parent's actions in Mahnke exhibited a complete abandonment of the parental relationship, the application of parent-child immunity could not logically achieve its intended goals.

The court recognized the second exception in 1956 in Waltlinger v. Birsner. In Waltlinger, an elderly woman sued her adult son to recover for injuries she sustained in her son's car when it unexpectedly rolled down an incline. The Court of Appeals held that parent-child immunity did not bar an action between a parent and an adult child. The court created this exception because a bar on suits between parents and adult children does not serve the doctrine's goals of promoting peace and harmony in the home and maintaining parental control over minor children.

Finally, Hatzinicolas v. Protopapas held that parent-child immunity does not apply when a minor brings a tort action against a parent's business partner or partnership. In Hatzinicolas, a child was injured by the rotating wheels of an automatic slicing machine on the premises of her father's partnership business. In deciding the case, the Court of Appeals once again relied on the policy rationale behind parent-child immunity. The court found that although a child's suit against a parent's business partner may jeopardize the partnership relationship, parent-child immunity does not bar the suit because the immunity is designed to protect solely the parent-child relationship.

c. Parent-Child Immunity as Applied in Maryland.—Although Maryland recognizes a few exceptions to parent-child immunity, the

30. Id. ("Ordinarily, the parent is not liable for damages to the child for a failure to perform a parental duty, or for excessive punishment of the child not maliciously inflicted, or for negligent disrepair of the home.").
31. Id.
32. 212 Md. 107, 128 A.2d 617 (1957).
33. Id. at 110-12, 128 A.2d at 618-19.
34. Id. at 126, 128 A.2d at 627.
35. Id.
37. Id. at 342, 550 A.2d at 948.
38. Id. at 342-43, 550 A.2d at 948.
39. Id. at 356, 550 A.2d at 955. "The parent-child immunity doctrine 'is founded upon public policy, and is designed to preserve the peace and harmony of the home, as well as to recognize the authority of the parent, under normal conditions, responsible for the maintenance of the home.'" Id. (quoting Frye v. Frye, 305 Md. 542, 550, 505 A.2d 826, 830 (1986)).
40. Id. at 358, 550 A.2d at 956.
41. See supra notes 26-40 and accompanying text (discussing exceptions to the parent-child immunity doctrine that have been recognized in Maryland).
courts have been more likely to reject than to accept new exceptions to the rule. Challenges to the doctrine have most frequently arisen in the context of automobile torts.\textsuperscript{42}

In 1971, the Court of Special Appeals, in \textit{Latz v. Latz},\textsuperscript{43} declined to make an exception to the parent-child immunity doctrine for an automobile tort. In \textit{Latz}, a father sued his minor daughter for the death of his wife, the minor’s mother.\textsuperscript{44} The death resulted from the minor’s negligent operation of an automobile in which the mother was a passenger.\textsuperscript{45} The court held that the trial court did not err in dismissing the father’s complaint against his daughter on the ground that parent-child immunity precluded suit.\textsuperscript{46} The fact that a minor who was being sued by her father was protected by liability insurance did not persuade the court to create an exception to the doctrine for automobile torts.\textsuperscript{47} The court relied on the doctrine of stare decisis, stating that, “for reasons of certainty and stability, changes in decisional doctrine are left to the Legislature.”\textsuperscript{48}

The Court of Special Appeals did not waver from this position seven years later in \textit{Montz v. Mendaloff},\textsuperscript{49} when a minor child sought an exception to the parent-child immunity doctrine for injuries resulting from her parents’ alleged gross negligence.\textsuperscript{50} In \textit{Montz}, the Court of Special Appeals held that a minor could not sue her mother for inju-
ries she sustained as a result of the mother's grossly negligent operation of a motor vehicle. The court reasoned that in light of its decision in Latz, the Maryland legislature had been aware of the existence of the parent-child immunity doctrine and had not changed it.

The issue of parent-child tort immunity in automobile accidents reached the Court of Appeals in 1986 in Frye v. Frye. In Frye, Barbara Frye brought suit against her husband, George Frye, on behalf of their minor son to recover for injuries he sustained as a result of George Frye's negligent operation of an automobile. The court held that parent-child immunity should not be abrogated despite the court's recent abrogation of interspousal immunity. The Court of Appeals distinguished the interspousal relationship from the parent-child relationship by recognizing the significant changes that had evolved in the marital relationship over time, and it reasoned that such significant changes in the parent-child relationship had not occurred. The court also reasoned that minors are protected by the legislature's "enactment of a comprehensive scheme for civil and criminal enforcement of the obligations to support children, parents and spouses."

The daughter married and moved out of her parents' house before bringing the instant lawsuit. Id.

51. Id. at 225, 388 A.2d at 571.
52. Id. at 224, 388 A.2d at 570. The court also compared the gross negligence alleged in Montz with the Mahnke exception for atrocious, willful acts. Id. at 225, 388 A.2d at 571. The court found that the mother's behavior in Montz did not rise to the level of abandoning or forfeiting her parental authority and privileges as the father had in Mahnke. Id.; see also supra notes 27-31 and accompanying text (discussing Mahnke).
53. 305 Md. 542, 505 A.2d 826 (1986).
54. Id. at 544, 505 A.2d at 827. She also named George Frye's automobile insurer as a defendant for denying coverage to her minor son under the uninsured motorist provision of the policy. Id.
55. Id. at 557, 505 A.2d at 834. In Boblitiz v. Boblitiz, 296 Md. 242, 462 A.2d 506 (1983), interspousal immunity was abrogated for tortious actions between spouses. Id. at 273, 462 A.2d at 521.
56. Frye, 305 Md. at 557, 505 A.2d at 834. At common law, a suit could not lie between a husband and wife because the wife had no legal existence apart from her husband. Id. at 555, 505 A.2d at 832. The court abrogated interspousal immunity because it was a vestige of the past and unsound in light of the circumstances of modern society. Id. at 557, 505 A.2d at 834.
57. Id. at 557-58, 505 A.2d at 834.
58. Id. at 560, 505 A.2d at 836. In Frye, the court further explained that parent-child suits disrupt family harmony because of a child's natural dependence upon his or her family. Id. at 549, 505 A.2d at 830. The court reasoned:

A minor is "dependent upon a parent to provide for him the judgment and care which he, and any property of his, may need during his immaturity. In a suit against him, he would ordinarily depend upon his parents to procure him an attorney, for he cannot appoint one . . . . One of his parents would ordinarily be appointed guardian ad litem, he being incapable of defending except by guardian."
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*Frye* also held that a minor child, injured by a parent's negligent operation of an automobile, cannot circumvent parent-child immunity by claiming to be an uninsured motorist for insurance purposes.\(^\text{59}\) Barbara Frye argued that because parent-child immunity precluded a suit by her son against his father, the father was rendered an uninsured motorist. Therefore, the son should have a claim under the uninsured motorist provision of the motor vehicle policy.\(^\text{60}\) The court did not accept this argument, however, and reasoned that parent-child immunity had "closed the front door to redress by the son from the father" and that a "back door" exception allowing the minor to maintain the action would not be recognized.\(^\text{61}\)

In *Frye*, the Court of Appeals acknowledged that the modern trend among other jurisdictions had moved toward abrogation of the parent-child immunity doctrine for motor vehicle torts.\(^\text{62}\) The court identified two primary reasons for abrogation common among other states:

1) The operation of an automobile is outside the area of parental control, authority and discretion. With respect to motor torts, the doctrine does not achieve the purpose of promoting family harmony or parental autonomy.

2) Automobile liability insurance, now widely prevalent, negates the family tranquility argument. Insurance tempers the possibility of family discord and depletion of family resources.\(^\text{63}\)

Without specifically addressing the first justification, the court sternly rejected abrogation based on the widespread existence of liability insurance.\(^\text{64}\) The court reasoned that compulsory motor vehicle liability insurance, mandated by the legislature, reflects the General Assembly's public policy.\(^\text{65}\) The court further explained that the exclusion of motor torts from parent-child immunity would inevitably have some impact on the state's insurance scheme and that a decision to alter that scheme ought to come from the legislature rather than the courts.\(^\text{66}\)

\(^{59}\) *Id.* (quoting Schneider v. Schneider, 160 Md. 18, 23, 152 A. 498, 500 (1930)).

\(^{60}\) *Id.* at 568, 505 A.2d at 839-40.

\(^{61}\) *Id.*, 505 A.2d at 839.

\(^{62}\) *Id.*, 505 A.2d at 840.

\(^{63}\) *Id.* at 562, 505 A.2d at 836-37.

\(^{64}\) *Id.* at 562-63, 505 A.2d at 837.

\(^{65}\) *Id.* at 566-67, 505 A.2d at 838-39.

\(^{66}\) *Id.* at 567, 505 A.2d at 839.
In Smith v. Gross, a mother brought a wrongful death action on behalf of her deceased son against the child's biological father following a fatal car crash. The mother argued that parental immunity was inapplicable because the child had never lived with the father and there was no father-child relationship to preserve. The Court of Appeals held that parent-child immunity bars wrongful death and survival actions brought on behalf of a deceased minor against a surviving parent, even if the child had not been living with that parent prior to the child's death. Once again, the court deferred to the legislature, stating:

If the legislature intended that the judicially created parent-child immunity rule be excepted from the legislatively created survival and wrongful death actions, it has had ample opportunity to say so. But it has allowed the rule to stand inviolate as we have adopted and applied it, without change or modification.

The court also reasoned that the "rights, privileges, obligations, and duties arising from the father-child relationship were not wiped out merely because the child lived with the mother." Additionally, the court explained that the primary requisite of the parent-child relationship was not whether the parent and the child lived together, but whether the defendant was, in fact, the child's father.

Most recently, the Court of Appeals reiterated its refusal to abrogate the parent-child immunity doctrine for motor vehicle torts in Warren v. Warren. The court reiterated its position on parental immunity, stating "[f]amily life and values have not significantly changed since we last addressed this issue . . . , and we believe that it is still in the best interest of both children and parents to retain parent-child immunity." The court once again noted that although other jurisdictions had abrogated the doctrine, in Maryland, an exception for

68. Id. at 141, 571 A.2d at 1220.
69. Id. at 147, 571 A.2d at 1223.
70. Id. at 148-49, 571 A.2d at 1224.
71. Id. at 149, 571 A.2d at 1224.
72. Id. at 148, 571 A.2d at 1223.
73. Id. at 147-48, 571 A.2d at 1223.
74. 336 Md. 618, 650 A.2d 252 (1994). In Warren, a mother and father brought suit on behalf of their son against the child's steppmother following a car accident, caused by the steppmother, that injured the minor. Id. at 620, 650 A.2d at 253. In addition to discussing the application of parent-child immunity to motor vehicle torts, the court held that the doctrine does not protect stepparents, regardless of whether they are standing in the place of a parent. Id. at 628, 650 A.2d at 257.
75. Id. at 626, 650 A.2d at 256.
motor vehicle torts would have to come from the legislature in accordance with its statutory insurance scheme.\textsuperscript{76}

The push for abrogation of parent-child immunity for motor torts is characterized by the argument that because automobile liability insurance mitigates the potential for family discord, the purpose for barring parent-child suits becomes obsolete.\textsuperscript{77} The Court of Appeals has repeatedly rejected this argument.\textsuperscript{78} In \textit{Frye}, the court explained that an exception to the immunity based on liability insurance will cause the cost of liability insurance to increase drastically, that it will lead to collusion and fraud, that, in the presence of insurance, a suit between family members is not truly adversary, that the insurer may not receive the necessary cooperation from a family defendant in providing adequate information for the insured's defense, that a defendant may be too helpful to the plaintiff family member and may prejudice the jury by his statements, and that the presence of insurance will unduly influence a jury to award an unjustifiable large recovery.\textsuperscript{79}

Thus, the Court of Appeals opposes abrogation of parent-child immunity based on the presence of liability insurance.\textsuperscript{80}

3. \textit{The Court's Reasoning}.—In \textit{Renko v. McLean}, the Court of Appeals held that a minor, injured in a motor vehicle accident resulting from her mother's negligence, may not sue her natural mother to recover for those injuries once she has reached the age of majority.\textsuperscript{81} It also held that the existence of mandatory motor vehicle liability insurance does not justify the creation of an exception to parent-child immunity for motor vehicle torts.\textsuperscript{82} Furthermore, the court held that parent-child immunity, as applied, did not violate either the Maryland Declaration of Rights or the United States Constitution.\textsuperscript{83}

\textsuperscript{76} \textit{Id.} at 627-28, 650 A.2d at 256-57.
\textsuperscript{77} See \textit{Frye v. Frye}, 305 Md. 542, 563, 505 A.2d 826, 837 (1986) (citing the availability of liability insurance as a major consideration in the abrogation of parent-child immunity in other jurisdictions).
\textsuperscript{78} See Warren, 336 Md. at 627-28, 650 A.2d at 256-57; \textit{Frye}, 305 Md. at 567, 505 A.2d at 839; Latz v. Latz, 10 Md. App. 720, 729, 272 A.2d 434, 441 (1971).\textsuperscript{79} \textit{Frye}, 305 Md. at 566, 505 A.2d at 838.
\textsuperscript{80} Warren, 336 Md. at 626, 650 A.2d at 256 (relying on \textit{Frye} for its rejection of abrogation of parent-child immunity based on compulsory motor vehicle liability insurance).
\textsuperscript{81} \textit{Renko}, 346 Md. at 473, 697 A.2d at 472-73.
\textsuperscript{82} \textit{Id.} at 473-81, 697 A.2d at 473-76 (discussing the arguments for and against abrogating the doctrine in light of mandatory automobile insurance).
\textsuperscript{83} \textit{Id.} at 481-84, 697 A.2d at 476-78.
The court first addressed the issue of whether persons who have reached the age of majority may sue their parents for events that occurred during that person's minority. Renko argued that because adults are permitted to sue their parents for acts that occur after they have reached the age of majority, the court should logically allow adult children to sue their parents for wrongful acts that occur during minority. The court distinguished Renko from Waltzinger by observing that although Renko had reached the age of majority, she sought recovery for events that had occurred during her minority. The Court of Appeals affirmed that parent-child immunity applies not only to suits initiated during the child's minority, but it bars actions arising from any events that occurred during the child's minority. The court reasoned that to hold otherwise would undermine its commitment to the doctrine by allowing minors to wait until they have reached the age of majority before commencing a suit that otherwise would have been barred. This position is consistent with the policy behind parent-child immunity because the "looming specter of a lawsuit is as surely detrimental to family peace and harmony and parental authority as is the actual suit itself.

Next, the court addressed the justifications for applying the parent-child immunity doctrine in light of compulsory motor vehicle liability insurance. Judge Karwacki, writing for the court, acknowledged that an overwhelming majority of states have totally or partially abrogated parent-child immunity for motor vehicle torts, but he objected to the reasoning employed by these jurisdictions. These jurisdictions reason that the threat a lawsuit between parents and their children poses to family harmony is nullified when the parents' liabil-

84. Id. at 471-73, 697 A.2d at 471-73.
85. Id. at 472-73, 697 A.2d at 472.
86. See supra notes 32-35 and accompanying text for a discussion of Waltzinger.
87. Renko, 346 Md. at 473, 697 A.2d at 472-73.
88. See generally id. at 471-73, 697 A.2d at 471-73 (comparing previously created exceptions to parent-child immunity with the exception for emancipated children proposed by Renko).
89. Id. at 473, 697 A.2d at 472.
90. Id.
91. Id., 697 A.2d at 473.
92. Id. at 478, 697 A.2d at 475. Jurisdictions abrogating parent-child immunity for motor vehicle torts have reasoned that liability insurance negates the disruption of family peace and harmony that is sought to be avoided by the doctrine. See, e.g., Williams v. Williams, 369 A.2d 669, 672 (Del. 1976) ("Liability insurance impersonalizes the suit and negates the possible disruption of family harmony by easing the financial repercussions of the accident."); Sorensen v. Sorensen, 339 N.E.2d 907, 914 (Mass. 1975) ("Where insurance exists, the domestic tranquillity argument is hollow . . . ." (internal quotation marks omitted)).
ity is covered by insurance. The Court of Appeals found that this reasoning gives rise to an even greater problem because it diminishes the adversarial nature of a lawsuit. Thus, the liability insurance becomes the sole reason for the existence of the suit and forces the insurer "to defend a suit that its insured has every incentive to lose." The court also explained that the dependence of a lawsuit upon the existence of liability insurance is inconsistent with Maryland law, because evidence of liability insurance is irrelevant to the issue of a defendant's liability.

Finally, the court reasoned that the insurance-based argument fails in the case of judgments that exceed the amount of applicable insurance coverage. When this happens, "the rancor and discord the insurance is said to obviate" would only resurface as the parent and child become adversaries in subsequent collection proceedings.

Lastly, the court addressed whether parent-child immunity violates either the Maryland Declaration of Rights or the Fourteenth Amendment to the United States Constitution. On the issue of due process, the court reasoned that it is well settled both under Maryland and federal law that there is no constitutionally protected property right in a particular cause of action. In addition, the court rejected Renko's equal protection argument because her age and familial status did not place her in a "suspect class."

93. Renko, 346 Md. at 474-78, 697 A.2d at 473-75 (citing case law from other jurisdictions abrogating parent-child immunity for motor tort cases).
94. Id. at 478, 697 A.2d at 475; see also text accompanying note 79 (warning of the potential for fraud and collusion when a parent-child suit is predicated on the existence of liability insurance).
95. Renko, 346 Md. at 478, 697 A.2d at 475.
96. Id.; see also Frye v. Frye, 305 Md. 542, 564, 505 A.2d 826, 837-38 (1986) (stating that the existence of liability insurance does not affect the question whether a father is precluded from bringing a tort action against his minor child).
97. Renko, 346 Md. at 479, 697 A.2d at 475-76.
98. Id., 697 A.2d at 476.
99. Id. at 481, 697 A.2d at 476. The Maryland Declaration of Rights states in pertinent part: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of RTS., art. XXIV.
100. Renko, 346 Md. at 481, 697 A.2d at 476. The United States Constitution states in pertinent part: "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
101. Renko, 346 Md. at 481, 697 A.2d at 477.
102. Id. at 482, 697 A.2d at 477; see also Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) ("[A] suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a
soned that the doctrine survives a rational basis standard of review because it serves the state's interest in "insulating families from the vagaries and rancorous effects of tort litigation."\(^{103}\)

4. Analysis.—In *Renko v. McLean*, the Court of Appeals refused to create a new exception to the doctrine of parent-child immunity. Renko's push to abrogate the doctrine was defeated by a holding that has bolstered the vitality of parent-child immunity in Maryland. This decision is not surprising given the Court of Appeals's reluctance to recognize new exceptions to the parent-child immunity doctrine.\(^{104}\) Despite the trend among other jurisdictions to abrogate the doctrine for motor torts, the court stands by its goal of preserving peace and harmony within families by barring parent-child tort suits. This position is firmly grounded in Maryland precedent and supported by logical and convincing policy arguments.

a. Approval of the Rationale for Parent-Child Immunity.—In *Renko*, the court relied on the policy arguments in favor of parent-child immunity that have been discussed throughout the history of the doctrine.\(^{105}\) Parent-child immunity is intended to promote family harmony,\(^{106}\) preserve parental discipline and control,\(^{107}\) protect families
from depleting their resources on litigation, and curb fraud and collusion among families. The conservative agenda behind this doctrine is undoubtedly the promotion of traditional relationships between parents and their children and the encouragement of dispute resolution within the family.

Maryland's strict adherence to these policy motives places it in the minority. In Renko, the Court of Appeals noted that most jurisdictions have either totally or partially abrogated the doctrine. Only eight states, including Maryland, do not make an exception to the doctrine for motor vehicle torts. Every other state has either never adopted the doctrine, completely abrogated it, abrogated it in motor tort cases, or created other exceptions to the doctrine.

Jurisdictions that have abrogated parent-child immunity have exhibited dissatisfaction with the policy arguments set forth by Maryland courts. Other courts reason that the injury giving rise to a lawsuit, rather than the lawsuit itself, is responsible for disruption of family harmony. Some jurisdictions have assuaged the concern that families will collude to defraud liability insurers by reasoning that the possibility of collusion exists in any lawsuit and that the determination of

against the looming specter of being hauled into court by an opportunistic attorney for the child. . . . We are not willing to open the door to rebellious children and frustrated parents and allow the courts to become the arbitrator of parent-child disputes and the overseer of parental decisions. Warren, 336 Md. at 626, 650 A.2d at 255-56 (quoting Glaskox v. Glaskox, 614 So. 2d 906, 913 (Miss. 1992) (Lee, J., dissenting)).

108. See Renko, 346 Md. at 480, 697 A.2d at 476 (arguing that suits for pain, suffering, and other noneconomic damages may "saddle a family with a judgment that they can ill-afford to pay because . . . it exceeds [their] available [liability] insurance").


110. See supra note 107; see also David A. Leib, Note, Maryland Refuses to Abrogate Parental Tort Immunity, 55 MD. L. REV. 832, 842 (1996) (stating that Maryland has become one of the nation's most conservative states on the issue of parent-child immunity).

111. Renko, 346 Md. at 474, 697 A.2d at 473.

112. Id. In Frye v. Frye, 305 Md. 542, 561-62, 505 A.2d 826, 836-37 (1986), and Warren, 336 Md. at 621 n.1, 627 n.2, 650 A.2d at 253 n.1, 256 n.2, the Court of Appeals also recognized the widespread abrogation of parent-child immunity.

113. Renko, 346 Md. at 474 & n.12, 697 A.2d at 473 & n.12. Those states are Alabama, Arkansas, Colorado, Georgia, Indiana, Louisiana, and Nebraska. Id.

114. Id. at 474, 697 A.2d at 473; see also Warren, 336 Md. at 627 n.2, 650 A.2d at 256 n.2 (citing authorities from 43 jurisdictions, including the District of Columbia, permitting parent-child suits for motor vehicle torts).

115. See Sorensen v. Sorensen, 339 N.E.2d 907, 913 (Mass. 1975) ("When the wrong has been committed, the harm to the basic fabric of the family has already been done and the source of rancor and discord already introduced into family relations.").
fact and a proper verdict are issues to be decided by a jury. Some states have adopted a "reasonable parent" standard that permits children to sue their parents in tort, but limits recovery to damages resulting from conduct that fails to meet the standard of care reasonably expected of parents. For automobile torts, courts may reason that abrogation is appropriate because the operation of an automobile is outside the traditional area of parental control.

Despite the "chorus of criticism surrounding the doctrine," Renko expresses the Court of Appeals's devotion to stare decisis on the issue of parent-child immunity. The court opined that since the doctrine was first adopted in 1930, the parent-child relationship had changed little, if at all. This opinion demonstrates that, in Maryland, the doctrine's purpose of preserving peace and harmony among families will trump the justifications for abrogation offered by the majority of other jurisdictions.

b. Abrogation of Parent-Child Immunity for Motor Vehicle Torts.— The most common exception to the parent-child immunity doctrine prohibits its application to motor vehicle tort suits. Many jurisdictions conclude that the widespread presence of automobile liability

116. See Renko, 346 Md. at 477, 697 A.2d at 474 ("[T]he possibility of collusion exists to a certain extent in any case. Every day we depend on juries and trial judges to sift evidence in order to determine the facts and arrive at proper verdicts." (quoting Glaskox v. Glaskox, 614 So. 2d 906, 912 (Miss. 1992)). But see infra notes 141-143 and accompanying text (explaining the effects collusion may have on a jury verdict).

117. See Leib, supra note 110, at 844 (discussing the reasonable and prudent parent standard).

118. See Frye v. Frye, 305 Md. 542, 562, 505 A.2d 826, 837 (1994) (identifying reasons why other states have excluded motor torts from parent-child immunity).


120. See Renko, 346 Md. at 484, 697 A.2d at 478 ("Maryland law has long recognized, save for extraordinary circumstances, that the parent-child immunity doctrine is a reasonable and well-founded limitation upon a child's access to our courts, serving to protect one of the most fundamental and sacred units in our society.").

121. Id. at 470, 697 A.2d at 471.

122. Haley, supra note 119, at 581.
insurance justifies partial abrogation of the doctrine. Courts following the majority view have concluded that a parent-child suit does not threaten the doctrine's concern for domestic tranquility when the parent is covered by liability insurance. The litigation becomes an action between the child and the parent's insurer rather than an action between parent and child. According to this argument, the presence of automobile liability insurance negates the concern for family tranquility by eliminating the adversarial roles a parent and child would normally assume in the absence of liability insurance.

Maryland courts strictly oppose abrogation of parent-child immunity based on the presence of liability insurance, but this disagreement reaches beyond whether the rationales behind the doctrine are being served. The Court of Appeals and the Court of Special Appeals have both rejected the insurance argument because insurance is not relevant to the issue of liability. In an ordinary tort case, Maryland law prohibits evidence indicating the presence of liability insurance from being presented to the jury. Evidence of a defendant's insur-

123. See Williams v. Williams, 369 A.2d 669, 672 (Del. 1976) ("'[W]hen insurance is involved, the action between parent and child is not truly adversary . . . ." (quoting Sorensen v. Sorensen, 339 N.E.2d 907, 914 (Mass. 1975)); Sorensen, 339 N.E.2d at 913 ("[I]t would be incongruous to permit recovery against a parent and the parent's insurance company by the unrelated child but to deny recovery to the parent's child when culpability is admitted or established."); Glaskox v. Glaskox, 614 So. 2d 906, 911 (Miss. 1992) (reasoning that "domestic peace and harmony may be more threatened by denying the cause of action than by permitting one, especially where there is insurance").

124. Sorensen, 339 N.E.2d at 914.

125. Id.


127. See Renko, 346 Md. at 478, 697 A.2d at 475 (discussing the lack of relevance of insurance to liability); Frye, 305 Md. at 564, 505 A.2d at 837 (stating that policies or contracts held by parents indemnifying them against loss from judgments are not relevant to the determination of the parents' liability (citing Schneider v. Schneider, 160 Md. 18, 24, 152 A.2d 498, 500 (1930)); Latz v. Latz, 10 Md. App. 720, 729, 272 A.2d 435, 440 (1971) (stating that the fact that a defendant has a particular type of insurance does not change the rule on parental immunity). Maryland is among a majority of jurisdictions following the rule that insurance is irrelevant to the determination of liability. Renko, 346 Md. at 478, 697 A.2d at 475.

128. See Allstate Ins. Co. v. Atwood, 319 Md. 247, 258, 572 A.2d 154, 159 (1990) (discussing the admissibility of liability insurance evidence at the trial of a tort case). There are, however, a few exceptions to this rule. Evidence of liability insurance may be admitted in motor vehicle torts if relevant to the cause of the accident, if reference to insurance is made by the defendant or his witness, or if relevant to show proof of agency, ownership, or control. Allstate Ins. Co. v. Miller, 315 Md. 182, 191 n.8, 553 A.2d 1268, 1272 n.8 (1989); Jones v. Federal Paper Bd. Co., 252 Md. 475, 494, 250 A.2d 655, 664-65 (1969). Similarly, the Federal Rules of Evidence limit the introduction of insurance coverage.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.
ance is inadmissible to show fault or lack thereof and may be highly prejudicial. Establishing the availability of a certain sum of coverage may distort a jury verdict or sway a jury to award damages without fault. "It is a common experience in many courts that a jury's generosity is proportional to the amount of available insurance."

In Renko, the court relied on these principles when it explained that, in a normal case, liability insurance is not relevant until an insured's liability has been fixed in an appropriate legal proceeding. Yet, in jurisdictions abrogating parent-child immunity for motor vehicle torts, the entire existence of the case is predicated on the presence of liability insurance. Liability insurance does not create liability; insurance only reimburses liability when liability otherwise exists. In the same respect, liability insurance cannot create a cause of action where one did not otherwise exist.

Abrogation of parent-child immunity based on the existence of liability insurance forces the insurer to defend a suit that its insured has every incentive to lose. Our legal system is designed to be an adversarial process; yet, in parent-child suits, parents are more likely to admit to liability, whether or not they believe that admission, if their insurance will fund their child's judgment. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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129. See Miller, 315 Md. at 191, 553 A.2d at 1272 (explaining the limited purposes for which liability insurance may be introduced in tort suits).
130. Atwood, 319 Md. at 258, 572 A.2d at 159. The Court of Appeals explained:

The rule against admitting evidence regarding insurance is for the protection of both parties. If the amount of insurance coverage is high, reference to it may prejudice the defendant because the jury may consider the fact that the defendant will not be personally liable for any damages, and therefore be overly generous in an award to the plaintiff. Conversely, if the limits of coverage are low, or if coverage is nonexistent, the award may be smaller than justified because the jury may limit the award to what it believes the defendant can personally afford regardless of the actual damages proved.

131. Miller, 315 Md. at 191-92, 553 A.2d at 1272.
132. Jones, 252 Md. at 494-95, 250 A.2d at 665.
133. Renko, 346 Md. at 479, 697 A.2d at 475.
134. Id. at 478, 697 A.2d at 475.
135. Id.

137. Renko, 346 Md. at 478, 697 A.2d at 475.
139. Renko, 346 Md. at 478 n.14, 697 A.2d at 475 n.14.
the concern for fraud and collusion arises. In collusive suits, insurers will inevitably be forced to defend the insured parent without knowledge of the facts giving rise to the child’s claim and with little hope of cooperation from the insured parent to avoid liability. Jurors are expected to determine liability and award verdicts based on facts and evidence. However, if facts relevant to the defendant’s liability are suppressed or fabricated by an agreement of the supposed adversaries, the jury’s verdict will be distorted in favor of the facts that the colluding plaintiff and defendant have chosen to set forth.

Partial abrogation based on liability insurance will force insurance companies to expend their own resources to guard against collusive suits. Proponents of abrogation have argued that cooperation clauses, which are frequently found in insurance contracts, provide insurers with an avenue to disclaim coverage in the event that an insured parent is colluding to defraud the insurer. Disclaimer under a cooperation clause is not, however, a simple remedy. In Maryland, an insurer may not disclaim coverage under a cooperation clause unless the insured’s lack of cooperation has actually prejudiced the insurer.

Insurance companies frequently face excessive litigation in order to establish the validity of such a disclaimer. Between the payment of judgments against parents and increased litigation ex-

140. See supra note 109 and accompanying text.
141. See Glaskox, 614 So. 2d at 915 (Lee, J., dissenting) (warning that abrogation of parent-child immunity will negate the antagonistic nature of the adversarial process).
142. Id.
143. Id. Some jurisdictions that have abrogated the immunity acknowledge the possibility of parent-child collusion, but reason that the benefit of injured parties receiving compensation outweighs the detriments of a limited number of collusive suits. See Sorensen v. Sorensen, 339 N.E.2d 907, 914 (Mass. 1975) ("When insurance is involved, the action between parent and child is not truly adversary; both parties seek recovery from the insurance carrier to create a fund for the child’s medical care and support without depleting the family's other assets.").
144. Glaskox, 614 So. 2d at 915 (Lee, J. dissenting) (discussing the adverse consequences of abrogation of parent-child immunity in motor vehicle torts will have on the insurance industry).
145. Sorensen, 339 N.E.2d at 915.
147. See, e.g., Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co., 791 F. Supp. 1079, 1080-81 (D. Md. 1992) (mem.) (suing for indemnification of defense costs incurred by one insurer against another insurer who disclaimed coverage based on the insured’s failure to provide timely notice of the suit); Sherwood Brands, Inc. v. Hartford Acc. & Indem. Co., 347 Md. 92, 50, 698 A.2d 1078, 1087 (1997) (rejecting the insurer’s disclaimer of coverage for defense costs incurred by the insured prior to notifying the insurer of the suit); Roussos, 104 Md. App. at 91, 655 A.2d at 45 (affirming the trial court’s grant of sum-
penses, the additional costs insurers incur undoubtedly will be passed on to policy holders.\textsuperscript{148}

In response to the abrogation of parent-child immunity in other jurisdictions, some insurance companies have begun inserting "household exclusion" clauses into their automobile liability insurance contracts.\textsuperscript{149} These clauses exclude coverage for family members living in the insured's household so that if a child is injured in a car accident due to her parent's negligence, the parent's insurer will not cover the costs of the injury to the child.\textsuperscript{150} Consequently, household exclusions protect insurers from fraudulent or collusive parent-child suits by eliminating the monetary incentive for such a suit. Some jurisdictions have held household exclusions to be invalid and against public policy,\textsuperscript{151} while other jurisdictions have enforced the exclusions.\textsuperscript{152} In the past, Maryland courts have rejected household exclusions in motor vehicle insurance policies.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{148} See Glaskox, 614 So. 2d at 915 (Lee, J., dissenting) (arguing that liability insurance rates will be driven up by abrogation of parent-child immunity based on the existence of liability insurance).
\item \textsuperscript{149} Compare Haley, supra note 119, at 582 (citing case law holding household exclusion clauses both valid and invalid) with Glaskox, 614 So. 2d at 915 (Lee, J., dissenting) (arguing, in 1992, that the widespread abrogation of parent-child immunity would cause insurers to exclude family members from liability coverage).
\item \textsuperscript{150} Haley, supra note 119, at 582.
\item \textsuperscript{151} See, e.g., Farmers Ins. Exch. v. Call, 712 P.2d 231, 236 (Utah 1985) (holding a household family exclusion in an automobile insurance policy contrary to public policy and therefore invalid).
\item \textsuperscript{152} See, e.g., Allstate Ins. Co. v. Boles, 481 N.E.2d 1096, 1101 (Ind. 1985) (holding that a household exclusion was not contrary to Indiana public policy); Walker v. American Family Mut. Ins. Co., 340 N.W.2d 599, 600 (Iowa 1983) (affirming the trial court's refusal to invalidate on public policy grounds an insurance contract clause that excluded from coverage bodily injury to any member of the insured's household).
\item \textsuperscript{153} See, e.g., State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co., 307 Md. 631, 644, 516 A.2d 586, 592 (1986) (holding a household exclusion clause in an automobile insurance contract invalid to the extent of minimum statutory liability coverage, but valid as to the coverage beyond that minimum); Jennings v. Government Employees Ins. Co., 302 Md. 352, 362, 488 A.2d 166, 171 (1985) (holding invalid a household exclusion clause in an automobile liability insurance policy). These clauses were found to be in conflict with the General Assembly's mandate on automobile liability insurance and the exclusions that the legislature intended to permit. Id. at 359, 488 A.2d at 169-70. Recently, however, Maryland's insurance code has been revised to allow a limited household exclusion from mandatory uninsured motorist coverage. Md. Code Ann., Ins. § 19-509(f)(1) (1997). The statute states in relevant part:
\begin{itemize}
\item \textsuperscript{154} Exclusions.—An insurer may exclude from the uninsured motorist coverage required by this section benefits for:
\begin{itemize}
\item (1) the named insured or a family member of the named insured who resides in the named insured's household for an injury that occurs when the named insured or family member is occupying or is struck as a pedestrian by an
For the foregoing reasons, the Court of Appeals has concluded: "The exclusion of motor torts from the parent-child immunity rule would inevitably have some impact on the insurance scheme and the social policy it furthers." In both Warren and Frye, the court reasoned that because the legislature created compulsory motor vehicle insurance as part of its elaborate insurance scheme, any exception to parent-child immunity should be left to the General Assembly. Renko concurred with Warren and Frye, citing the legislature’s silence on the issue of parent-child immunity.

In addition to evidentiary and legislative problems, the insurance-based argument in favor of abrogation suffers from another flaw. In Renko, the Court of Appeals noted that this argument fails to assess the consequences of an award that exceeds the amount of available coverage. In this situation, a judgment in excess of the parents’ insurance coverage may require subsequent collection proceedings against the parents, causing further disruption of family harmony. Even if recovery were limited to the amount of available insurance, Renko’s argument “that her recovery should be no different than that of any person negligently injured” would be weakened because damage awards among similarly injured plaintiffs would vary greatly depending upon the amount of available liability insurance.

5. Conclusion.—Renko v. McLean is the latest decision in a series of cases demonstrating the vitality of the parent-child immunity doctrine in Maryland law. In Renko, the court was unwavering in its deference to the doctrine’s rationale of promoting peace and harmony.
mony within families and preserving parental authority over children. The court’s reluctance to allow new exceptions to the doctrine is well grounded in legal precedent, policy arguments, and logic. Because the Court of Appeals has rejected even the most widely accepted arguments in favor of abrogation, proponents will have to direct their arguments to the General Assembly in order to change the doctrine of parent-child immunity in Maryland.

CATHY A. HINGER

C. Clarifying the Elements of Malicious Use of Process and Abuse of Process Claims

In One Thousand Fleet Ltd. Partnership v. Guerriero, the Court of Appeals held that a community organization’s lawsuit challenging Baltimore City’s decision to grant a zoning modification and issue a building permit was neither a malicious use of process nor an abuse of process even though the lawsuit had a detrimental effect on the developer who intended to renovate the site. In reaching its decision, the Court of Appeals clarified the elements of both torts. While forgoing a detailed discussion of some of these elements, the court addressed a question of first impression regarding the termination issue of malicious use of process and reinforced the damages element of abuse of process. In addressing these issues, the Court of Appeals made the already stringent malicious use of process and abuse of process standards even more difficult for plaintiffs to meet.

1. The Case.—During the summer of 1992, One Thousand Fleet Limited Partnership (Fleet), a real estate development business, began negotiations to purchase an abandoned warehouse that it

161. See supra notes 105-110 and accompanying text.
162. See supra notes 119-121 and accompanying text.
1. 346 Md. 29, 694 A.2d 952 (1997).
2. Id. at 43, 48, 694 A.2d at 958-59, 961.
3. See id. at 37-38, 694 A.2d at 956 (explaining that an action for malicious use of process has five elements and that an action for abuse of process has three elements); see also infra notes 118-122 and accompanying text (discussing the elements of malicious use of process); infra notes 130-133 and accompanying text (discussing the elements of abuse of process).
4. For example, the court chose not to discuss the “prior proceeding” and “probable cause” elements of malicious use of process, nor did it discuss the “ulterior motive” element of abuse of process. See infra notes 153-164, 170-172 and accompanying text.
5. Guerriero, 346 Md. at 41-48, 694 A.2d at 958-61.
planned to convert to an apartment building.\textsuperscript{6} Initially, the Little Italy Community Organization (the Community Organization) supported the conversion of the warehouse to apartments.\textsuperscript{7}

After reaching an agreement of sale with the warehouse owners in April 1993, Fleet requested that the Mayor and City Council of Baltimore rezone the property from heavy industrial to residential use.\textsuperscript{8} Fleet also requested conditional use authority\textsuperscript{9} from the City's Board of Municipal and Zoning Appeals so that the building could be utilized as apartments.\textsuperscript{10} The City granted both of Fleet's requests.\textsuperscript{11}

Following the zoning change and receipt of the conditional use authority, Fleet sought and obtained commitments for federal, state, and local funding for the conversion of the warehouse to apartments.\textsuperscript{12} To obtain the state and local funds, Fleet promised that ten of the fifty-six apartments in the building would be rented to people of "moderate income."\textsuperscript{13} About the time that Fleet secured these funds, the Community Organization withdrew its support for the project.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{6} Id. at 32, 694 A.2d at 953. The abandoned warehouse at issue in this case was the Bagby Furniture building, located at 509-521 South Exeter Street in Baltimore City. \textit{Id.} Fleet planned to renovate it into a 56-unit apartment complex. \textit{Id.}
  \item \textsuperscript{7} Id. In a March 15, 1993 letter to Fleet's predecessor, the Community Organization stated that "[t]he community overwhelmingly approved the conversion of the building into 56 apartment units." \textit{Id.} at 32-33, 694 A.2d at 953-54.
  \item \textsuperscript{8} Id. at 33, 694 A.2d at 954. The rezoning was necessary to convert the abandoned warehouse into apartments. \textit{Id.}
  \item \textsuperscript{9} In Baltimore City, an empty building—no matter its size—is considered a one-family dwelling, and the Board of Municipal and Zoning Appeals must authorize as a "conditional use" any conversion of the building for use by more than one family. One Thousand Fleet, Appeal No. 385-93X, Board of Municipal and Zoning Appeals, Baltimore City, Md. (Nov. 30, 1993) (referencing \textit{BALTIMORE CITY, MD., NEW COMPREHENSIVE ZONING ORDINANCE No. 1051} (Apr. 20, 1971)).
  \item \textsuperscript{10} \textit{Guerriero}, \textit{346 Md.} at 33, 694 A.2d at 954.
  \item \textsuperscript{11} Id. Fleet received the zoning change from the Mayor and City Council on July 2, 1993, and the conditional use authority from the Board of Municipal and Zoning Appeals on November 30, 1993. \textit{Id.}
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id. at 33-34, 694 A.2d at 954.
  \item \textsuperscript{14} Id. at 34, 694 A.2d at 954. According to Fleet's complaint, the Community Organization's support for the project dissipated when Fleet agreed to reserve 10 apartments for moderate income residents. \textit{Id.} Fleet alleged that John Guerriero, a Little Italy property owner, stated during a meeting regarding the public financing that the project troubled him because "it would attract residents of African-American descent" to the neighborhood." \textit{Id.} In addition, Fleet alleged that Guerriero offered to fund a lawsuit to stop the project, provided his name would not be associated with the suit. \textit{Id.}

Guerriero eventually had his lawyer send a letter to the Manekin Corporation, the realtor handling the sale of the warehouse, offering to purchase the building for $300,000 cash. \textit{Id.}
After Fleet completed its purchase of the warehouse, the Community Organization and Richard Ingrao, a Little Italy property owner and then president of the Community Organization, filed four actions against the Board of Municipal and Zoning Appeals and the Mayor and City Council of Baltimore.\textsuperscript{15} In the lawsuits, the Community Organization and Ingrao challenged the Board's approval of the conditional use authority and the City's rezoning of the building and subsequent issuance of a building permit.\textsuperscript{16} Fleet filed a motion to intervene, which the Circuit Court for Baltimore City granted.\textsuperscript{17} On June 8, 1995, the circuit court decided that the Community Organization and Ingrao lacked standing to assert their claims and consequently dismissed all of the lawsuits.\textsuperscript{18} The Community Organization and Ingrao appealed to the Court of Special Appeals.\textsuperscript{19} On December 5, 1995, the Court of Special Appeals dismissed the case for lack of prosecution.\textsuperscript{20}

On April 24, 1995, Fleet filed a complaint in the Circuit Court for Baltimore City against the Community Organization, Ingrao, and John Guerriero, alleging abuse of process stemming from the four lawsuits filed by the Community Organization and Ingrao against the Board of Municipal and Zoning Appeals as well as the Mayor and City Council of Baltimore.\textsuperscript{21} On June 26, 1995, Fleet amended its complaint to add a malicious use of process claim.\textsuperscript{22}

\begin{enumerate}
\item Id.
\item Id. Fleet was not a defendant in any of the four lawsuits. Id. at 35, 694 A.2d at 954.
\item Id.
\item Id., 694 A.2d at 955.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. Fleet alleged in its abuse of process complaint that the Community Organization and Ingrao filed their suits "at the direction of Guerriero and with his financial backing." Id. Moreover, Fleet asserted that they filed their suits "not for the purposes set forth therein but to (i) interfere with Plaintiff's business affairs, (ii) cause a failure of the financing for the Project, (iii) depress the purchase price of the Property and (iv) facilitate the purchase of the Property by Guerriero at a price below market value." Plaintiff's Complaint and Demand for Jury Trial at 7, One Thousand Fleet Ltd. Partnership v. Guerriero, No. 95114001/CL195817 (Cir. Ct. Baltimore City Apr. 24, 1995).
\item The Community Organization, Ingrao, and Guerriero subsequently filed a two-count counterclaim. Guerriero, 346 Md. at 35, 694 A.2d at 955. In the first count, the Community Organization, Ingrao, and Guerriero alleged that the City wrongly issued a building permit because the conditional use authority on which they based the permit was invalid. Id. In the second count, the Community Organization, Ingrao, and Guerriero claimed that Fleet's allegations of racism in a letter sent to a judge shortly after the filing of its abuse of process complaint constituted defamation. Id.
\item Guerriero, 346 Md. at 35, 694 A.2d at 955. In the amended complaint, Fleet alleged that the suits by the Community Organization and Ingrao were filed without probable cause; that each suit terminated in its favor; that the suits were filed with malice "in that each was intended to interfere with Plaintiffs [sic] financing of the Property and the Pro-
The circuit court granted the motion of the Community Organization, Ingrao, and Guerriero to dismiss, and Fleet appealed to the Court of Special Appeals. The Court of Appeals granted certiorari before consideration of the case by the Court of Special Appeals.

2. Legal Background.—Maryland courts have had many opportunities during the last century to examine the torts of malicious use of process and abuse of process. Despite extensive consideration of certain elements of these torts—for example, the “probable cause,” “malice,” and “damages” elements of malicious use of process and the “improper use” element of abuse of process—Maryland courts have left some unanswered questions regarding the requirements of these claims. Two such questions, which the Court of Appeals addressed in One Thousand Fleet Ltd. Partnership v. Guerriero, concerned what constitutes termination of the prior proceeding in a malicious use of process claim and whether damages are required to establish abuse of process.

a. Malicious Use of Process.—In Owens v. Graetzel, the Court of Appeals set forth the five elements of the tort of malicious use of process: (1) the institution of prior civil proceedings; (2) the lack of probable cause for the proceedings; (3) the presence of malice in the proceedings; (4) the termination of the original proceedings in the

ject, reduce the value [of] the property and facilitate Guerriero’s purchase of the Property at a reduce [sic] price”; and that Fleet sustained actual damages because it had not been able to finalize its financing and had incurred increased costs and lost rental revenue due to the delay. Plaintiff’s First Amended Complaint at 8-9, One Thousand Fleet Ltd. Partnership v. Guerriero, No. 95114001/CL195817 (Cir. Ct. Baltimore City June 26, 1995).

23. Guerriero, 346 Md. at 35-36, 694 A.2d at 955. The Community Organization, Ingrao, and Guerriero moved to dismiss the abuse of process claim because Fleet failed to allege the requisite misuse of process after its issuance and damages. Defendants’ Memorandum of Points and Authorities in Support of Motion to Dismiss at 5-9, One Thousand Fleet Ltd. Partnership v. Guerriero, No. 95114001/CL195817 (Cir. Ct. Baltimore City Sept. 7, 1995). They moved to dismiss the malicious use of process claim because Fleet failed to show that it sustained damages as a result of a prior civil proceeding filed by the defendants without probable cause and with malice. Id. at 9-13.

The trial court granted the motions of the Community Organization, Ingrao, and Guerriero for the reasons that they set forth in their motion and because the underlying lawsuit that gave rise to the malicious use of process claim was on appeal. Guerriero, 346 Md. at 35-36, 694 A.2d at 955.

24. Guerriero, 346 Md. at 36, 694 A.2d at 955.
25. See infra notes 30-83 and 86-112 and accompanying text.
26. See infra notes 32-56 and 73-83 and accompanying text.
27. See infra notes 86-95 and accompanying text.
28. See infra notes 124-126 and 134-136 and accompanying text.
29. 149 Md. 689, 132 A. 265 (1926).
defendant’s favor; and (5) the infliction of damages upon the defendant by arrest, seizure of property, or other special injury. Because the first element—the requirement of a prior proceeding—has generally been addressed by the courts as a part of the other four elements, this discussion will focus on the last four elements.

(1) Probable Cause.—In Owens v. Graetz, the Court of Appeals disposed of a malicious use of process cause of action by addressing only the “probable cause” element of the tort. In Owens, a mortgagor filed a complaint against a mortgagee alleging malicious use of process. The court was able to dispose of the case by examining only whether there was probable cause for the prior proceedings. Noting that the mortgagor did not win the foreclosure proceeding initiated by the mortgagee until after an appeal, the Court of Appeals concluded that there was probable cause for the prior action, stating that “the effect of the chancellor’s decree, despite its reversal on appeal by this Court, was a conclusive adjudication that the appellee had probable cause in beginning his foreclosure action.”

After explaining how a trial judge’s decision evidenced probable cause in Owens, the Court of Appeals discussed how an attorney’s actions established probable cause in North Point Construction Co. v. Sag-

30. Id. at 695-96, 132 A. at 267-68. The Court of Appeals defined special injury for purposes of malicious use of process as one “which would not necessarily result in all suits prosecuted to recover for a like cause of action.” Id., 132 A. at 267.

The Court of Appeals altered the elements it enumerated in Owens in the subsequent case of Shamberger v. Desse, 236 Md. 318, 320, 204 A.2d 68, 69 (1964). See infra notes 73-76 and accompanying text for a discussion of Shamberger. The Shamberger court explained that the elements necessary to prove malicious use of process were “(a) the institution or continuation of a proceeding by the present defendant against the plaintiff; (b) the termination of such proceeding in the present plaintiff’s favor; (c) absence of probable cause or malice in instituting the proceeding; and (d) that damages were sustained by the plaintiff.” Id. (emphasis added); accord Delisi v. Garnett, 257 Md. 4, 7, 261 A.2d 784, 786 (1970) (explaining that “there must be a showing of malice or want of probable cause” to sustain an action for malicious use of process).


32. 149 Md. 689, 132 A. 265 (1926).

33. Id. at 696-98, 132 A. at 267-68.

34. Id. at 692, 132 A. at 266. The mortgagee instituted a foreclosure proceeding against the mortgagor because of his belief that the mortgagor’s failure to make an advance interest payment was a default. Id. The court ruled in the mortgagor’s favor, and the mortgagee subsequently initiated a malicious use of process claim against the mortgagee. Id. Although this suit by a mortgagor against her mortgagee would today be called an action for malicious use of process, the Court of Appeals in Owens referred to it as an action for “malicious prosecution.” See id.

35. Id. at 696-98, 132 A. at 268.

36. Id. at 698, 132 A. at 268.
In Sagner, a construction company filed an action for malicious use of process against three individuals who had petitioned the court to appoint a receiver for the company, claiming that the company owed them money. In deciding the malicious use of process suit, the Sagner court focused solely on the element of probable cause. According to the court, because the three creditors were represented by an attorney in the prior proceeding, there was a presumption of probable cause. The court reasoned that "in a civil action, it is enough that an attorney at law who acts in good faith in presenting and prosecuting a claim for his client, had reasonable ground to believe that his client had a good case."

The Court of Appeals had yet another opportunity to address the probable cause element of malicious use of process in Walker v. American Security & Trust Co. In Walker, the court concluded that there was probable cause for a conservator trust company to initiate a habeas corpus action in order to regain custody of its ward after she had been taken from her apartment by her son. The court explained that the son had removed his mother from the lawful custody of the conservator trust company without her consent or approval.

37. 185 Md. 200, 208-09, 44 A.2d 441, 445-46 (1945).
38. Id. at 205-06, 44 A.2d at 444. The three individuals became upset when negotiations with the construction company led not to the payment of the company's debts to them, but to the payment of its debt to a fourth creditor. Id. at 206, 44 A.2d at 444. Their eventual suit against North Point Construction Company resulted in a settlement in which the company agreed to pay them only a portion of the amounts that they claimed were owed. Id. Throughout the lawsuit, officials from the construction company claimed either that the amounts sought by the three creditors were incorrect or that the company was not liable. Id.
39. Id. at 208-09, 44 A.2d at 445-46. Although the court failed to enumerate each element of malicious use of process individually, it briefly discussed damages, suggesting that "[t]he mere expense and annoyance of defending a civil action is not a sufficient special damage or injury to sustain an action for malicious prosecution." Id. at 207, 44 A.2d at 445. However, the court said little more than this about damages. See id. The court did not focus at all on the requirements of malice and the termination of the prior proceedings during its disposition of the case. See id. at 207-09, 44 A.2d at 444-46.
40. Id. at 208, 44 A.2d at 445.
41. Id. The Court of Appeals suggested that the construction company could have rebutted this presumption only by proving the existence of a conspiracy between the creditors and their legal counsel to institute receivership proceedings despite knowledge that there was no reasonable grounds for doing so. Id.; accord Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 544, 321 A.2d 182, 197 (1974) (noting that a "[b]ank was further protected from a finding that there was a want of probable cause by its reliance upon the advice of its attorney").
42. 237 Md. 80, 89, 205 A.2d 302, 308 (1964).
43. Id. at 83-84, 89, 205 A.2d at 304-05, 308. Without permission from her conservator, a son took his mother from an apartment near Washington to a Baltimore medical specialist and then to her home in Talbot County. Id. at 83, 205 A.2d at 304.
44. Id. at 89, 205 A.2d at 308.
According to the court, the presence of probable cause precluded the malicious use of process action.45

As a result of Owens, Sagner, and Walker, it is relatively clear that a plaintiff asserting a malicious use of process claim will have difficulty establishing a lack of probable cause for the prior proceeding. If the other party received a favorable ruling at the trial or appellate level in the prior proceeding, if the other party was represented by an attorney acting in good faith, or if the other party instituted the prior proceeding in response to an unlawful act against him, there will have been probable cause, and the malicious use of process action will fail.46

(2) Malice.—In Siegman v. Equitable Trust Co.,47 the Court of Appeals addressed the “malice” element of malicious use of process.48 In Siegman, a husband and wife filed a malicious use of process claim against the bank in which they had a joint checking account.49 Their claim was based on the bank’s attempt to satisfy Mrs. Siegman’s individual debt out of the couple’s joint account.50 In holding that the bank’s efforts did not constitute a malicious use of process, the Court of Appeals noted that there can be no malice “where an act, though wrongful, is committed in the honest assertion of a supposed right and without any evil intention.”51

After suggesting in Siegman that a wrongful act would not necessarily reveal malice, the Court of Appeals indicated in Wesko v. G.E.M., Inc.52 that malice could not always be inferred from a lack of probable cause: “While malice can be inferred from want of probable cause, it is no more than a permissible inference . . . subject to negation by

45. Id.

46. See supra notes 32-45 and accompanying text. But see Wesko v. G.E.M., Inc., 272 Md. 192, 194, 321 A.2d 529, 530 (1974) (concluding that a store lacked probable cause for having a customer’s wages attached even though the store was represented by an attorney).

47. 267 Md. 309, 297 A.2d 758 (1972).

48. Id. at 314, 297 A.2d at 760-61.

49. Id. at 311, 297 A.2d at 759.

50. Id. at 313, 297 A.2d at 760. According to Maryland law, a bank cannot charge a joint account for the debt of only one of the joint account depositors. Id.

51. Id. at 314, 297 A.2d at 761. The court also addressed the element of probable cause. Id. at 317, 297 A.2d at 762. It stated that “[t]he fact that an attorney acting in good faith in presenting and prosecuting a claim for his client had reasonable grounds to believe his client had a valid claim is sufficient to show probable cause on the part of the client.” Id. (citing North Point Constr. Co. v. Sagner, 185 Md. 200, 208, 44 A.2d 441, 445 (1945)).

proof that there was no actual malice on the defendant's part." In Wesko, the court held that although a store lacked probable cause for having the wages of a customer attached when that customer had already satisfied the debt in question, the fact that the store took such action as a result of a clerical error eliminated the possibility of an improper motive.

Based on the rulings of Siegman and Wesko, it appears that the presence of malice is as difficult for a malicious use of process plaintiff to establish as the lack of probable cause. Just because the prior proceeding was initiated wrongfully or without probable cause, there is not necessarily a presumption of malice.

(3) Termination of the Proceedings.—The fourth element of a malicious use of process claim requires that the prior proceedings must have terminated in the defendant's favor. In Walker v. American Security & Trust Co., the Court of Appeals considered whether the prior proceedings had terminated in favor of the defendant. The court recognized that the plaintiff in the underlying habeas corpus proceeding ultimately dismissed its case. Explaining, however, that the dismissal occurred only after the plaintiff obtained what it sought to achieve by means of the habeas corpus proceeding—judicial per-

53. Id. at 197, 321 A.2d at 532 (citation omitted); accord Palmer Ford, Inc. v. Wood, 298 Md. 484, 508, 471 A.2d 297, 309 (1984) ("We have said that the existence of malice flowing from the want of probable cause is a permissible inference and not a presumption."); Hooke v. Equitable Credit Corp., 42 Md. App. 610, 616, 402 A.2d 110, 114 (1979) ("The element of malice . . . may be inferred from the element of a want of probable cause.").

54. Wesko, 272 Md. at 194, 321 A.2d at 530.

55. Id. at 199, 321 A.2d at 533. But cf. Keys v. Chrysler Credit Corp., 303 Md. 397, 408, 494 A.2d 200, 205 (1985) (suggesting that the existence of malice can be inferred from the lack of probable cause). In Keys, Chrysler Credit Corporation requested that Anna Keys's wages be attached even though the debt that the attachment was to satisfy had been paid four years earlier. Id. at 401, 494 A.2d at 202. The attorney who requested the writ of attachment on behalf of Chrysler Credit Corporation was the same lawyer who signed the "Order of Satisfaction" given to Anna Keys when she paid her debt in full. Id. The trial judge decided to take Keys's malicious use of process claim from the jury, believing that only the three following elements constituting malicious use of process had been satisfied: that a prior civil proceeding had been instituted by the defendant, that the proceeding was instituted without probable cause, and that the proceeding terminated in the plaintiff's favor. Id. at 407, 494 A.2d at 205. In its review of the lower court's decision, the Court of Appeals stressed that "[f]rom the lack of probable cause, the jury could have inferred the existence of malice." Id. at 408, 494 A.2d at 205.

56. See supra notes 47-55 and accompanying text.

57. See supra note 30 and accompanying text.

58. 237 Md. 80, 205 A.2d 302 (1964).

59. Id. at 89, 205 A.2d at 308.

60. Id.
mission to continue supervision of a ward under its care—the court held that termination was not in the defendant’s favor.61

It was even more clear in Herring v. Citizens Bank & Trust Co.62 that the prior proceeding had not terminated in favor of the party now asserting a malicious use of process claim.63 In Herring, the party bringing the malicious use of process action had been ordered in the prior proceeding to pay a judgment of $52,387, plus interest.64 The court stated, “The element of the tort of malicious use of process requiring that the prior proceedings terminate in favor of the defendant therein was, therefore, not even arguably satisfied.”65

In Berman v. Karvounis,66 the Court of Appeals addressed the issue of whether to affirm the dismissal of a malicious use of process claim because several counts in the underlying proceeding remained open and unadjudicated.67 The court first reiterated that malicious use of process required a termination of the prior proceeding in favor of the plaintiff.68 It then explained that an adjudication of less than all of the counts of a complaint is not a termination of the action because such adjudication is subject to revision until entry of judgment on all counts.69

Although Maryland courts have had opportunities to consider whether the losing party in a prior proceeding could argue that termination was in his favor,70 or whether dismissal of only some counts of a claim constituted termination of a prior proceeding,71 other questions regarding the termination element of malicious use of process have eluded them. One such question is whether the prior proceeding is terminated if there is a pending appeal.72

61. Id.
63. Id. at 547, 321 A.2d at 198-99.
64. Id., 321 A.2d at 198.
65. Id.
67. Id. at 267, 518 A.2d at 730.
68. Id. at 266-67, 518 A.2d at 729-30.
69. Id. at 267, 518 A.2d at 730. According to the Court of Appeals, the only time that this would not be true is when the court entered final judgment on some of the counts of a complaint “upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Id. There was no such determination or direction in the proceeding giving rise to Berman. See id.
70. See supra notes 58-65 and accompanying text.
71. See supra notes 66-69 and accompanying text.
72. See Guerrero, 346 Md. at 41, 694 A.2d at 958 (“The question of whether a proceeding has been ‘terminated’ for purposes of a malicious use of process action when the judgment ‘terminating’ the proceeding was pending on appeal at the time the plaintiff initiated the malicious use of process action is a question of first impression in this State.”).
(4) Damages.—The Court of Appeals first addressed the issue of damages in the context of malicious use of process in Shamberger v. Dessel. In Shamberger, an individual instituted a caveat proceeding prior to the probate of a will—an action that, until it was dismissed with prejudice, prevented the appellant in the malicious use of process action from possessing certain real property. The court held that the appellant had not suffered a special injury, an essential element of malicious prosecution. The court reasoned that the appellant’s inability to use the real estate during the caveat proceeding was an injury that would result from “all caveats to wills involving devises of real property,” and, therefore, not a special injury.

Walker v. American Security & Trust Co. also indicated how difficult it is for a plaintiff to satisfy the damages requirement of malicious use of process. In deciding whether a conservator trust company’s habeas corpus action against its ward’s son was a malicious use of process, the Court of Appeals stated that “[m]ere annoyance and the expense of defending a civil action are not enough” to satisfy the damages requirement of malicious use of process.

In Keys v. Chrysler Credit Corp., the Court of Appeals once again addressed the damages element of malicious use of process. The court held that the attachment of an individual’s wages for a debt that had been paid four years earlier constituted sufficient damages to sustain an action for malicious use of process. The court explained, “[T]he action will lie wherever the defendant . . . has been deprived of his liberty, or of the possession, use or enjoyment of property.”

73. 236 Md. 318, 321, 204 A.2d 68, 69-70 (1964); see also supra note 30.
74. Shamberger, 236 Md. at 319-20, 204 A.2d at 69.
75. Id. at 321, 204 A.2d at 70.
76. Id.; accord Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 548, 321 A.2d 182, 199 (1974) (rejecting the debtors’ special injury argument by saying that “[a]ny damage . . . to their credit ratings and business reputations by virtue of the filing of the confessed judgments was only that damage typically sustained by anyone placed in similar straits”).
77. 237 Md. 80, 205 A.2d 302 (1964).
78. See id. at 89-90, 205 A.2d at 302.
79. Id. at 90, 205 A.2d at 308; accord Hooke v. Equitable Credit Corp., 42 Md. App. 610, 613-14, 402 A.2d 110, 113 (1979) (dismissing a contention that attorneys’ fees and other expenses incurred in defending against a civil action constituted special damages).
80. 303 Md. 397, 494 A.2d 200 (1985).
81. Id. at 409-10, 494 A.2d at 206-07.
82. Id. at 407-10, 494 A.2d at 205-07.
83. Id. at 410, 494 A.2d at 207-08 (emphasis omitted) (quoting Owens v. Graetzel, 149 Md. 689, 695, 132 A. 265, 267 (1926)).
b. Abuse of Process.—In addition to claims of malicious use of process, Maryland courts have also been faced with several abuse of process cases. In Maryland, there are three elements essential to sustaining a claim of abuse of process:

(1) that the defendant made an illegal, improper, perverted use of the process, a use neither warranted nor authorized by the process, . . . and (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of process, and (3) that damage resulted to the plaintiff from the irregularity.\(^{84}\)

The Court of Appeals distinguished abuse of process from malicious use of process in *Walker v. American Security & Trust Co.*, explaining that the former concerns misuse of process once a valid proceeding has begun, whereas the latter contemplates that the prior proceeding was invalid and initiated without probable cause.\(^{85}\)

(1) Improper Use of Process.—In *Bartlett v. Christhilf*,\(^{86}\) a receiver sued his co-receiver for abuse of process, based on the co-receiver’s lawsuit against him for unlawfully withholding assets, obstructing collection of the assets, acting in contempt of the authority of the court that had appointed him receiver, and embezzling money from the trust.\(^{87}\) The court emphasized that abuse of process is “the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ.”\(^{88}\) The court further said that “[a]ll the cases upon this subject depend either upon the arrest of the person or the seizure of his property.”\(^{89}\) After determining that the receiver had not misused the court’s order against his co-receiver, and that the alleged injuries to the co-receiver’s business and reputation were insufficient to meet the abuse of


\(^{85}\) 237 Md. 80, 87, 205 A.2d 302, 307 (1964). In *Berman*, the Court of Appeals emphasized that it was irrelevant in an abuse of process action whether the prior proceedings terminated in favor of the plaintiff. 308 Md. at 262, 518 A.2d at 727. In *Berman*, the trial judge had dismissed an abuse of process claim, saying that several counts of the underlying proceedings were still alive and awaiting disposition. Id.

\(^{86}\) 69 Md. 219, 14 A. 518 (1888).

\(^{87}\) Id. at 222-23, 14 A. at 518. The plaintiff in the abuse of process action alleged that his co-receiver brought suit against him “for the purpose of having [him] declared in contempt of court and removed from his office of receiver, and to disgrace him.” Id. at 228, 14 A. at 520. He further alleged that his feelings, reputation, and business had suffered as a result of the action against him. Id., 14 A. at 520-21.

\(^{88}\) Id. at 229, 14 A. at 521.

\(^{89}\) Id. at 231, 14 A. at 522.
process damages standard, the Court of Appeals held that no abuse of process had occurred.  

In *Walker v. American Security & Trust Co.*, the Court of Appeals once again focused on the improper use of process, holding that there was no abuse of process in a habeas corpus action brought by a conservator trust company to regain control of its ward. This was stated as "abuse of process is concerned with the improper use of criminal or civil process in a manner not contemplated by law after it has been issued."  

In assessing the abuse of process claim, the court focused on the propriety of the writ. The court found a writ of habeas corpus to be a proper and normal means of regaining custody of a ward, notwithstanding the fact that the ward was with her son voluntarily. Therefore, the court held that the son’s action for abuse of process failed. Based on *Walker*, it appears that there is no improper use of process if the plaintiff uses process only to gain the remedy normally awarded in the particular cause of action.  

(2) *Ulterior Motive.*—In *Keys v. Chrysler Credit Corp.*, the Court of Appeals focused on the ulterior motive element of abuse of process. The court indicated that, in addition to the improper use or perversion of process after its issuance, the tort of abuse of process requires an ulterior motive on the part of the individual who initiated the proceedings in question. The Court of Appeals said that the jury in *Keys* could reasonably infer an ulterior motive on the part of Chrysler Credit Corporation in that it attached the wages of Anna Keys for the purpose of satisfying a debt that had already been paid in full.  

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90. *Id.* at 230-31, 14 A. at 521-22.  
92. *Id.* at 87, 205 A.2d at 306.  
94. *Id.* at 87-88, 205 A.2d at 307.  
95. *Id.* at 88, 205 A.2d at 307.  
96. *See supra* notes 55, 80-83 and accompanying text for a discussion of the facts of this case.  
98. *Id.* at 411, 494 A.2d at 207.  
99. *Id.* However, the court said that the presence of an ulterior motive in issuing process did not guarantee that process was used in a manner not intended by law after issuance. *Id.* at 411-12, 494 A.2d at 207. The court treated the issues of ulterior motive and misuse of process after issuance as two separate questions. *See id.* After determining whether Chrysler Credit Corporation initiated the attachment proceedings with an ulterior motive, the court decided whether Chrysler utilized the process to achieve an unusual result outside the normal scope of an attachment proceeding. *Id.*
The Court of Special Appeals considered the issue of ulterior motive in *Herring v. Citizens Bank & Trust Co.* The *Herring* court stated it could not determine whether a bank instituted confessed judgment proceedings against a debtor for the allegedly ulterior motive of collecting $5000 in attorney's fees. However, the court held that because the bank's confessed judgment proceedings resulted in the collection of a debt—exactly the purpose that one would expect such proceedings to serve—there was no abuse of process in *Herring*.

(3) Damages.—In *Bartlett v. Christhilf*, the Court of Appeals indicated that only two forms of injury would satisfy the abuse of process damages standard. It stated that “[a]ll the cases upon this subject depend either upon the arrest of the person or the seizure of his property.” After concluding that the plaintiff had suffered only injuries to business and reputation, the court held that no abuse of process had occurred.

In *Herring v. Citizens Bank & Trust Co.*, the Court of Special Appeals considered whether injuries to the plaintiffs' credit ratings and personal and business reputations, resulting from a bank's confessed judgment proceedings against them, satisfied the damages requirement of abuse of process. The court held that such damages were insufficient because “the injuries contemplated by this particular tort (and an indispensable element of it) are limited to an improper arrest of the person or an improper seizure of property.”

Despite the clarity with which the *Bartlett* and *Herring* courts addressed the damages element of abuse of process, many cases left a great deal of uncertainty as to whether a showing of damages was even

100. 21 Md. App. 517, 531, 321 A.2d 182, 190 (1974). The court speculated that, if the bank initially desired to collect these attorneys' fees, "the actual institution of such [confessed judgment] proceedings would appear to have been resorted to only when all hope of achieving that ulterior purpose was despaired of." *Id.*

101. *Id.* at 532, 321 A.2d at 191. The Court of Special Appeals could not place a great deal of weight on the plaintiffs' claim that the bank used process not only to assure debt collection, but to obtain "undue and excessive" attorneys' fees, because such fees were never obtained. *Id.* at 533, 321 A.2d at 191. The court stated that, "if the act of the prosecutor is in itself regular, the motive, ulterior or otherwise, is immaterial." *Id.* at 534, 321 A.2d at 192 (internal quotation marks omitted).

102. See *supra* note 87 for a discussion of the facts of this case.

103. 69 Md. 219, 231, 14 A. 518, 522 (1888).

104. *Id.*

105. *Id.*


107. *Id.* at 536, 321 A.2d at 193.

108. See *supra* notes 102-107 and accompanying text.
necessary. In *Keys v. Chrysler Credit Corp.*, the Court of Appeals mentioned only that a showing of "improper use of the process" and "ulterior motive" were required, and in *Walker v. American Security & Trust Co.*, the court never indicated that damages were an element of abuse of process despite doing so for malicious use of process. Just as the effect of a pending appeal of the underlying proceeding would be the major question facing the *Guerriero* court in its malicious use of process analysis, the question whether abuse of process contained a damages element would be a focal point for the *Guerriero* court in its discussion of this second tort.

3. *The Court's Reasoning.*—In *Guerriero*, after determining the legal significance of the injuries suffered by a developer and the pendency of an appeal of the underlying proceeding, the Court of Appeals held that a lawsuit challenging the developer's acquisition of building permits and a zoning modification was neither a malicious use of process nor an abuse of process. The court began its analysis by identifying the standards for malicious use of process and abuse of process, explicitly distinguishing the two causes of action.

The *Guerriero* court recognized five elements necessary to maintain an action for malicious use of process: (1) that the defendant in the malicious use of process action must have instituted a prior civil proceeding; (2) that the defendant must have instituted this proceeding without probable cause; (3) that the defendant must have

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109. See *supra* notes 96-99 for a discussion of this case.
111. *See supra* notes 42-45 and 91-95 for a discussion of this case.
113. *See infra* notes 124-126 and accompanying text.
114. *See infra* notes 134-136 and accompanying text.
115. 346 Md. at 43, 48, 694 A.2d at 958-59, 961.
117. *See id.* at 38, 694 A.2d at 956 ("The two torts at issue . . . are separate and distinct."). The court continued:

"An action for abuse of process . . . is concerned with the improper use of criminal or civil process in a manner not contemplated by law after it has been issued, without the necessity of showing lack of probable cause or termination of the proceeding in favor of the plaintiff, while actions for malicious prosecution or malicious use of process are concerned with maliciously causing criminal or civil process to issue for its ostensible purpose, but without probable cause."

*Id.* at 39, 694 A.2d at 956-57 (quoting *Walker*, 237 Md. at 87, 205 A.2d at 306-07).
118. *Id.* at 37, 694 A.2d at 956.
119. *Id.* The Court of Appeals noted that "[p]robable cause for purposes of malicious use of process means 'a reasonable ground for belief in the existence of such state of facts
initiated the proceeding with malice;\(^{120}\) (4) that in the prior civil proceeding, the court must have ruled in favor of the party now bringing an action for malicious use of process;\(^{121}\) and (5) that the plaintiff in the malicious use of process action must demonstrate damages by arrest or imprisonment, by seizure of property, or by other special injury.\(^{122}\)

Applying these five elements of malicious use of process to the case before it, the Court of Appeals concluded that Fleet could not prevail on its malicious use of process claim.\(^{123}\) Fleet began its malicious use of process action while the underlying proceedings were pending on appeal and, therefore, before the underlying suit against it had terminated.\(^{124}\) Thus the court held that Fleet failed to satisfy the “termination of proceedings” element. Addressing the effect on a malicious use of process claim of a pending appeal of the underlying proceeding—a question of first impression in Maryland\(^{125}\)—the court stated: “It would be a waste of judicial resources to allow the plaintiff in the malicious prosecution action to prosecute his claim only to have it rendered meaningless if later the appeal of the underlying action is decided against him.”\(^{126}\)

The court held that Fleet also failed to satisfy the damages element of the tort because the injuries that it claimed to have endured were no different than those that any real estate developer would suffer during a challenge to the zoning of its property.\(^{127}\) The Court of Appeals stated: “To qualify as a ‘special injury,’ the damages must be different than those that ordinarily result from all suits for like causes of action.”\(^{128}\) The court elected not to consider the “prior proceed-

\(^{120}\) Id. (quoting North Point Constr. Co. v. Sagner, 185 Md. 200, 208-09, 44 A.2d 441, 445 (1945)).

\(^{121}\) Id. The court recognized that malice can be inferred from a lack of probable cause. Id.

\(^{122}\) Id. The Court of Appeals elected not to consider whether the plaintiff in the malicious use of process action can be an intervening party as well as an original party in the underlying lawsuit. See id.

\(^{123}\) Id. at 40-45, 694 A.2d at 957-59.

\(^{124}\) Id. at 41-43, 694 A.2d at 958-59. Although Fleet filed its amended complaint after the circuit court had dismissed the lawsuit by the Community Organization and Ingrao, the Court of Special Appeals had not yet acted on the Community Organization and Ingrao’s appeal of the decision. Id. at 43, 694 A.2d at 958.

\(^{125}\) Id. at 41, 694 A.2d at 958.

\(^{126}\) Id. at 43, 694 A.2d at 958 (quoting Moran v. Klatzke, 682 P.2d 1156, 1159 (Ariz. Ct. App. 1984)).

\(^{127}\) Id. at 44-45, 694 A.2d at 959.

\(^{128}\) Id. at 44, 694 A.2d at 959.
ing," "probable cause," and "malice" elements of malicious use of process in holding that Fleet's cause of action failed due to insufficient damages and lack of final disposition of the prior proceeding. 129

In considering the claim of abuse of process, the court recognized three elements a plaintiff must establish to prevail. 130 First, the defendant must have "willfully used process after it issued in a manner not contemplated by law." 131 Second, the defendant must have "acted to satisfy an ulterior motive." 132 Finally, the plaintiff must have suffered damages as a result of the defendant's "perverted use of process." 133

Because Fleet failed to establish the elements necessary for abuse of process, the Court of Appeals affirmed the circuit court's dismissal of Fleet's claim. 134 The court did not consider whether "Fleet properly alleged abuse of process after the lawsuits were filed because . . . Fleet did not allege legally cognizable damages." 135 Noting that Fleet alleged neither arrest nor seizure of property, the court indicated that Fleet's increased financing and construction costs as well as its lost rental revenue were insufficient to satisfy the abuse of process damages element. 136 Without sufficient damages, there could be no abuse of process, 137 just as actions for malicious use of process must fail absent a showing of damages. 138

4. Analysis.—In addressing the termination issue of malicious use of process and the damages element of abuse of process, the Court of Appeals in One Thousand Fleet Ltd. Partnership v. Guerriero answered some unresolved questions about the two torts. In the case of the termination element of malicious use of process, the court also created new legal doctrine. In doing so, however, the Court of Appeals did not in any way depart from the stringent standards that pre-

129. See id. at 40-45, 694 A.2d at 957-59.
130. See id. at 38, 694 A.2d at 956.
131. Id.
132. Id.
133. Id.
134. Id. at 48, 694 A.2d at 961.
135. Id. at 45, 694 A.2d at 960.
136. Id. at 45-46, 694 A.2d at 960. According to the court, the damages element of abuse of process will not be satisfied even if there exists a special injury that would satisfy the malicious use of process damages element because "[a]ll the [abuse of process cases] depend either upon the arrest of the person or the seizure of his property." Id. (quoting Bartlett v. Christhilf, 69 Md. 219, 231, 14 A. 518, 522 (1888)).
137. Id. at 48, 694 A.2d at 961.
138. Id. at 43-44, 694 A.2d at 959.
vious malicious use of process and abuse of process plaintiffs have had difficulty meeting.

a. Malicious Use of Process.—In Guerriero, the Court of Appeals applied the same five-part standard that it had used many times before. Because it found that the plaintiff failed to establish all five elements necessary to a claim of malicious use of process, the Court of Appeals was correct in its disposition of this portion of the case.

Fleet’s action for malicious use of process failed, in part, because it did not suffer the requisite damages for a malicious use of process claim. Fleet only suffered an inability to obtain final financing for the conversion of the warehouse to apartments, delays that increased the cost of construction, and a loss of rental revenue. Based on the ruling of the Court of Appeals three decades earlier in Shamberger v. Dessel, which was endorsed by the decision of the Court of Special Appeals in Herring v. Citizens Bank & Trust Co., such damages are predictable and, therefore, insufficient to establish a claim for malicious use of process. Shamberger recognized that special damages necessary for a malicious use of process claim cannot be satisfied by ordinary damages that any defendant involved in a similar lawsuit would experience. Most developers whose projects are the subject of lawsuits are likely to experience construction delays, lost rental income during the period of delay, and—depending on the fluctuations of interest rates and prices during the delay—less attractive financing

139. See id. at 37, 694 A.2d at 956; see also supra notes 32-83 and accompanying text.
140. See Guerriero, 346 Md. at 41-45, 694 A.2d at 958-59. The Court of Appeals said that the absence of even one of the five elements would prevent Fleet from succeeding in its cause of action. Id. This interpretation of the rule is consistent with prior Maryland decisions. See, e.g., Owens v. Graetzl, 149 Md. 689, 695, 132 A. 265, 267 (1926) (discussing the five elements of malicious use of process and explaining that all five must co-exist); Hooke v. Equitable Credit Corp., 42 Md. App. 610, 613, 402 A.2d 110, 113 (1979) (noting that the failure to plead even one of the five elements will defeat a malicious use of process claim); Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 539, 321 A.2d 182, 194 (1974) (stating that the absence of any one of the five elements of malicious use of process will be fatal to the suit).
141. See Guerriero, 346 Md. at 43-45, 694 A.2d at 959.
142. Id. at 44, 694 A.2d at 959.
143. See supra notes 30 and 73-76 and accompanying text for a discussion of Shamberger.
144. See supra note 76 for a discussion of Herring.
145. See Shamberger v. Dessel, 236 Md. 318, 321, 204 A.2d 68, 70 (1964) (stating that the filing of a caveat to a will did not meet the malicious use of process damages standard because a delay in possession of property is not a special injury “which would not ordinarily result in all caveats to wills involving devises of real property”); see also Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 548, 321 A.2d 182, 199 (1974) (explaining that the damages requirement for the malicious use of process claim was not met because the damage suffered “was only that damage typically sustained by anyone placed in similar straits.”).
and construction costs. In adhering to the precedent set by these cases, the Guerriero court confirmed what many previous malicious use of process plaintiffs must have realized: While recognizing malicious use of process causes of action in order to discourage frivolous and unjustifiably harmful litigation, Maryland courts will apply a sufficiently stringent damages standard in such cases so that they cannot be used to discourage other parties from asserting apparently valid, even if ultimately unsuccessful, legal claims.

The Court of Appeals could have held that Fleet’s malicious use of process claim failed simply by determining that Fleet did not satisfy the damages element.146 In Guerriero, however, the Court of Appeals elected not to dispose of Fleet’s claim based solely on the damages issue and, prior to its discussion of damages, answered “a question of first impression in this State.”147 Specifically, the court determined whether the termination element of a malicious use of process claim would be satisfied if the prior judgment was pending on appeal.148 In answering this question, the Court of Appeals likely made the decision of individuals contemplating the initiation of a malicious use of process cause of action even more difficult.

In making its determination, the Court of Appeals examined the law of other jurisdictions and reflected on the public policy reasons for following the law of these other states.149 Ultimately, the court crafted a compelling argument that the prior action by the Community Organization and Ingrao, which was awaiting disposition by the Court of Special Appeals when Fleet initiated its claim, had not been terminated.150 Suggesting that it should always be the goal of a court to discourage “‘repetitive and unnecessary litigation,’” the Court of Appeals stated that “‘[i]t would be a waste of judicial resources to allow the plaintiff in the malicious prosecution action to prosecute his

146. In many previous cases, the court ended its discussion of malicious use of process upon determining that the plaintiff failed to establish one of the required elements. See, e.g., Berman v. Karvounis, 308 Md. 259, 266-68, 518 A.2d 726, 729-30 (1987) (determining that, after only an analysis of the termination element, there was no malicious use of process); Shamberger, 236 Md. at 321, 204 A.2d at 70 (considering whether the filing of a caveat to a will resulted in a special injury, but not whether the filing occurred without probable cause and with malice); Owens v. Graetzel, 149 Md. 689, 698, 132 A. 265, 268 (1926) (deciding that it was unnecessary to consider elements such as malice, because it had been determined that there was probable cause).
147. Guerriero, 346 Md. at 41, 694 A.2d at 958.
148. Id.
149. Id. at 42-43, 694 A.2d at 958-59. The Court of Appeals considered cases from Alabama, Arizona, Florida, Indiana, Kentucky, and Michigan. Id. These cases held that an action giving rise to a claim for malicious use of process does not terminate until final resolution on appeal. Id.
150. Id. at 41-43, 694 A.2d at 958-59.
claim only to have it rendered meaningless if later the appeal of the underlying action is decided against him." 151 The Court of Appeals essentially mandated that an individual thinking about initiating a malicious use of process lawsuit may have to wait for years until all adverse decisions against the other party are upheld on appeal.

Fleet's failure to satisfy the "termination of proceedings" element of malicious use of process due to a pending appeal would not have prevented it from re-filing the action following the appeal; therefore, the Court of Appeals needed to consider another element of malicious use of process in order to prevent subsequent litigation. 152 Because it chose to examine the damages element, the court missed an opportunity to resolve some issues regarding the first two elements of the tort—the institution by the defendant of a prior civil proceeding against the present plaintiff (who was merely an intervening party in the underlying proceeding giving rise to this case), and the institution of that proceeding without probable cause. 153 In Guerriero, the prior proceeding was a zoning challenge by the Community Organization and Ingrao against the Board of Municipal and Zoning Appeals as well as the Mayor and City Council of Baltimore. 154 John Guerriero was not a plaintiff in the prior proceeding, and Fleet was an intervening party, not a named defendant. 155 The court mentioned that Guerriero, Ingrao, and the Community Organization had raised the issue of Fleet's absence from the underlying lawsuit. 156 The court also mentioned that Fleet responded by suggesting that it was essentially a named defendant because "it was clearly the target of each action." 157 An analysis of whether Fleet had standing to maintain its action would likely have provided as much guidance to future Maryland courts faced with the issue of an intervening party in a malicious use of process case as the court's discussion of the novel issue of termination, and it might have resolved some doubts in the minds of future malicious use of process plaintiffs. That is, a decision that an intervening party could assert a malicious use of process claim would have elimi-

152. Id. at 43, 694 A.2d at 959.
153. Id. at 37, 694 A.2d at 956.
154. Id. at 33, 694 A.2d at 954; see also supra notes 15-17 and accompanying text.
155. See Guerriero, 346 Md. at 33, 694 A.2d at 954.
156. Id. at 41, 694 A.2d at 957. Without addressing the merits of the arguments, the Court of Appeals mentioned Guerriero, Ingrao, and the Community Organization's contention that Fleet lacked standing due to its absence in the prior proceeding and Fleet's contention that it had the right to intervene because its interests were at stake in the zoning challenge. Id.
157. Id.
nated some anxiety on the part of individuals who are effectively the targets of litigation but, as in Guerriero, not the parties initially named in the prior proceeding.

The Court of Appeals also decided not to discuss the "probable cause" element of malicious use of process, leaving future courts with the task of resolving some contradictory statements from previous cases. In both North Point Construction Co. v. Sagner and Siegman v. Equitable Trust Co., the court suggested that probable cause exists whenever an attorney acting in good faith files a claim on behalf of a client, but in Wesko v. G.E.M., Inc., the fact that an attorney was representing a store in an attachment proceeding against a customer did not mean that there was probable cause. In the underlying proceeding giving rise to Fleet's malicious use of process claim, the Community Organization and Ingrao were represented by an attorney, as are most parties to litigation. If it had elected to consider the "probable cause" element of malicious use of process instead of damages, the court could have determined whether an attorney's representation of the Community Organization and Ingrao in the zoning challenge gave rise to a nearly irrebuttable presumption of probable cause or whether such representation was just one factor in establishing probable cause. If the former, then it will be less likely that a plaintiff can succeed in a malicious use of process claim because parties infrequently initiate civil litigation without the representation of an attorney.

158. See id. at 40-45, 694 A.2d at 957-59.
159. See supra notes 37-41 and accompanying text for a discussion of Sagner.
160. See supra notes 47-51 and accompanying text for a discussion of Siegman.
161. See Siegman v. Equitable Trust Co., 267 Md. 309, 317, 297 A.2d 758, 762 (1972); North Point Constr. Co. v. Sagner, 185 Md. 200, 208, 44 A.2d 441, 445 (1945); see also supra notes 41 and 51 and accompanying text.
162. See supra notes 52-55 and accompanying text for a discussion of Wesko.
163. Wesko v. G.E.M., Inc., 272 Md. 192, 200, 321 A.2d 529, 534 (1974); see also supra notes 53-54 and accompanying text. In Sagner, the Court of Appeals indicated that the only way to overcome the presumption of probable cause based on an attorney's presence in a case would be to prove the existence of a conspiracy between the attorney and the client to initiate proceedings for which there were no reasonable grounds. See North Point Constr. Co. v. Sagner, 185 Md. 200, 208, 44 A.2d 441, 445 (1945); see also supra note 41. Such a conspiracy, however, would constitute malice. The Siegman court noted: "'[M]alice may be characterized as the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but with an evil or rancorous motive influenced by hate.'" Siegman, 267 Md. at 314, 297 A.2d at 760 (quoting Drug Fair v. Smith, 263 Md. 341, 352, 283 A.2d 392, 398 (1971)). The plaintiff in Wesko overcame the presumption of probable cause based on a lawyer's presence without a showing of malice. Wesko, 272 Md. at 199, 321 A.2d at 533; see also supra note 55 and accompanying text.
164. Guerriero, 346 Md. at 35, 694 A.2d at 954.
b. Abuse of Process.—In finding insufficient Fleet's allegation that the Community Organization, Ingrao, and Guerriero engaged in an abuse of process, the Court of Appeals applied the three-part standard of the Herring and Berman cases. Although many courts have disposed of abuse of process cases by focusing on the first element—i.e., that the defendant willfully used process after it issued in a manner not contemplated by law—fewer courts have placed much emphasis on either the second element—i.e., that the defendant acted to satisfy an ulterior motive—or the third element—i.e., that the plaintiff suffered damages as a result of the defendant's misuse of process. The Guerriero court focused mainly on damages during its abuse of process analysis, and in doing so, it presented a damages standard for abuse of process even more stringent than the one facing malicious use of process plaintiffs.

In determining whether Fleet had been the victim of an abuse of process, the Guerriero court chose not to focus on the ulterior motive element of the tort. Although the court recognized an ulterior motive as an element of the tort, it did not address whether Ingrao, the Community Organization, or Guerriero possessed an ulterior motive in initiating the four lawsuits. The court did mention, however, Fleet's contention that the ulterior motive element was satisfied based on John Guerriero's desire to purchase the warehouse at a reduced price. Thus, the court suggested that the ulterior motive require-
ment may be easy to meet (i.e., with any evidence of questionable goals on the part of the plaintiff in the underlying proceeding) and not a significant obstacle for an abuse of process plaintiff.

On the other hand, the court’s discussion of the damages element\textsuperscript{173} did establish a difficult standard for a plaintiff in an abuse of process action to meet. The court ultimately held that Fleet had not proven legally cognizable damages.\textsuperscript{174} It refuted Fleet’s claim that it had met the damages requirement by establishing loss of money, a delay of its project, and increased construction, legal, and financing costs.\textsuperscript{175} The court recalled a statement made by Judge McSherry in Bartlett v. Christhilf:\textsuperscript{176} “All the cases upon this subject [abuse of process] depend either upon the arrest of the person or the seizure of his property; and we have been referred to none where this action was sustained for an injury to the plaintiff’s business or good name.”\textsuperscript{177}

Because Fleet had not suffered an arrest or seizure of its property,\textsuperscript{178} the Court of Appeals correctly held that Fleet had failed to state a cause of action for abuse of process. In reaching this holding, the court explicitly and unequivocally reinforced the requirements for meeting the damages element of an abuse of process claim. Given the omission of these details from many previous cases,\textsuperscript{179} such a reminder was long overdue. However, the court established a definitive abuse of process damages standard that will be extremely difficult for plaintiffs to meet. Plaintiffs in malicious use of process cases have had enough difficulty meeting a damages standard that includes a “special injury” element,\textsuperscript{180} which is not even present in the arrest or seizure of

\textsuperscript{173} See Guerriero, 346 Md. at 45-48, 694 A.2d at 960-61.

\textsuperscript{174} See id. at 48, 694 A.2d at 961.

\textsuperscript{175} See id. at 47, 694 A.2d at 960.

\textsuperscript{176} Id. at 45-46, 694 A.2d at 960 (citing Bartlett v. Christhilf, 69 Md. 219, 231, 14 A. 518, 522 (1888)). In Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 321 A.2d 182 (1974), the Court of Special Appeals noted that damages were an element of abuse of process and that they were evidenced only by an arrest of a person or seizure of property. Id. at 534, 536, 321 A.2d at 192-93.

\textsuperscript{177} Bartlett, 69 Md. at 231, 14 A. at 522.

\textsuperscript{178} See Guerriero, 346 Md. at 32-35, 694 A.2d at 953-55.

\textsuperscript{179} See, e.g., Keys v. Chrysler Credit Corp., 303 Md. 397, 412, 494 A.2d 200, 207 (1985) (dismissing an abuse of process claim merely because there was no misuse or perversion of the process after its issuance); Walker v. American Sec. & Trust Co., 237 Md. 80, 88, 205 A.2d 302, 307 (1964) (concluding that there was no abuse of process simply because a habeas corpus proceeding was a proper means for a conservator trust company to regain control of its ward).

\textsuperscript{180} See supra notes 73-79 and accompanying text.
property standard that the Gueriero court articulated for abuse of process. Essentially, unless a plaintiff who has been the victim of an improper use of process by someone with even the worst possible motive can also establish that he was arrested or suffered a seizure of property, his action for abuse of process will fail.

5. Conclusion.—In correctly deciding that a zoning challenge by a community organization and one of the area’s residents was not a malicious use of process or abuse of process, the Court of Appeals addressed a question of first impression and held that a proceeding pending appeal will not satisfy the termination element of malicious use of process. Furthermore, the court reiterated that any injury short of arrest or seizure of property will not meet the damages requirement of abuse of process. In so holding, although it elected not to illuminate further the details of the “prior proceeding” and “probable cause” elements of malicious use of process and the “ultimate motive” element of abuse of process, the Court of Appeals shed some much needed light on the “termination of proceedings” element of malicious use of process and reinforced the damages element of abuse of process. Unfortunately for future malicious use of process and abuse of process plaintiffs, the Court of Appeals adhered to stringent damages standards that have proven difficult to meet, and in the case of malicious use of process, the court likely made the initiation of such an action even more burdensome with its requirement that a plaintiff wait until after the defendant exhausts all appeals in the underlying proceeding.

Christopher W. Pate

D. Customer Use of Non-Public Restrooms: Clarifying the Jury’s Role in Applying Maryland’s Tort Immunity Statute

In Houston v. Safeway Stores, Inc., the Court of Appeals construed, for the first time, Maryland’s statute granting immunity to retail establishments from liability arising from a customer’s use of a non-public

181. See supra note 136 and accompanying text.
182. Gueriero, 346 Md. at 40-48, 694 A.2d at 957-61.
183. Id. at 43, 694 A.2d at 958-59.
184. Id. at 48, 694 A.2d at 961.
185. See supra notes 153-164, 170-172 and accompanying text.
186. See supra notes 147-151 and accompanying text.
187. See supra notes 173-181 and accompanying text.
restroom.\textsuperscript{2} The court found that there was sufficient evidence to support the jury's finding that the restroom was "public," and therefore, the statute did not shield the store from liability.\textsuperscript{3} In so finding, the court reversed the Court of Special Appeals,\textsuperscript{4} which held, as a matter of law, that the facility in question was "not a public restroom,"\textsuperscript{5} and that, therefore, the statute granting immunity to the retail establishments governed the case.\textsuperscript{6} In its opinion, the Court of Appeals, in determining the nature of a restroom for purposes of the statute, examined the legislative history of section 5-378 and considered the legislature's intent in enacting the law.\textsuperscript{7} In addition, the court clarified the proper legal analysis for cases involving customers injured while attempting to use a toilet in a retail establishment.\textsuperscript{8} Finally, the court defined the purview of the jury in determining the nature of the restroom at issue.\textsuperscript{9} By confirming the jury's power to determine threshold factual questions, Houston places a practical limitation on the application of the immunity statute. Further, viewing the statute in the context of the law in other jurisdictions and examining the motivations behind its enactment suggest the law is special interest legislation.

\textsuperscript{2} Md. Code Ann., Cts. & Jud. Proc. § 5-378 (1995). This section was renumbered in 1997, and is now section 5-635. Md. Code Ann., Cts. & Jud. Proc. § 5-378 (1997) (noting transfer of immunity provisions under that section to section 5-635). However, for simplicity, this Note will refer to the statute as section 5-378, as this was the number of the section when the Court of Appeals decided the principal case. The statute reads:

[Immunity]—Customer use of employee toilet facility in retail establishment.

(a) Definition.—In this section "customer" means an individual who is lawfully on the premises of a retail establishment.

(b) In general.—A retail establishment and any employee of a retail establishment are not civilly liable for any act or omission in allowing a customer, including a customer as defined in § 24-209 of the Health-General Article, to use a toilet facility that is not a public toilet facility, if the act or omission:

(1) Is not willful or grossly negligent;

(2) Occurs in an area of the retail establishment that is not accessible to the public; and

(3) Results in an injury to or death of the customer or any individual other than an employee accompanying the customer.

(c) Employee toilet not public restroom.—Notwithstanding any provision of this section, an employee toilet facility is not to be considered a public restroom.


\textsuperscript{3} Houston, 346 Md. at 523-24, 697 A.2d at 860-61.


\textsuperscript{5} Id. at 198, 674 A.2d at 97 (internal quotation marks omitted).

\textsuperscript{6} Id. at 198-200, 674 A.2d at 97-98.

\textsuperscript{7} Houston, 346 Md. at 511-21, 697 A.2d at 855-59.

\textsuperscript{8} Id. at 522, 697 A.2d at 860.

\textsuperscript{9} Id. at 522-24, 697 A.2d at 860-61.
The Case.—While shopping at a Safeway store in Lanham, Maryland, on September 16, 1992, Carrie Houston asked a store employee whether there was a restroom available for her use. She was told to go to the back of the store and proceed through a set of double doors into a storage or warehouse area. While searching for the restroom in this area, Ms. Houston slipped on a piece of twine and fell to the floor, suffering an injury that required the amputation of one of her toes.

Ms. Houston filed a negligence suit against Safeway, alleging that the store had “breached the applicable standard of care by failing to maintain its premises in a safe condition.” Safeway claimed that it was immune from civil liability pursuant to section 5-378 of the Courts and Judicial Proceedings Article.

The case was bifurcated, and a jury trial was held on the issue of liability in the Circuit Court for Prince George’s County. At the beginning of the proceedings, a bench conference was held to determine the issues appropriate for expert testimony. At this conference, the trial judge stated that the question whether the restroom was public was a matter for the jury “without the aid of opinions by ‘experts.’”

At trial, both parties presented evidence on the question whether the restroom used by Ms. Houston in the Safeway store should be considered “public.” It was shown that the double doors, through which Ms. Houston was instructed to go, each bore a sign reading “No Admittance.” There were no restrooms in the retail area of the store. The first-floor facility, to which Ms. Houston was directed, was the only facility equipped for use by handicapped persons, although there were two other facilities on the second floor located near the employee lounge. Customers in need of a restroom were never directed to the second-floor facilities, but “were directed exclusively to

10. Id. at 506, 697 A.2d at 852.
11. Id.
12. Id.
13. Id.
14. Id. See supra note 2 for a description of the statutory provisions.
15. Houston, 346 Md. at 507, 697 A.2d at 853.
16. Id.
17. Id.
18. Id. (stating that a “great deal of conflicting evidence was presented at trial on the question of whether the restroom at issue should be considered a ‘public’ restroom”).
20. Houston, 346 Md. at 508, 697 A.2d at 853.
21. Id.
the first-floor restroom." Furthermore, Ms. Houston presented evidence that the double doors, through which she had to pass in order to reach the first-floor restroom, were sometimes kept open, preventing customers from reading the "No Admittance" signs.

The parties also presented evidence on the issue of whether customers were required to get permission before using the restroom. Safeway maintained that all customers seeking to use the restroom must ask for permission because the first-floor facility is always locked, and the key is kept at the front of the store. Houston contended, however, that customers familiar with the store can proceed directly to the first-floor facility without asking for permission first. She also stated that during the more than twenty years she had used the restroom as a customer, it was rarely locked, but if it was locked, the key was always hanging on a nail next to the facility and readily available.

At trial, the parties also addressed the issue of who used the facility, and how often. There was no evidence presented that a customer was ever denied access to the first-floor restroom. Safeway testified that approximately four customers per shift were directed to the first-floor restroom. Using these figures, Houston argued that as many as three thousand customers used Safeway's first-floor restroom each year. Although Safeway employees are permitted to use the first-floor restroom, the "employees used this facility on a less frequent basis than customers."

After the plaintiff's case-in-chief, and again at the close of all evidence, Safeway moved for judgment, relying on the immunity granted by section 5-378. The trial court reserved ruling on both motions and submitted the case to the jury.

The jury, using a special verdict form prepared by Safeway, returned the following findings: "(1) that the restroom was not an employee toilet facility, (2) that the restroom was a public toilet facility,

22. Id.
23. Id. at 508-09, 697 A.2d at 853.
24. Id. at 508-10, 697 A.2d at 853-54.
25. Id. at 509, 697 A.2d at 854.
26. Id.
27. Id. at 509-10, 697 A.2d at 854.
28. Id. at 510, 697 A.2d at 854.
29. Id.
30. Id. Safeway's corporate designee also testified that "four or five" customers per day were directed to the first floor restroom. Id.
31. Id.
32. Id.
33. Id. See supra note 2 for the language of the statute.
34. Houston, 346 Md. at 510, 697 A.2d at 854.
(3) that Safeway was negligent, and (4) that Petitioner was not contributorily negligent."\textsuperscript{35}

Safeway then moved for judgment notwithstanding the verdict.\textsuperscript{36} After a hearing, the trial court found, as a matter of law, that the restroom at issue was not public and that under section 5-378 Safeway was immune from liability.\textsuperscript{37} The court did not discuss any other requirements of the statute.\textsuperscript{38}

Ms. Houston appealed to the Court of Special Appeals, which affirmed the trial court's ruling.\textsuperscript{39} The Court of Special Appeals held that the restroom was not public, and thus, the action was governed by section 5-378, which granted immunity to Safeway.\textsuperscript{40} Judge Cathell, writing for the court, began his examination of the issue by reviewing the legislative history of the statute.\textsuperscript{41} After examining the evolution of the statute,\textsuperscript{42} the court concluded that the General Assembly intended retail establishments to have immunity from liability for customers' permissive\textsuperscript{43} use of their "private and/or employee" facilities.\textsuperscript{44} The court felt that the appropriate distinction under section 5-378 was "between public and private facilities."\textsuperscript{45} Thus, Judge Cathell turned the analysis to "what exactly differentiates a public facility from a private one,"\textsuperscript{46} and conducted an exhaustive examination of the definition of the word "public."\textsuperscript{47} The court held that:

\textsuperscript{35} Id. at 510-11, 697 A.2d at 854.
\textsuperscript{36} Id. at 511, 697 A.2d at 854.
\textsuperscript{37} Id.
\textsuperscript{38} Id. Specifically, the trial court did not discuss subsections (b)(1) and (b)(2) of section 5-378, which require that there be no "willful" or "grossly negligent" conduct and that the injury occur in an area not "accessible" to the general public. Id. See supra note 2 for the full text of the statute.
\textsuperscript{39} Houston, 109 Md. App. at 200-01, 674 A.2d at 97-98.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 184-89, 674 A.2d at 90-93.
\textsuperscript{42} Id.; see also infra notes 62-71 and accompanying text (describing the evolution of the statute).
\textsuperscript{43} See infra note 68 and accompanying text (distinguishing section 24-209, which grants immunity when retail businesses are required to provide access to customers with specified physical disorders, from section 5-378, which grants immunity to all retailers that allow customers to use their employee restrooms).
\textsuperscript{44} Houston, 109 Md. App. at 190-91, 674 A.2d at 93.
\textsuperscript{45} Id. at 191, 674 A.2d at 93. It is important to note that the parties had distinguished only between "public" and "employee" facilities. Id. For Judge Cathell, this was a crucial difference. Because, as Judge Cathell put it, "while an employee rest room will always be a private, i.e., nonpublic, rest room, it cannot be said that a private rest room will always be an employee rest room." Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 191-97, 674 A.2d at 93-96.
A public rest room is one that is (1) generally unlocked and devoid of other barriers to its entry, (2) available for the unrestricted use of the general public, (3) situated in an area of the retail establishment to which the general public is invited to participate in the primary activities of the establishment, (4) duly identifiable as a public rest room by way of signs, such as "Rest Rooms," "Mens," "Ladies," in open view in the retail area of the store, and (5) for which no permission need be obtained before use.

The court then applied the facts of the case to this definition and found that the restroom at issue could not reasonably be characterized as "public." Further, the court held that "occasional use by customers" did not render an otherwise private restroom public. Thus, the court affirmed the trial court's ruling that section 5-378 granted Safeway immunity from Ms. Houston's suit.

Ms. Houston appealed to the Court of Appeals, which granted certiorari to review the judgment of the intermediate appellate court.

2. Legal Background.—Maryland first enacted a statute addressing customer access to non-public restrooms and a retail establishment's immunity from suit for providing such access in 1987. Prior to that, Maryland followed the common law principles of premises liability.

a. The Common Law.—Under the common law principles of negligence based on premises liability, courts first classify the injured plaintiff as a trespasser, a licensee, or an invitee, and then courts determine the level of care the defendant owed to the plaintiff based on that classification. Determining the classification of the plaintiff is normally a question of fact left to the jury. In Maryland, customers

48. Id. at 197, 674 A.2d at 96 (footnote omitted).
49. Id. at 198-99, 674 A.2d at 97.
50. Id. at 200, 674 A.2d at 98.
51. Id. at 200-01, 674 A.2d at 98.
52. Houston, 346 Md. at 511, 697 A.2d at 855.
53. See id.; Houston, 109 Md. App. at 185, 674 A.2d at 90 (tracing the legislative history of the statute).
55. See, e.g., Coken v. Peterson, 92 N.E.2d 352, 354 (III. App. Ct. 1950) (holding that the issue of whether the plaintiff was an invitee or trespasser after passing through a swinging door in the mistaken belief that it led to the wash room, was a question for the jury).
in retail establishments are considered business invitees. Based on this classification, store owners owe their customers “a duty of ordinary care to maintain their premises in a reasonably safe condition.” However, this duty only extends to parts of the store where customers are invited.

Thus, the common law only barred recovery to customers, categorized as “invitees,” when they exceeded the scope of their invitation by going to a place not covered by the invitation. Under these principles, a retail establishment could protect itself from liability by denying customers access to private restrooms. Thus, the law prior to 1987 provided a disincentive for retailers to allow customers access to their private facilities. The retailers’ potential liability for negligence resulted in some customers, who suffered from certain medical conditions, being subject to “great embarrassment and inconvenience when they were denied access to restrooms in stores.”

b. The Origins of the Immunity Statute.—The legislature passed section 24-209 of the Health-General Article in 1987. That statute was designed to provide customers with access to restrooms when nec-

56. Giant Food, Inc. v. Mitchell, 334 Md. 633, 636, 640 A.2d 1134, 1135 (1994); Pellicot v. Keene, 181 Md. 135, 137, 28 A.2d 826, 827 (1942); see also RESTATEMENT (SECOND) OF TORTS § 332 cmt. e (discussing the two classes of business visitors).

57. Giant Food, 334 Md. at 636, 640 A.2d at 1135.

58. See Pellicot, 181 Md. at 139, 28 A.2d at 828 (holding that store owners’ duty of care does not extend to areas behind the store’s counters).

59. See RESTATEMENT (SECOND) OF TORTS § 332 cmt. l (discussing “scope of invitation” as it applies to tort liability based on land conditions and use).

60. Houston, 109 Md. App. at 185, 674 A.2d at 90.

61. Houston, 346 Md. at 511, 697 A.2d at 855.


(a) “Customer” defined.—In this section “customer” means an individual who:

(1) Suffers from Crohn’s disease, ulcerative colitis or any other inflammatory bowel disease, or any other medical condition that requires immediate access to a toilet facility; or

(2) Utilizes an ostomy device.

(b) In general.—At the request of a customer, and where a public restroom is not readily available, each retail establishment with 20 or more employees that has a toilet facility for its employees shall allow the customer to use the facility.

(c) Employee toilet not public restroom.—Notwithstanding any provision of this section, an employee toilet facility is not to be considered a public restroom.

(d) Civil liability of retail establishment or employee.—A retail establishment and any employee of a retail establishment are not civilly liable for any act or omission in allowing a customer to use a toilet facility that is not a public toilet facility, if:

(1) The act or omission is not willful or one of gross negligence;

(2) The act or omission occurs in an area of the retail establishment that is not accessible to the public; and
necessary for medical reasons while limiting a retailer's liability if those customers were injured as a result of the retailer's ordinary negligence. The original statute was restricted to businesses with twenty or more employees.

In 1989, these tort immunity provisions were expanded with the passage of section 24-210. Section 24-210 gave immunity to "retail establishments of any size" that allowed "any customer to use an employee toilet facility." The limited immunity provisions of section 24-209(d) were removed and transferred to section 24-210. Thereafter, the essential difference between section 24-209 and section 24-210 was that section 24-209 "required" retailers to provide access to customers with specified medical conditions, while section 24-210

(3) The act or omission results in an injury to or death of the customer or anyone other than an employee accompanying the customer.

Id. Section 24-209 was originally enacted as section 11-209 of Health Environmental Article; however, the legislature later transferred Title 11 to the Health-General Article. See 1987 Md. Laws 306.


65. 1989 Md. Laws 387. Thus, after 1989, section 24-210 read:

Same—Civil liability of retail establishment or employee.

(a) "Customer" defined.—In this section, "customer" means an individual who is lawfully on the premises of a retail establishment.

(b) In general.—A retail establishment and any employee of a retail establishment are not civilly liable for any act or omission in allowing a customer, including a customer as defined in § 24-209 of this subtitle, to use a toilet facility that is not a public toilet facility, if:

(1) The act or omission is not willful or one of gross negligence;

(2) The act or omission occurs in an area of the retail establishment that is not accessible to the public; and

(3) The act or omission results in an injury to or death of the customer or anyone other than an employee accompanying the customer.

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(c) Employee toilet not public restroom.—Notwithstanding any provision of this section, an employee toilet facility is not to be considered a public restroom.

granted immunity for "allowing" any customers to use non-public restrooms.68

In 1990, Maryland's immunity provisions were consolidated.69 Section 24-210 was re-enacted, without substantive changes, as section 5-378 of the Courts and Judicial Proceedings Article.70

Recently, in 1997, the provisions under section 5-378 were re-numbered and transferred to section 5-635 of the same Article.71

c. **Judgment Notwithstanding the Verdict.**—Maryland Rule 2-532 governs the operation of motions for judgment notwithstanding the verdict (j.n.o.v.).72 Subsection (a) of the rule provides that "[i]n a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion."73 The moving party is "entitled to a . . . JNOV when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense."74 However, if there exists any legally competent evidence, however slight, from which the jury could have found as they did, a j.n.o.v. would be improper.75

When considering a motion for j.n.o.v., the trial court must assume the truth of all credible evidence, as well as all "reasonable inferences" drawn from such evidence, and then view the evidence and the inferences in the "light most favorable to the party opposing the motion."76 Subsection (e) of Rule 2-532, governing the disposition of j.n.o.v. motions, states that in circumstances where the jury has returned a verdict, "the court may deny the motion, or it may grant the motion, set aside any judgment entered on the verdict, and direct the

68. See Houston, 346 Md. at 515, 697 A.2d at 856 (discussing the difference between the two statutes).
69. See id.; 1990 Md. Laws 546.
70. However, the title of the statute was changed from "Same—Civil liability of retail establishment or employee" to "[Immunity]—Customer use of employee toilet facility in retail establishment." Houston, 346 Md. at 515 n.4, 697 A.2d at 857 n.4; see also supra note 2 (quoting Md. Code Ann., Cts. & Jud. Proc. § 5-378 in full).
71. See supra note 2.
72. Md. R. 2-532.
73. Md. R. 2-532(a); see Annapolis Mall, Ltd. v. Yogurt Tree, Inc., 299 Md. 244, 256, 473 A.2d 32, 38 (1984) (holding that "the grounds which may be advanced for a judgment n.o.v. are limited to those advanced in support of the motion for directed verdict").
76. Id.
entry of a new judgment.”77 Alternatively, “[i]f a verdict has not been returned, the court may grant the motion and direct the entry of judgment or order a new trial.”78 In addition, if the party’s motion for j.n.o.v. is granted, “the court . . . shall decide whether to grant that party’s motion for new trial, if any, should the judgment thereafter be reversed on appeal.”79

Upon appeal, if the appellate court finds that the trial court erred in granting the j.n.o.v., subsection (f) (1) provides three possible remedies: the appellate court may enter judgment on the original verdict, remand the case for a new trial if the trial court granted a conditional motion for a new trial, or order a new trial.80 If, however, the motion for j.n.o.v. is denied by the trial court and the appellate court reverses, it may “enter judgment as if the motion had been granted or . . . itself order a new trial.”81 When reviewing such a denial, the court must “assume the truth of all credible evidence and all inferences of fact reasonably deducible from it tending to sustain the decision of the trial court in favor of the nonmoving party.”82

3. The Court’s Reasoning.—In Houston, the Court of Appeals held that there was sufficient evidence for the jury’s finding that the restroom was “public,” and that, therefore, section 5-378 did not shield Safeway from liability.83 Writing for the majority, Judge Chasanow considered the legislature’s intent in passing section 5-378 and concluded that a “totality of the surrounding circumstances” test should be applied to determine whether the restroom is “public.”84

The court began its analysis by reviewing the history of the immunity statute. The court stated that “[p]rior to 1987, Maryland retailers were not required to allow their customers access to any restroom on the premises that was maintained solely for use by employees and not for use by the public.”85 The court said that this policy resulted in stores’ denial of restroom access to some customers who suffered from medical conditions such as inflammatory bowel disease.86 Consequently, the court noted, the General Assembly passed section 24-209

77. Md. R. 2-532(e).
78. Id.
79. Id.
83. Houston, 346 Md. at 523-24, 697 A.2d at 860-61.
84. Id. at 518, 697 A.2d at 858.
85. Id. at 511, 697 A.2d at 855.
86. Id.
of the Health-General Article to help these customers gain access to restrooms, while at the same time limiting store liability should the customer be injured.\textsuperscript{87} The statute mandated access to non-public restrooms for customers with special medical conditions if the store employed twenty or more people.\textsuperscript{88} In 1989, the limited immunity provisions of section 24-209 were expanded with passage of section 24-210, which granted immunity regardless of the customer's medical condition or the size of the establishment.\textsuperscript{89} The court noted that the essential difference between section 24-209 and 24-210 was that in the former, persons suffering from specified medical conditions were entitled to use non-public facilities, while under the latter, access to such facilities for any customer was at the discretion of the store.\textsuperscript{90} The court observed that this was the state of the law until 1990, when all of Maryland's immunity provisions were consolidated, and section 24-210 was transferred to section 5-378 of the Courts and Judicial Proceedings Article while section 24-209 remained unchanged.\textsuperscript{91}

The court then turned its focus to the intermediate court's reasoning.\textsuperscript{92} The Court of Appeals noted that the intermediate court did not base its decision on either the reasoning of the trial court or on any arguments presented by the parties.\textsuperscript{93} Instead, the Court of Special Appeals considered the wording of section 24-209 and section 5-378, noting as significant that section 24-209 expressly limited its provisions to "employee" restrooms while section 5-378 applied to all non-public restrooms.\textsuperscript{94} The Court of Appeals concluded that the intermediate court seemed to be "imply[ing] that the legislature retained the distinction between public and employee toilets in the 1989 reenactment of § 24-209, but that the legislature changed the distinctions to public versus private toilets when it enacted § 24-210."\textsuperscript{95} The Court of Appeals, however, found no evidence to suggest that the legislature intended the terms "not a public toilet facility" and "employee toilet facility" to be interpreted differently.\textsuperscript{96} Thus, the court held that for the purposes of these two statutes, the terms "private rest-

\begin{itemize}
\item \textsuperscript{87} Id. at 511-12, 697 A.2d at 855.
\item \textsuperscript{88} Id. at 513, 697 A.2d at 855.
\item \textsuperscript{89} Id., 697 A.2d at 856.
\item \textsuperscript{90} Id. at 515, 697 A.2d at 856.
\item \textsuperscript{91} Id., 697 A.2d at 856-57.
\item \textsuperscript{92} Id. at 511-15, 697 A.2d at 855-57.
\item \textsuperscript{93} See id. at 515, 697 A.2d at 857.
\item \textsuperscript{94} See id. at 516, 697 A.2d at 857 (reviewing the intermediate court's treatment of the difference between "non-public" and "employee").
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\end{itemize}
room," "non-public restroom," and "employee restroom" could be used interchangeably.\textsuperscript{97}

The court went on to review the intermediate court's formulation of a five-factor definition for "public restroom."\textsuperscript{98} However, the court concluded that there was no reason to believe that the legislature intended such a specific definition for the purposes of section 5-378.\textsuperscript{99} Instead, the court held that "[a] court should be able to consider the totality of the surrounding circumstances in any individual case to determine whether a particular restroom is public."\textsuperscript{100} If the toilet is found to be a public facility, then the immunity provisions of section 5-378 and section 24-209 do not apply.\textsuperscript{101} However, if the toilet is found to be private, non-public, or an employee facility, then the immunity provisions of the statutes apply, assuming that the other requirements of the statutes are satisfied.\textsuperscript{102}

In dicta, the court, in order to aid future litigants and retail establishments, addressed the "accessibility" requirement of section 5-378(b)(2), which states that the statute applies to areas within a retail establishment that are not accessible to the public.\textsuperscript{103} The court agreed with the lower court's conclusion that "the fact that the store, with some regularity, directed patrons to that rest room does not render the facility accessible within the meaning of the statute."\textsuperscript{104} In other words, retailers would not lose immunity protections under section 5-378 simply because they regularly allowed customers to use a particular restroom. Rather, the court noted that the term "not accessible," as used in the statute, refers to areas such as stock rooms where shipments of new merchandise are received.\textsuperscript{105} The court noted that such areas "may not be maintained in as safe a condition as the retail floor," and therefore it is possible that a customer might be injured while in a stock room.\textsuperscript{106} The court stated that the provisions of sec-

\textsuperscript{97} Id. at 516-17, 697 A.2d at 857.
\textsuperscript{98} Id. at 517-18, 697 A.2d at 857-58.
\textsuperscript{99} Id. at 518, 697 A.2d at 858.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 522, 697 A.2d at 860.
\textsuperscript{102} Id. at 518, 697 A.2d at 858. Specifically, section 5-378(b) requires that the act or omission not be "willful or grossly negligent" and that the injury occur in a non-accessible area of the store. See supra note 2 (reproducing the text of section 5-378 in full); supra note 38 and accompanying text. The same requirements apply to section 24-209. See supra note 62.
\textsuperscript{103} Houston, 346 Md. at 519-20, 697 A.2d at 858-59.
\textsuperscript{104} Id. at 519, 697 A.2d at 858 (quoting Houston, 109 Md. App. at 198-99, 674 A.2d at 97 (footnote omitted)).
\textsuperscript{105} Id. at 519-20, 697 A.2d at 859.
\textsuperscript{106} Id. at 520, 697 A.2d at 859.
tion 5-378 were meant to protect a retailer in such a case. However, the court explained that section 5-378 would not shield an establishment from liability if a customer were injured in an accessible area, such as the retail floor. In such a case, the customer would be considered an invitee and the store owner would have a duty to maintain the area in a reasonably safe condition.

Finally, the court addressed the procedural grounds for reversing the trial court’s ruling. The court held that because there were material facts in dispute as to whether the restroom was public, it was improper for the trial court to grant the defendant’s motion for judgment notwithstanding the verdict. The court cited six separate facts in dispute that it found to be material:

(1) that the “no admittance” sign on the double doors was clearly visible to customers versus that the sign is not visible when the double doors are blocked open, as is sometimes done; (2) that persons who knew the location of the toilet were required to ask permission before using it versus that Petitioner’s daughter may have used the toilet in the past without asking for permission; (3) that the door to the first-floor toilet was always kept locked versus that it was not locked on the day that Petitioner was injured; (4) that if the door to the first-floor restroom was kept locked the key was kept in the front of the store versus that Petitioner’s daughter always found the key hanging right next to the door; (5) that very few people were ever directed to the first-floor restroom versus that as many as 3,000 people annually were so directed; and (6) that employees commonly used the first-floor restroom versus that they rarely used it.

Considering the dispute over material facts, the court held that it “was appropriate for the trial judge to decline to rule on Safeway’s motions for judgment and let the jury resolve the factual issue.” Moreover, the lower court should have been bound by the jury’s finding that the restroom was a public facility, because there was sufficient evidence to sustain such a finding.

107. Id.
108. Id.
109. Id. at 521, 697 A.2d at 859-60.
110. Id. at 523, 697 A.2d at 860.
111. Id. at 522-23, 697 A.2d at 860.
112. Id. at 523, 697 A.2d at 860.
113. Id.
Judge Raker dissented, stating that the lower court's ruling should be affirmed. In reaching this conclusion, Judge Raker mentioned two factors: (1) that the restroom was located approximately ninety feet inside the stock area, and (2) that the stock area and restroom were behind doors marked "No Admittance." Based on these two factors, Judge Raker opined that it was appropriate for the trial court to find that the restroom in question was not a public facility as a matter of law. Moreover, Judge Raker stated that she did not agree with the majority's conclusion that the facts in dispute were material—specifically, whether customers knew the location of the restroom or had to ask permission, the existence and location of a key, or the amount of use. In Judge Raker's opinion these facts did not affect the status of the restroom as being either public or non-public.

4. Analysis.—In Houston v. Safeway, the Court of Appeals wisely left to the jury the threshold factual determination of whether a particular restroom is "public," and therefore beyond the scope of Maryland's statute granting immunity to retail stores that permit customers to use their non-public restrooms. In reversing the lower courts, the court applied the correct standard for reviewing a judgment notwithstanding the verdict, and it found that the existence of disputed material facts precluded a finding as a matter of law that the facility in question was non-public. The court resisted the temptation to adopt a narrow, judicially defined test for determining when toilets are "public," and instead developed a "totality of the circumstances" test, which leaves the power to consider all factors relevant to a particular situation to the fact finder. With this decision, the Court of Appeals clarified the application of Maryland's unique immunity statute. However, in order to fully grasp the significance of this immunity statute, it must be viewed in the broader context of what other jurisdictions are doing, as well as the policy considerations that suggested the necessity of the statute originally.

a. Procedural Grounds for Reversal.—The Court of Appeals's decision to overturn the ruling of the Court of Special Appeals was based on solid procedural grounds, and the court correctly applied
the proper standard of appellate review. At trial Safeway moved for judgment both at the end of the plaintiff's case-in-chief and after the close of all evidence. When Safeway again renewed its motion for judgment after the jury's verdict, the renewed motion became a motion for judgment notwithstanding the verdict (j.n.o.v.), pursuant to Rule 2-532(b).

In the Court of Special Appeals opinion, Judge Cathell claimed that there was "absolutely no evidence" that the first-floor restroom in the Safeway store was public. In its appeal to the Court of Appeals, Safeway argued that "uncontroverted evidence" showed that the restroom was a private facility. However, as the Court of Appeals correctly noted, there were material facts in dispute in this case. There was conflicting evidence presented on several issues, including the following: the visibility of the "No Admittance" sign, whether the restroom was kept locked, the location of the key to the restroom, and the amount of use by patrons versus employees. Considering the existence of material facts in dispute and the procedural rules regarding j.n.o.v., it was improper for the trial court to grant Safeway's motion for j.n.o.v., and for the Court of Special Appeals to affirm the trial court. Thus, the Court of Appeals's decision to reverse the judgment and reinstate the jury's verdict was procedurally sound.

b. The Test: Which Toilets Are Public?—In overruling the Court of Special Appeals, the Houston court developed a broad "totality of the surrounding circumstances" test to determine whether a restroom is "public." This is in sharp contrast to the intermediate court's very particularized five-factor definition of "public." While each approach has its merits, the Court of Appeals's "totality of the surrounding circumstances" test offers the best method of establishing whether the restroom at issue is public.

120. See supra text accompanying note 33.
121. See Md. R. 2-532(b). Subsection (b) of Rule 2-532 states in part: "If the court reserves ruling on a motion for judgment made at the close of all the evidence, that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party or if no verdict is returned." Id.
122. Houston, 109 Md. App. at 194, 674 A.2d at 95.
124. Houston, 346 Md. at 524, 697 A.2d at 861.
125. Id.; see supra notes 19-27 and accompanying text.
126. See supra text accompanying notes 72-82.
127. See supra text accompanying note 100.
128. See supra text accompanying note 48.
(1) The Five-Factor Definition.—After an exhaustive survey of the term "public" as used and defined in numerous contexts, Judge Cathell settled on a "concise" definition that clearly sets out the parameters of what constitutes a public restroom. His very limited list of characteristics would permit only restrooms that are unlocked, open to the public without having to ask permission, located on the sales floor, and equipped with a posted sign indicating that there is a restroom.

Judge Cathell’s exact definition of a public restroom would certainly make it simpler to determine whether the immunity statute, section 5-378, applies to a particular case. Fact finders or defendant retailers would only need to hold the list out in front of them and check off whether the factors were present to determine whether the retailer was immune from suit. Should any one factor be lacking—e.g., a sign missing from the restroom door—the restroom facility could be declared non-public, and the statute would grant immunity to the retail establishment.

The practical result of this approach would be predictability. Any retail establishment endeavoring to ensure that the protections of section 5-378 extended to its restroom facility would be on notice as to exactly which characteristics would render a restroom “public.” With an almost formulaic certainty, retailers would be able to predict whether they were vulnerable to suit for any particular restroom on their premises.

However, it is the very predictable nature of Judge Cathell’s five-factor definition that is its major limitation. This approach, while clear, is extremely rigid. It allows only for the factors viewed as important and relevant by the Court of Special Appeals to be considered in making the determination of whether the restroom is public. Thus, it effectively removes the fact finder’s discretion to examine each particular case individually and render a finding as to the threshold question based on that unique situation, replacing individualized judgment and discretion with a checklist of factors.

(2) The “Totality of the Surrounding Circumstances” Test.—The Court of Appeals’s approach to whether a facility is “public” is much broader than that of the intermediate appellate court. It allows the

129. See Houston, 109 Md. App. at 191-97, 674 A.2d at 93-96.
130. Id. at 197, 674 A.2d at 96.
131. Id.
132. See supra text accompanying note 48.
trier of fact to go beyond the concise list of factors identified by Judge Cathell and apply its own judgment to the particular situation. It allows for flexibility and openness in determining what considerations should enter into the examination of the facts.

Certainly, fact finders may conclude that the same factors as those highlighted by Judge Cathell should predominate; however, with the "totality of the surrounding circumstances" test they are not bound by or limited to those criteria. For example, the issue of "use"—by whom is the facility used on a regular or exclusive basis—may be considered highly relevant under some circumstances. However, as this factor is absent from Judge Cathell's list, the fact finder would be barred from weighing such a consideration in making its determination.

Possibly the most common criticism of any "broad" legal test is that it is vague and can be unpredictable, often producing varied results. The "totality of the surrounding circumstances" test applied to the threshold question of whether a restroom is public could result in conflicting findings. In one case, a jury might determine that a particular facility is public; however, in another, factually similar case, a jury might find that same restroom to be non-public. Thus, this approach does not offer a retail establishment a clear guide to whether its particular facility is a public restroom. The totality of the surrounding circumstances test will make it more difficult for retailers to ascertain whether they are immune under the statute, thus denying them the opportunity to predict with complete accuracy their future liability. However, providing such assurances is not the purpose of the tort law system. This point was eloquently stated by Oliver Wendell Holmes in his classic compilation of lectures, *The Common Law*. He wrote:

> The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage,

134. See Houston, 346 Md. at 518, 697 A.2d at 858.

135. This is especially the case with tort cases that go to the jury, as the main concern is that juries are inherently biased toward the plaintiff, and can often render unpredictable verdicts. See Erik Moller, RAND Institute, Trends in Civil Jury Verdicts Since 1985, at 13-14 (1995).

136. "When the material facts of the case, and the inferences to be drawn from those facts, are undisputed, the nature of the toilet facility can be determined as a matter of law." Houston, 346 Md. at 522, 697 A.2d at 860.
and for the most part, if not always, the consequences of an act are not known, but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm,—that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.\textsuperscript{137}

Thus, while the provisions of section 5-378 grant statutory immunity to retailers under specific circumstances, the law does not, nor should it, serve as a "crystal ball" from which defendant-retailers can foretell future liability. Therefore, on balance, the Court of Appeals's approach, which considers the totality of the circumstances in any case and is more compatible with the overall aims of tort law, is preferable to the legal test developed by the lower court.

c. Viewing Maryland's Unique Immunity Statute in Context.

The provisions of section 5-378 are unique to Maryland.\textsuperscript{138} While other states grant various types of tort immunity, such as governmental immunity and employer immunity from tort liability in some situations covered under workers' compensation laws,\textsuperscript{139} no other state has granted immunity to retail establishments for situations in which customers use their non-public restroom facilities. The law in other states primarily follows the common law premises liability framework, similar to Maryland law prior to the enactment of the immunity statutes.\textsuperscript{140}

\textsuperscript{137}\textit{Oliver Wendell Holmes, Jr., The Common Law} 79 (1881).

\textsuperscript{138} See Reply Brief of Petitioner at 16, Houston v. Safeway Stores, Inc., 346 Md. 503, 697 A.2d 851 (1997) (No. 64). Several Westlaw searches turned up no other states with similar immunity statutes. Search of WESTLAW, St-ann-all Database (Apr. 23, 1998) ((customer /p immunity /p restroom) or (store /p immunity & toilet /p customer /p use)). However, several states do have statutes regulating public restrooms. See, e.g., ME. REV. STAT. ANN. tit. 22, § 1686 (West 1992) (requiring that certain establishments provide toilet facilities for customer use); NEB. REV. STAT. § 81-2,264 (1996) (requiring that food establishments provide conveniently located toilet facilities); OHIO REV. CODE ANN. § 3767.34 (Anderson 1997) (requiring that certain establishments provide free restroom facilities).


\textsuperscript{140} See supra text accompanying notes 59-61.
The fact that Maryland is the only state with an immunity statute like sections 5-378 and 24-209 naturally leads to the question: Why did Maryland see the need for such a unique statute? At first glance, one wonders if the answer to this question lies in the possibility that Maryland suffered from an explosion of litigation holding retailers liable for customer injuries in restrooms, and the statutes were enacted as a response to that problem. However, there does not seem to be any evidence of such an explosion.\textsuperscript{141} If the laws were not passed in response to a litigation crisis, the question still remains: What was the motivation behind enacting the immunity statutes?\textsuperscript{142}

\begin{enumerate}
\item \textit{Retailer Immunity as a Public Interest Law.}—The Court of Appeals gives one possible answer to this question in \textit{Houston}. It noted that before the enactment of the statutes granting immunity, retailers were not required to grant customers access to private restrooms, and “many citizens who required immediate access to a restroom because of [medical] problems” were forced to “suffer great embarrassment and inconvenience.”\textsuperscript{143} Thus, the Court of Appeals’s statement seems to suggest that the immunity provisions were enacted as a type of “Good Samaritan”\textsuperscript{144} law designed to benefit the public.
\end{enumerate}

\begin{footnotes}
\footnote{141}{In fact, Maryland case law does not report any cases, other than the principal case, involving customers injured while attempting to use retail establishment restrooms. Although it is possible that such cases may be litigated in the lower courts with some frequency, it is worth observing that neither the Court of Appeals nor the Court of Special Appeals noted any increase of litigation in this area. There are, however, several interesting cases in other jurisdictions involving customers injured while attempting to use retailer toilet facilities. See, e.g., Dickau v. Rafala, 104 A.2d 214, 215 (Conn. 1954) (involving a customer who was injured by falling down stairs while looking for the restroom); Hon v. Percy A. Brown & Co., 110 A.2d 375, 376 (Pa. 1955) (involving a shopper injured by a swinging door in a grocery store on her way to the restroom); Bauhof v. Adair, 56 A.2d 370, 371 (Pa. Super. Ct. 1948) (involving a plaintiff who was injured when entering a dark room while attempting to locate the ladies’ restroom); Strawhacker v. Stephen F. Whitman & Sons, Inc., 23 A.2d 349, 350 (Pa. Super. Ct. 1941) (involving a customer who was injured in a restaurant lavatory while attempting to hang her coat). No other states have immunity statutes like Maryland’s. \textit{See supra} note 138 and accompanying text.}
\footnote{142}{This question is aimed at discovering the “motivation” behind the passage of the law, as opposed to the legislative “intent.” For a brief discussion comparing “motive” and “intent” in statutory interpretation, see Richard A. Posner, \textit{Economics, Politics, and the Reading of Statutes and the Constitution}, 49 U. CHI. L. REV. 263, 272-73 (1982). Courts typically look to the intent of the legislative body, but not at its motive in enacting the legislation. \textit{Id.}}
\footnote{143}{\textit{See supra} note 61 and accompanying text; \textit{see also Senate Econ. & Envtl. Affairs Comm., Summary of Committee Report, S.B. 413} (Md. 1987).}
\footnote{144}{The term is used here in its non-legal sense, meaning simply one who helps another. \textit{See American Heritage Dictionary} 567 (2d ed. 1982). It does not refer to the “Good Samaritan doctrine” in tort law, which holds that a volunteer rescuer cannot be charged with contributory negligence as a matter of law for risking her own life while attempting to rescue another. \textit{See Black’s Law Dictionary} 694 (6th ed. 1990). It is worth...
The idea being, once retailers were guaranteed immunity, they would permit more customers to use their restrooms. Such a law could be viewed as serving the public interest, because it would give customers greater access to restrooms.

This public interest explanation provides a convincing reason for the enactment of section 24-209, which mandates access for customers with specific medical conditions. It does not, however, aid in understanding the necessity for expanding the statutory immunity protections to all customers permitted to use private restrooms, as was done in 1989 with the enactment of section 24-210, which later became section 5-378. Thus, while public interest could have been the motivation behind section 24-209, it does not provide an answer for why Maryland felt the need to expand retailer immunity under section 5-378.

(2) The Immunity Statutes as Special Interest Legislation.—One possible explanation for the expansion of the immunity provisions is that the law was special interest legislation passed simply to benefit retailers who wished to avoid liability and thus control potential economic losses. Special interest groups often play a large role in influencing the passage of many laws. In the case of section 24-210, which later became section 5-378, the legislative record reveals that two special interest groups, the Maryland Retailers Association and the Mid-Atlantic Food Dealers, testified before the House Judiciary Committee in support of the bill. There were no opponents. In fact, the bill’s sponsor, Delegate Elliot, was an independent druggist. Thus, it seems likely that the expanded immunity statute was a

noting that the Maryland Retailers Association, an interest group that testified in support of the statute, refers to the law in its newsletter as granting its members “‘good samaritan’ immunity.” Court Weakens Retailers Protections, Md. RETAILERS ASSOC. NEWSLETTER, Fall 1997, at 3.

145. By providing such an “incentive” to retailers, it is questionable whether retailers under this scheme can truly be considered Good Samaritans, because they are not performing a “selfless” act. See AMERICAN HERITAGE DICTIONARY, supra note 144, at 567 (defining “Good Samaritan” as a “compassionate person who unselfishly helps others”).

146. See supra notes 64-70 and accompanying text.

147. For an extensive case study examining the effect of special interest groups on the passage of one particular law, and the effect that this can have on the judicial process, see Jonathan R. Macey, Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall, 33 EMORY L.J. 1 (1984).


149. Id.

150. Telephone Interview with Tom Saguella, President, Maryland Retailers Association (Jan. 20, 1998).
piece of special interest legislation. However, it is still possible that a law designed to benefit a special interest can have the corollary effect of benefitting the general public. Here, for example, the immunity statutes may have increased the number of retailers who permit customers access to restrooms, when they might otherwise not have, thus benefitting consumers. At the same time retailers would avoid any risk of liability. Considering the special interest aspect of section 5-378, it was wise for the Court of Appeals to examine the statute’s application and scope critically.

5. Conclusion.—In Houston, the Court of Appeals held that a limited definition of what constitutes a “public” restroom was not intended by the General Assembly; rather, the proper analysis leaves the question to be determined by the jury through the application of a “totality of the surrounding circumstances” standard. In so doing, the court refused to predetermine which facilities are granted immunity under section 5-378 by formulating a narrow definition, but instead left the issue to the jury. In that way, Houston represents a confirmation of the jury’s ability to determine complex factual questions, without rigidly prescribed judicial constraints. Further, the court’s treatment of the statute was appropriate considering the uniqueness of the statute and the special interest motivations behind its enactment. The Court of Appeals reaffirmed Maryland’s recognition of the basic common law principles of tort liability by resisting the temptation to extend the scope of a special interest immunity statute.

SHILPA M. PATEL

E. Denouncing the Existence of a Universal Action at Law to Redress Breaches of Fiduciary Duty

In Kann v. Kann, the Court of Appeals held that there is no independent, ubiquitous cause of action at law to redress every breach of fiduciary duty. In so holding, the court upheld equity’s historically ingrained dominion over trusts, and it necessarily confined the jury trial right in actions brought by a beneficiary against a trustee to scant exceptions. The court correctly applied Maryland law, but it was unpersuaded by arguments that the inadequacy of existing equitable remedies warrants the creation of an action at law to redress a trustee’s breach of fiduciary duty. As a consequence, the court

1. 344 Md. 689, 690 A.2d 509 (1997).
2. Id. at 693, 690 A.2d at 511.
3. Id.
avoided discussing the discernible breaches of fiduciary duty by the trustee in the instant case.

1. The Case.—Frances O. Kann died testate in 1974. She predeceased her husband, Louis M. Kann, Jr., and the couple's two children, Donald R. Kann and Lois K. Fekete. Under her will, Frances allocated a portion of her estate to her widowed husband and placed the remainder in trust (the Frances Trust), naming Louis as life income beneficiary and sole trustee—no successor trustee was named. The Frances Trust was unorthodox for want of any provision allowing Louis to invade the trust principal on his own behalf. The remainder of the trust, consisting of the principal in its entirety along with any undistributed income, was to be divided equally between Donald and Lois, free of trust.

Louis remarried twice after Frances's death. Louis's marriage in 1979 to his third wife, Regina H. Kann, lasted fourteen years, until his death on December 18, 1992. Like Frances's will, Louis's will stipulated that his entire residuary estate be held in trust. Under Louis's trust (the Louis Trust), Regina would receive the income from the trust assets for the duration of her life. Louis's will further provided that Regina's accustomed standard of living was of paramount concern, and therefore, whenever necessary to maintain that standard, the trust principal was to be invaded. Following Regina's death, one-half of the remainder of the Louis Trust assets would be distributed to Lois and the other half would be divided equally between Donald's two sons, Aaron and Burton. Donald was designated as the sole trustee of the Louis Trust and personal representative of Louis's

4. Id.
5. Id.
7. Motion to Dismiss and Brief of Appellee Donald R. Kann at 17, Kann v. Kann, 344 Md. 689, 690 A.2d 509 (1997) (No. 22).
8. Kann, 344 Md. at 693, 690 A.2d at 511.
9. Id. In 1976, Louis entered into a marriage that lasted only one year. Id.
10. Id. From 1974 until his death in 1992, Louis retained his position as trustee of the Frances Trust. Brief of Appellant at 3, Kann (No. 22).
11. Kann, 344 Md. at 693, 690 A.2d at 511.
12. Id.
13. Id.
14. Id. Donald was not named as a beneficiary under Louis's will. Brief of Appellant at 3, Kann (No. 22).
In his capacity as trustee of the Louis Trust, invasion of the trust principal for Regina's benefit was within Donald's sole discretion.\(^1\)

Shortly after Louis's death, Donald procured legal assistance from Venable, Baetjer and Howard (Venable) and, specifically, the head of Venable's estates and trusts practice group, Alexander I. Lewis, III.\(^2\) The attorneys then delegated to Donald, as personal representative of the estate, the responsibility of compiling the estate's assets and liabilities.\(^3\) In late 1992 or early 1993, while reviewing Louis's bank records, Donald discovered evidence that Louis may have improperly transferred $10,412.71 in funds from the Frances Trust to a checking account held jointly by Regina and Louis.\(^4\) In the meantime, because Louis's death had left the position of trustee of the Frances Trust vacant, Donald petitioned for appointment as successor trustee on March 31, 1993; the Circuit Court for Baltimore City granted the petition.\(^5\) By this time, Donald had doubts regarding his father's execution of the Frances Trust, but he had yet to scrutinize Louis's finances to expose the extent of his father's transgressions.\(^6\)

Over the ten-month period subsequent to his initial discovery of the apparently misappropriated assets, Donald, acting on the advice of counsel, continued to investigate his father's conduct while Louis was trustee of the Frances Trust.\(^7\) Donald concluded that Louis had mis-

15. Kann, 344 Md. at 693-94, 690 A.2d at 511.
16. Id. at 693, 690 A.2d at 511; Kann, No. 621, slip op. at 1-2.
17. Kann, 344 Md. at 694, 690 A.2d at 511.
18. Motion to Dismiss and Brief of Appellee Donald R. Kann at 18, Kann (No. 22).
19. Kann, 344 Md. at 694 & n.1, 690 A.2d at 511 & n.1. Donald's suspicion was triggered by an uncharacteristically large deposit made in August 1992. Id.
20. Id. at 694, 690 A.2d at 511-12.
21. Id. There was some conflict between the parties regarding Donald's motives in applying to become successor trustee of the Frances Trust. The Court of Appeals's opinion is silent on this issue. See id. On appeal, Donald's counsel argued that:
Donald seemed the most logical choice to succeed Louis as trustee, because Donald already served as a fiduciary of Louis's estate and because the only other likely candidate—Donald's sister and co-beneficiary, Lois—lived out of state.

... Notably, Donald assumed that role long before he or his lawyers had reached any conclusion about whether his father had actually misappropriated funds from the Frances Kann Trust.

Regina contended that Donald "created a conflict of interest by petitioning the Circuit Court to become successor trustee of Frances's trust after he already knew that he would be claiming that [Louis] had improperly taken money from [Frances's] trust." Brief of Appellant at 13, Kann (No. 22).
22. Kann, 344 Md. at 694, 690 A.2d at 511. Donald and his wife, Joanna B. Kann, spent approximately 1200 hours researching Louis's finances to calculate the amount thought to have been misappropriated from the Frances Trust. Brief of Appellant at 4, Kann (No.
appropriated over $118,000 during his eighteen-year tenure as trustee of the Frances Trust.\textsuperscript{23} According to Donald's estimation, if given the opportunity to accrue, these funds would have increased to $195,300.\textsuperscript{24} Donald, once again acting on the advice of counsel, diverted $195,300 from Louis's estate to a segregated, interest-bearing account in the name of the Frances Trust while he awaited a final resolution of the matter.\textsuperscript{25}

On December 21, 1993, Donald, by filing a supplemental inventory with the Orphan's Court for Baltimore City, formally alleged that Louis had misappropriated funds with a present value of $196,197.31 from the Frances Trust.\textsuperscript{26} On January 12, 1995, the Orphan's Court approved the adjusted inventory and the First and Final Administration of Louis's estate.\textsuperscript{27} After consulting with Venable, Donald consciously withheld from Regina all information pertaining to his discovery of Louis's defalcations, including information regarding the recently concluded Orphan's Court proceedings, Donald's appointment as successor trustee of the Frances Trust, the investigation of Louis's financial affairs, and the transfer of misappropriated assets from the Louis Trust back to the Frances Trust.\textsuperscript{28}

After the funds in question were transferred, and the twenty-day period to file exceptions to the accounting approved by the Orphan's Court had elapsed, Donald forwarded to Regina a detailed memoran-
dum enumerating Louis's alleged misappropriations from the Frances Trust. Donald's hopes of amicably settling this matter were squelched when Regina responded to the memorandum by demanding payment of $500,000. In April 1994, Donald—through his counsel and in his capacities as personal representative of Louis's estate, trustee of the Louis Trust, and substitute trustee of the Frances Trust—responded by filing a complaint for declaratory judgment in the Circuit Court for Baltimore City. Regina answered the complaint, filed a counterclaim, and requested a jury trial.

Regina alleged in her counterclaim that Donald contravened his fiduciary duties as personal representative of Louis's estate and as trustee of the Louis Trust. She claimed that Donald improperly aided the Frances Trust, in which he had a beneficial interest, at the expense of the Louis Trust, that he wrongly shared information between the two trusts, and that he failed to inform her of the misappropriations in a timely fashion. Regina's counterclaim also alleged that Donald created a conflict of interest by petitioning to succeed Louis as trustee of the Frances Trust. Regina further asserted that Donald failed to raise procedural defenses, including lack of timeliness, and unspecified substantive defenses to the claim against Louis's probate estate that was made by the Frances Trust. The counterclaim joined Venable and Lewis, individually, as counter-defendants.

Regina charged the attorneys with professional negligence, Donald with fraud and malfeasance, and Venable, Lewis, and Donald, jointly

29. Kann, 344 Md. at 695, 690 A.2d at 512; Brief of Appellant at 5, Kann (No. 22); see also Joint Record Extract at E61-178, Kann v. Kann, 344 Md. 689, 690 A.2d 509 (1997) (No. 22) (containing the memorandum and all of its attachments).
30. Motion to Dismiss and Brief of Appellee Donald R. Kann at 21, Kann (No. 22).
31. Kann, 344 Md. at 695, 690 A.2d at 512. Lois as well as Donald's sons, Aaron and Burton, joined with Donald in filing the complaint. Id. The complaint, filed under the Maryland Uniform Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Proc. §§ 3-401 to -415 (1995), aimed to clarify the parties' rights and responsibilities with respect to the segregated assets. Kann, 344 Md. at 695, 701, 690 A.2d at 512, 515.
32. Kann, 344 Md. at 695, 690 A.2d at 512. Both Regina's answer and her counterclaim included prayers for a jury trial. Id.
33. Id. Regina amended the counterclaim twice, first to add a count for conversion against both Donald and his attorneys and next to make obvious that she sought to hold Donald personally liable. Id. at 695-96, 690 A.2d at 512-13.
34. Id. at 695-96, 690 A.2d at 512.
35. Id. at 696, 690 A.2d at 512.
36. Id. Regina asserted that the attorney respondents were negligent and acted in cohort with Donald in his breaches of trust by either directly performing or erroneously advising Donald to perform the allegedly improper acts. Id.
and severally, with breach of fiduciary duty, civil conspiracy, and conversion. She demanded $42 million in punitive damages.

The trial court dismissed Regina’s counterclaim in its entirety for failure to state claims upon which relief could be granted, and afterward, the court tried the declaratory judgment action at a bench trial. In the Circuit Court for Baltimore City, Judge Robert I.H. Hammerman found that Donald had acted properly when he transferred the money and that Donald had not breached his fiduciary duty as trustee of the Louis Trust. Regina appealed the judgment in Donald’s favor to the Court of Special Appeals.

In an unreported opinion, the Court of Special Appeals affirmed the lower court’s ruling. That court began its journey into the “morass created by the alleged defalcation and breaches of fiduciary duty . . . at a fork in the road of pleadings between law and equity.” Mindful of Maryland’s rule that the remedies available to a beneficiary for a trustee’s breach of duty are generally equitable, the court observed that Regina failed to allege a recognized exception to the prevailing rule. Even assuming that recourse in a court of law were available to Regina, the court determined that her allegations were deficient. Regardless, the court concluded that Maryland does not recognize the tort of breach of fiduciary duty. Furthermore, the Court of Special Appeals found that the attorney defendants owed no duty to Regina and that the trial court’s determination that Donald

37. Brief of Respondents Venable, Baetjer and Howard and Alexander I. Lewis, III, at 11, Kann (No. 22).
38. Kann, 344 Md. at 696-97, 690 A.2d at 513. Regina also requested damages for “stress, mental anguish and exacerbation of various physical ailments and conditions directly resulting from Donald’s actions.” Brief of Appellant at 17-18, Kann (No. 22).
39. Kann, 344 Md. at 697, 690 A.2d at 513.
40. Id. Judge Hammerman was “thoroughly impressed” with Donald’s “honorable” actions throughout this ordeal and found that Donald, although he “might wind up with more money” as a result of the proceedings, was in no way “motivated in whole or in part by his self interest.” Joint Record Extract at E269-70, Kann (No. 22) (oral opinion of the Circuit Court for Baltimore City, Jan. 20, 1995).
41. Kann, 344 Md. at 697, 690 A.2d at 513.
42. Kann, No. 621, slip op. at 26. The Court of Special Appeals commented that, during the declaratory judgment proceeding, Donald presented substantial evidence to show that Louis misappropriated assets from the Frances Trust, whereas “Regina was unable to explain what had happened to the missing money.” Id. at 3-4.
43. Id. at 5.
44. Id. at 6-15.
45. Id. Regina had failed to allege any cognizable damages and failed to prove that Donald did anything more than extract misappropriated assets—assets that Regina had no legal right to possess. Id. at 16-17.
46. Id. at 15 n.5, 16.
acted properly was not reversible as a clearly erroneous finding.\footnote{Id. at 20-26.} Regina then appealed to the Court of Appeals, which granted certiorari in order to resolve whether the issues raised in Regina's counterclaim were legally sufficient and whether she was entitled to a trial by jury.\footnote{Kann, 344 Md. at 697, 690 A.2d at 513.}

2. Legal Background.—

a. Right to Trial by Jury.—Maryland's first Constitution, adopted in 1776, did not specifically consider a jury trial right in the context of civil litigation.\footnote{Luppino v. Gray, 336 Md. 194, 200 & n.6, 647 A.2d 429, 432 & n.6 (1994).} Instead, the Constitution of 1851 was the earliest of Maryland's constitutions to recognize the preservation of the right to a jury trial in civil actions.\footnote{Id at 200, 647 A.2d at 432. Article X, section 4 of the Constitution of 1851 provided that "[t]he trial by jury of all issues of fact in civil proceedings, in the several courts of law in this State, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved." Md. Const. of 1851, art. X, § 4; see also Md. R. 2-325(a) ("Any party may elect a trial by jury of any issue triable of right by a jury . . . .").} Article X, section 4 of the Constitution of 1851 "inviolably preserved" the right to a jury trial as that right existed at common law in 1776.\footnote{See C. Christopher Brown, The Law/Equity Dichotomy in Maryland, 39 Md. L. Rev. 427, 457 (1980) (discussing the right to trial by jury in Maryland).} Hence, determining entitlement to a jury trial "requires an historical inquiry on a case by case basis as to when the right to a jury trial existed in 1776."\footnote{Id.} This historical analysis and a Maryland litigant's right to a jury trial, when no federal law is involved, are governed by Article 23 of the Maryland Declaration of Rights rather than by the Seventh and Fourteenth Amendments to the United States Constitution.\footnote{Walker v. Sauvinet, 92 U.S. 90, 92 (1875); Bringe v. Collins, 274 Md. 338, 346, 335 A.2d 670, 675 (1975). Though not bound by federal law on the issue of the right to jury trial, the Court of Appeals has cited with approval cases such as Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). See Higgins v. Barnes, 310 Md. 532, 551, 530 A.2d 724, 733 (1987) (citing those Supreme Court cases).} Maryland's guarantee of a right to trial by jury is not absolute, however, and the parties

\footnote{Id. at 20-26.}
may waive that right either expressly or by failing to request a jury trial in a timely fashion.\textsuperscript{54}

When conducting a historical analysis to evaluate if a jury trial right applies to a specific action, the court will ascertain whether the action would have been heard in a court of law or a court of equity at the time Maryland's Constitution was first adopted.\textsuperscript{55} Equity courts historically did not recognize a jury trial right.\textsuperscript{56} In addition to equity's inability to conduct a jury trial, only a court of law may impose punitive damages on a defendant.\textsuperscript{57} Once a court of equity has assumed jurisdiction, though, that court may grant complete relief, including damages,\textsuperscript{58} in strict adherence to the principle that "equity suffers no right to be without a remedy."\textsuperscript{59}

"[S]ince they were first enforced," trusts have been subject to the courts' equitable jurisdiction.\textsuperscript{60} In fact, the autonomy that equity ex-

\textsuperscript{54} See Md. R. 2-325(b) ("The failure of a party to file the demand within 15 days after service of the last pleading filed by any party directed to the issue constitutes a waiver of trial by jury.").

\textsuperscript{55} See Pennsylvania v. Warren, 204 Md. 467, 473-74, 105 A.2d 488, 490-91 (1954); Hashem v. Taheri, 82 Md. App. 269, 272-73, 571 A.2d 837, 839-40 (1990). "It was as if one entered Maryland's courts of general jurisdiction through two doors, one marked 'law,' the other 'equity,' and once inside, the jury trial question was resolved on the basis of which door one had used for entry." Richard W. Bourne & John A. Lynch, Jr., Merger of Law and Equity Under the Revised Maryland Rules: Does It Threaten Trial by Jury?, 14 U. BALT. L. REV. 1, 44-45 (1984) (footnote omitted).

\textsuperscript{56} See Warren, 204 Md. at 473, 105 A.2d at 491 ("Finding that the proceedings should be in equity, it is not necessary that we pass upon the right to a jury trial . . . ."); Hashem, 82 Md. App. at 273, 571 A.2d at 839 ("Equitable claims will be decided by the court without a jury.").

\textsuperscript{57} Superior Constr. Co. v. Elmo, 204 Md. 1, 20, 104 A.2d 581, 585 (1954) ("[A] court of equity is a court of conscience which will not enforce penalties or forfeitures, or go beyond compensation . . . . [E]quity will permit only what is just and right with no element of vengeance.").

\textsuperscript{58} See Phil J. Corp. v. Markle, 249 Md. 718, 725, 241 A.2d 718, 722 (1968); Brown, supra note 51, at 435-36, 443-44. Thus, after a court of equity obtains jurisdiction, it may grant traditionally legal forms of relief even if all equitable issues were previously discarded and no possibility for equitable relief remains. McKeever v. Washington Heights Realty Corp., 183 Md. 216, 224, 37 A.2d 305, 310 (1944). Although an equity court is prevented from granting punitive damages, it can award compensatory damages in certain circumstances and can also award relief to a defendant. See Hardisty v. Kay, 268 Md. 202, 212, 299 A.2d 771, 776 (1973) (stating that an equity court may award money damages); Vulcan Waterproofers, Inc. v. Maryland Home Improvement Comm'n, 253 Md. 204, 211-12, 252 A.2d 62, 66 (1969) (asserting that equity may grant a defendant relief even though the defendant did not request it).

\textsuperscript{59} Wells v. Price, 183 Md. 443, 452, 37 A.2d 888, 893 (1944).

\textsuperscript{60} 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 197, at 188 (4th ed. 1988).
erts over trusts is so intrinsic to Maryland practice that the Maryland courts have been reluctant to recognize more than limited exceptions to the general rule. The anomalies are confined to situations in which a trustee is bound to immediately and unconditionally distribute money or chattels to the beneficiary or circumstances in which the trustee has entered into improper investments. Notwithstanding the foregoing exceptions, claims brought by the beneficiary of a trust against the trustee have not entitled the beneficiary to a jury trial.

Despite equity's jurisdiction over trusts, the right to a jury trial will be granted if a legitimate legal claim is posed, irrespective of the means used to raise that legal claim. Accordingly, counterclaims have enjoyed the same assurances to trial by jury as primary claims. In Higgins v. Barnes, for example, the defendant was accorded a jury trial on the legal claims presented by her counterclaim despite the fact that the counterclaim was introduced in an equitable action. None of the issues in Higgins was resolved by a jury. In order to give credence to the jury trial guarantee, the Higgins court held that the damages claim should have been submitted to the jury first. Later, the trial judge could have resolved any remaining equitable

61. See Nelson v. Howard, 5 Md. 327, 331 (1854) (declaring that a beneficiary may not sue the trustee at law); Green v. Johnson, 3 G. & J. 389 (Md. 1831) (commenting that a court of law will not decide actions concerning trusts).


63. Id. at 152, 582 A.2d at 562 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 197, 198 (1959)).

64. Id.

65. Id. at 151, 582 A.2d at 562. There are numerous cases brought by a beneficiary against a trustee that proceeded in equity without a jury. See, e.g., Maryland Nat'l Bank v. Cummins, 322 Md. 570, 588 A.2d 1205 (1991); Mangels v. Tippett, 167 Md. 290, 173 A. 191 (1934) (case name in the Atlantic Reporter is Mangels v. Safe Deposit & Trust Co.).


67. Id. at 551, 530 A.2d at 733.

68. 310 Md. 532, 530 A.2d 724 (1987).

69. Id.

70. Id. at 535, 530 A.2d at 725. Essentially, the plaintiff in Higgins claimed that the defendant breached the contract. Id. The defendant averred damages resulting from the plaintiff’s alleged failure to perform in conformity with the contract’s specifications. Id. The contract dispute concerned the plaintiff’s promise to construct a building and the defendant’s promise to secure his debt to the plaintiff. Id.

71. Id. at 554, 530 A.2d at 725.

72. Id. at 552, 530 A.2d at 734.
Thus, where one case raises both legal and equitable issues, a court's resolution of the equitable claims will rarely defeat the right to a jury's judgment on the legal issues.\footnote{73}{Id.}

According to the Maryland Uniform Declaratory Judgment Act, the fact that a declaratory judgment is sought does not affect the right to trial by jury.\footnote{74}{Id. at 551, 530 A.2d at 733.} In delineating a claimant's right to trial by jury in a particular declaratory judgment action, the "circuit court must look to the underlying circumstances to ascertain whether, prior to the [Maryland Uniform Declaratory Judgment Act], legal relief would have sufficed or, alternatively, whether special factors would warrant the intervention of equity."\footnote{75}{MD. CODE ANN., CTS. & CRIM. PROC. § 3-404 (1995); see also Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (noting that the right to jury trial is specifically preserved under the federal Declaratory Judgment Act). Prior to Maryland's procedural merger of law and equity in 1984, a declaratory judgment claim could be instituted in either a court of law or equity. Himes v. Day, 254 Md. 197, 206, 254 A.2d 181, 186 (1969).} Thus, a court hearing a claim for declaratory relief must once again engage in a historical analysis in order to determine a litigant's right to be heard by a jury.

For both typical legal actions and declaratory judgment claims, the law is replete with authority establishing that if a right to trial by jury accompanies an action under the common law as it existed when Maryland's Constitution was first enacted, that right continues to apply to comparable actions today.\footnote{76}{Bourne & Lynch, supra note 55, at 50.} However, because the administration of trusts is intrinsically equitable in nature and because a court of equity had (and continues to have) no power to defer factual issues to a jury for determination, an action that focuses on the administration of a trust will seldom be resolved by a jury.\footnote{77}{See supra notes 55, 66-76 and accompanying text.}

\paragraph{b. Breach of Fiduciary Duty.}—

\textit{(1) Duty of Loyalty.}—"Fiduciary" is a comprehensive term used to describe a person who must exercise duties of good faith, confidence, and trust towards another.\footnote{78}{See supra notes 60-65 and accompanying text.} Executors and administrators, receivers, pledgees, guardians, agents, corporate directors and officers, partners, joint adventurers, attorneys, and trustees are all fiduciaries.\footnote{79}{See BLACK'S LAW DICTIONARY 626 (6th ed. 1990).} "[T]he fiduciary element . . . is peculiarly intense in the case.
the duty of loyalty. 81 Though there are other obligations the trustee has to the beneficiary, 82 the duty of loyalty is the most sacred and heavily guarded: 83 it requires the trustee's unfailing devotion to the interests of the beneficiary. 84

Judge Benjamin N. Cardozo eloquently described the duty of loyalty in this oft-quoted passage from Meinhard v. Salmon. 85

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court. 86

Maryland similarly acknowledges the sanctity of the trustee's relationship to the beneficiary and has proscribed situations that result in a division of the trustee's loyalties. In the 1934 case of Mangels v. Tip-

Loyalty, 3 Md. L. Rev. 221, 221 (1939) (same); Austin Wakeman Scott, The Trustee's Duty of Loyalty, 49 Harv. L. Rev. 521, 521 (1936) (same).

81. Scott, supra note 80, at 521.

82. Along with the duty of loyalty, the Restatement (Second) of Trusts lists the following as fiduciary duties: the duty to furnish information (section 173), the duty to exercise reasonable care and skill to preserve trust property (section 176), the duty to defend actions (section 178), and the duty to keep trust property separate (section 179). Restatement (Second) of Trusts §§ 173, 176, 178, 179 (1959).

83. Clapp, supra note 80, at 221. The duty of loyalty is "[t]he most fundamental duty owed by the trustee to the beneficiaries." Board of Trustees of the Employees' Retirement Sys. v. Mayor of Baltimore, 317 Md. 72, 110, 562 A.2d 720, 738 (1989) (alteration in original) (quoting 2A Austin W. Scott, Scott on Trusts § 170 (William F. Fratcher ed., 4th ed. 1987)).

84. The Restatement (Second) of Trusts defines the duty of loyalty as follows:

(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.

Restatement (Second) of Trusts § 170.

85. 164 N.E. 545 (N.Y. 1928).

86. Id. at 546 (citation omitted). This excerpt has been cited with approval by Maryland courts. See Herring v. Offutt, 266 Md. 593, 597, 295 A.2d 876, 879 (1972).
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The court held that a fiduciary will breach the duty of loyalty simply by creating circumstances in which the trustee's personal interests may conflict with those of the beneficiary, regardless of whether the trustee's actions were proper or the beneficiary experienced a loss. 88

On December 24, 1931, Bernard M. Mangels died testate. 89 Richard B. Tippett was named co-trustee of Mangels's testamentary trust (the Mangels Trust). 90 The assets of that trust included Mangels's one-half interest in the Mangels-Herold Company, consisting of 1250 shares of stock valued at $100,000 at the time of Mangels's death. 91 Through his position as trustee, Tippett obtained the voting rights for the 1250 shares, and at a regular meeting of directors, Tippett was elected secretary of the Mangels-Herold Company at a salary of $50 per week. 92 Mangels's widow, Gertrude, and children were not informed of Tippett's position, although they were the beneficiaries of the Mangels Trust. 93 After making several fruitless inquiries of Tippett into the status of the finances of the Mangels Trust, the beneficiaries filed a petition for removal of Tippett as trustee and for an accounting of the trust assets. 94 They alleged, inter alia, that Tippett was withholding information, that the income beneficiary had received less than her share of the profits for 1932, that the estate was paying half of Tippett's salary through its one-half ownership interest in the company, that the trust estate was not being administered to the advantage of the beneficiaries, and that Gertrude and Tippett could not comport congenially. 95

The court held that Tippett could not be removed from his position as trustee simply because the beneficiaries and trustee could not interact amicably, though the relationship between beneficiary and trustee is one factor for the court to consider in determining whether

87. 167 Md. 290, 173 A. 191 (1934).
88. Id. at 300, 173 A. at 195.
89. Id. at 291, 173 A. at 192.
90. Id. at 294, 173 A. at 193. The Safe-Deposit and Trust Company was the other trustee named along with Tippett. Id.
91. Id.
92. Id. at 294-95, 173 A. at 193. At the meeting, Tippett and the other half-owner of the company, John H. Herold, voted. Id. at 294, 173 A. at 193. After voting on the new directors of the company, at which time Tippett was named one of three directors, Tippett motioned to elect Herold president and treasurer, and Herold motioned to elect Tippett secretary. Id.
93. Id. at 296, 173 A. at 194.
94. Id. at 296-97, 173 A. at 194.
95. Id. at 297-98, 173 A. at 194.
to exercise its discretion to remove a trustee. Although the court refused to remove Tippett, it went on to declare "that a trustee . . . is not permitted to place himself in such position that the interest of the beneficiary and his own personal interest do or may conflict." If the foregoing rule were not applied rigidly, the court reasoned, many frauds and inequities would go undetected. Therefore, the only way for courts to "inculcate and enjoin a strict observance of the divine precept: 'Lead us not into temptation'" is for them to remove the temptation altogether. Though Tippett was not shown to have acted with bad motive or evil intention, the court could not allow him to retain his salary when that salary undeniably depleted the assets of the Mangels Trust.

The rule proffered in Mangels has been extended to cover various situations where there is, or may be, an element of self-dealing. The trustee, for instance, may not individually purchase property held by the trust unless the beneficiaries consent. A trustee is also prohibited from selling personal property to the trust, from using trust property for his own purposes, and from purchasing from a third party an interest adverse to that of the beneficiary. A trustee will breach the duty of loyalty by competing in any way with the interests of the beneficiary.

The Court of Appeals has recognized a general presumption against the validity of any transaction in which the fiduciary's interests may be advanced at the expense of the beneficiary. Transactions in

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96. Id. at 298-300, 173 A. at 194-95.
97. Id. at 300, 173 A. at 195.
98. Id. at 304, 173 A. at 197.
99. Id. at 302, 173 A. at 196 (quoting Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456 (1860)).
100. Id. at 303, 173 A. at 197.
101. Id. at 305, 173 A. at 197. The rule that a trustee may not attain any position in which there may be a conflict with the beneficiary's interests is applied as strictly as possible, and the motives of the trustee are therefore irrelevant. Id. at 303, 173 A. at 197; Clapp, supra note 80, at 222.
102. Mangels, 167 Md. at 305-06, 173 A. at 197-98. Because the Mangels Trust held half of the shares in the Mangels-Herold Company, when Tippett drew a salary from the company, it depleted the company's profits and thus the distribution to Gertrude, the income beneficiary of the trust. Id. at 305, 173 A. at 197.
103. See Madden v. Mercantile-Safe Deposit & Trust Co., 27 Md. App. 17, 33, 339 A.2d 340, 350 (1975) ("When a person . . . is a party to or otherwise profits from a transaction with a trust or other estate of which he is a fiduciary . . . he is self dealing.").
104. See Smith v. Townshend, 27 Md. 368, 388 (1867); Clapp, supra note 80, at 222-27.
105. Clapp, supra note 80, at 227-29.
106. Id. at 231-32.
107. See Hughes v. McDaniel, 202 Md. 626, 632, 98 A.2d 1, 4 (1953) ("[A] trustee is prohibited from placing himself in any position where his self-interest will or may conflict
which a trustee’s "self-interest will or may conflict with his duties," are not fraudulent per se, but are voidable when the consent of the beneficiary has not been obtained beforehand. The courts have invoked this rule because loyalties are at least drawn into question when the fiduciary is sitting on both sides of a bargain. Where a transaction is fair, however, the rule does not apply if the trustee is protecting the beneficiary's interests, if the beneficiary has consented, if the beneficiary has slept on her rights, or if a statute, the instrument that created the trust, or a court has authorized the transaction.

In *Cosden v. Mercantile-Safe Deposit & Trust Co.*, the Court of Appeals employed the self-dealing doctrine, but determined that the trust company had not breached its fiduciary duty to the beneficiary when it sold trust property. The principal contention in *Cosden* was that trust assets were sold at an inadequate price because the trust company held a twenty-percent interest in the purchaser-corporation through other trusts and fiduciary accounts. The presumption of invalidity that attaches to transactions in which the trustee might profit was not controlling because the trustee itself neither benefited from the transaction nor entered into the sale for its own advancement. Thus, when a common fiduciary deals among two different trusts but has no personal interest in the outcome, the transaction will be sustained if it was fair and made in good faith.

Although some transactions involving two trusts with a common trustee may be valid, the trustee nevertheless owes the beneficiary of each trust the duty to defend against any claim that may result in a loss to the trust estate. Maryland adheres to the *Restatement (Second) of

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1. Id.
4. Harlan, 174 Md. at 592, 199 A. at 869 ("[C]onfidence in the loyalty and impartiality of a fiduciary is not maintained by one who is at once the seller and the buyer of the subject of sale.").
5. Id. at 592-93, 199 A. at 869.
7. Id. at 545, 398 A.2d at 475.
8. Id. at 531, 398 A.2d at 467, 470.
9. Id. at 398 A.2d at 470.
10. Id. at 536-37, 398 A.2d at 470.
which contains a duty to defend provision. Encompassed in the trustee's duty to defend the trust against claims is the trustee's duty to appeal. If the trustee, acting on behalf of the trust, is sued and loses, the trustee must appeal the adverse decision to a higher court if it is unreasonable not to appeal. The trustee can settle a claim "even though it appears to be a claim which is not enforceable, if the cost and risk incurred in defending the claim would be such that it is not unreasonable not to contest the claim." As the preceding discussion demonstrates, the duty of loyalty demands a presumption of invalidity for any situation in which there is a possibility that the trustee's interests will interfere with the beneficiary's interests. The trustee may not take a personal stake in a transaction unless the beneficiary, the court, or the testator has affirmatively sanctioned the trustee's actions. In cases where the trustee's interests may conflict and authorization was not previously obtained, the actual gain or loss to the beneficiary is irrelevant, as are the fiduciary's motives or good faith intentions, because the mere manifestation of such a conflict will serve to invalidate actions perpetrated while the trustee's loyalties were divided.

(2) Breach of Fiduciary Duty as an Independent Cause of Action.—Although the Court of Appeals never formally recognized or disclaimed breach of fiduciary duty as a tort before Kann, it has commented on the existence of the tort on several occasions. For example, Adams v. Coates involved the right to punitive damages in a traditionally equitable action—an accounting between partners. While the court refused to award punitive damages, it did assume, "solely for the purpose of discussion," that the tort of breach of fiduci-


120. Restatement (Second) of Trusts § 178. The Restatement defines the duty to defend by declaring that "[t]he trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense." Id.

121. Id. § 178 cmt. a.

122. Id. § 178 cmt. c.


125. 331 Md. 1, 626 A.2d 36 (1993). Judge Rodowsky authored both Kann and Adams. Kann, 344 Md. at 693, 690 A.2d at 511; Adams, 331 Md. at 2, 626 A.2d at 36.

126. Adams, 331 Md. at 9-10, 626 A.2d at 40.

127. Id. at 15, 626 A.2d at 43.
ary duty existed in Maryland. The court further assumed that, "under proper proof, the tort can be the springboard for punitive damages."

In Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc., the Court of Appeals took the Adams discussion one step further: it assumed the existence of the tort of breach of fiduciary duty and went on to describe the elements of that theoretical tort. Using section 874 of the Restatement (Second) of Torts as its guide, the Alleco court listed "(1) the existence of a fiduciary relationship, (2) a breach of duty owed by the fiduciary to the beneficiary, and (3) harm resulting from the breach" as elements of the hypothetical tort of breach of fiduciary duty. These requirements, the court opined, are in conformity with those identified by other jurisdictions that have already recognized the possibility of tort liability for breaches of fiduciary duty. Nevertheless, because the plaintiffs in Alleco had failed at all levels of the litigation to prove the requisite harm resulting from the breach, the court held that they did not adequately state a cause of action.

Similarly relying on section 874 of the Restatement (Second) of Torts and armed with the Adams and Alleco opinions, the Court of Special Appeals, in Hartlove v. Maryland School for the Blind, endorsed breach of fiduciary duty as an independent cause of action in tort. The Court of Special Appeals decided Hartlove after it ruled on Kann but prior to the Court of Appeals's opinion in Kann. Henry F. Hartlove was the personal representative of the estate of Claude Faye Bass, and the Maryland School for the Blind (the School) was the residuary legatee under Bass's will. In its suit against Hart-

128. Id. at 12, 626 A.2d at 41.
129. Id.
131. Id. at 192, 665 A.2d at 1046.
132. Id. at 191-92, 665 A.2d at 1045-46; see infra notes 188-193 and accompanying text (discussing the Court of Appeals's treatment of section 874 of the Restatement (Second) of Torts in Kann).
133. Alleco, 340 Md. at 192, 665 A.2d at 1046.
134. Id. (citing Moses v. Diocese of Colorado, 863 P.2d 310, 321-23 (Colo. 1993); Davis v. Church of Jesus Christ of Latter Day Saints, 852 P.2d 640, 649 (Mont. 1993)).
135. Id. at 184, 193, 665 A.2d at 1042-43, 1047.
137. Id. at 331, 681 A.2d at 593. The Hartlove decision is in stark contrast to the intermediate appellate court's Kann opinion, in which it vehemently stated that such a tort does not exist. Kann, No. 621, slip op. at 16.
138. Kann, 344 Md. at 708, 690 A.2d at 518.
139. Hartlove, 111 Md. App. at 316, 681 A.2d at 586.
love, the School alleged that Hartlove had misappropriated funds and mismanaged the estate’s assets.\footnote{Id.} Specifically, the School alleged that several bank accounts, with assets totaling approximately $176,000, held jointly by Hartlove and Bass before she died, were Bass’s sole property.\footnote{Id.} Therefore, the School claimed that the funds in those accounts should have passed through the probate estate to the residuary legatee and not to Hartlove personally through a right of survivorship.\footnote{Id.}

The School sought both equitable and legal forms of relief, including compensatory and punitive damages, a constructive trust, an accounting, injunctions, and the removal of Hartlove from his position as personal representative of the Bass estate.\footnote{Id.} The circuit court submitted two conversion counts, an unjust enrichment count, and charges of breach of fiduciary duty to the jury for consideration.\footnote{Id.} The jury found in favor of the School on the breach of fiduciary duty count and awarded $25,000 in compensatory damages, but returned a verdict for Hartlove on the other three counts.\footnote{Id.} Both parties appealed.\footnote{Id.}

On review, the Court of Special Appeals described the standard of care owed by a fiduciary as:

1. The exercise of the care, skill and diligence of a reasonably prudent person dealing with his or her own property;
2. The exercise of good faith and loyalty to all the beneficiaries;

\footnote{Id.} When Hartlove filed the first of two information reports with the Register of Wills, he failed to include the assets contained in several of Bass’s bank accounts. \footnote{Id. at 320-21 & n.5, 681 A.2d at 588-89 & n.5; see Md. Code Ann., Tax-Gen. § 7-224 (1997) (describing an information report as a written report, made under oath, that lists the decedent’s assets). He later listed these accounts on a supplemental information report. Hartlove, 111 Md. App. at 321, 681 A.2d at 589. The School contended that Hartlove originally omitted the accounts from the report “because he thought ‘that [he] could get away with taking [one of the accounts].’” Id. (first alteration in original).}

\footnote{Id. at 317, 681 A.2d at 587.}

\footnote{Id. at 325, 681 A.2d at 591.}

\footnote{Id. at 324, 681 A.2d at 591.} Hartlove filed the first of two information reports with the Register of Wills, he failed to include the assets contained in several of Bass’s bank accounts. \footnote{Id. at 320-21 & n.5, 681 A.2d at 588-89 & n.5; see Md. Code Ann., Tax-Gen. § 7-224 (1997) (describing an information report as a written report, made under oath, that lists the decedent’s assets). He later listed these accounts on a supplemental information report. Hartlove, 111 Md. App. at 321, 681 A.2d at 589. The School contended that Hartlove originally omitted the accounts from the report “because he thought ‘that [he] could get away with taking [one of the accounts].’” Id. (first alteration in original).}

\footnote{Id. at 317, 681 A.2d at 587.}

\footnote{Id. at 325, 681 A.2d at 591.}

\footnote{Id. at 324, 681 A.2d at 591.} Furthermore, the trial judge stated after the trial that “he would have found no breach of fiduciary duty” had he been sitting alone as the trier of fact in a court of equity. \footnote{Id. at 316-17, 681 A.2d at 586-87. Hartlove “contend[ed] that, because there [was] no independent cause of action for breach of fiduciary duty, the trial court erred in instructing the jury on that claim.” Id. at 326, 681 A.2d at 591. Hartlove “emphasize[d] that he [did] not contend that a fiduciary may never be accountable for misdeeds. Rather, he contend[ed] that the specific claim against the fiduciary must [have been] based on a ‘recognized’ cause of action, such as fraud.” Id. at 327, 681 A.2d at 591.}
3. The lack of self-dealing;
4. The exercise of reasonable watchfulness over investments; and
5. The maintenance of full, accurate and precise records.147

Given the stringent standard demanded of fiduciaries, the intermediate appellate court reasoned that fiduciaries should be accountable under an independent tort action for their breaches of duty.148 The court then proceeded to provide a substantial number of cases from other jurisdictions that recognize the tort of breach of fiduciary duty.149 Nonetheless, the Court of Special Appeals never reached a decision regarding whether a jury trial right would attend the new action.150

The Hartlove court also asserted that the adequacy of existing remedies was not a compelling justification for failing to recognize a new tort.151 The fact that the School prevailed only on the breach of fiduciary duty count illustrated that the other remedies available were insufficient. The Hartlove dissent, however, stated "that our adversarial system contemplates that on occasion litigants lose," whereas the majority's view would not prevent the court from creating new causes of action whenever a litigant cannot prevail using an established legal doctrine.152 The dissent also advanced judicial economy concerns, noting that an independent tort for breach of fiduciary duty could well "open a broad range of applicability."153 Because the final word

147. Id. at 330-31, 681 A.2d at 593 (quoting ALLAN J. GIBBER, GIBBER ON ESTATE ADMINISTRATION § 3-1, at 3-1 (3d ed. 1991)).
148. Id. at 331, 681 A.2d at 593.
150. Hartlove, 111 Md. App. at 333-34, 339, 681 A.2d at 594-95, 598 (declining to reach the issue because Hartlove failed to properly preserve the argument that the circuit court erred in submitting the breach of fiduciary duty claim to the jury).
151. Id. at 332-33 & n.13, 681 A.2d at 594 & n.13.
152. Id. at 358, 681 A.2d at 607 (Cathell, J., dissenting).
153. Id. at 355-56, 681 A.2d at 605-06; see supra text accompanying note 80 (listing types of fiduciaries).
on the acceptance of a new tort rests with either the General Assembly or the Court of Appeals, after Hartlove, the circumstances were ripe for Maryland's high court to conclusively establish whether an autonomous action based on breach of fiduciary duty would stand as the law of this state.

3. The Court's Reasoning.—In Kann v. Kann, the Court of Appeals held that mere allegations of a breach of fiduciary duty do not alone engender a generic cause of action at law, triable of right by a jury and imputable to all denominations of fiduciaries. The court, insisting that “[t]rusts are, and have been since they were first enforced, within the peculiar province of courts of equity,” repudiated a beneficiary's ability to maintain an action at law for the trustee's breach of trust. Additionally, the court refused to "preside over the death of equity" by advocating a manifest departure from traditional Maryland law through the creation of a new tort without a showing that existing equitable remedies for breach of a trustee's duties are inadequate.

Before commencing its inquiry into Regina Kann's right to maintain an action at law and the concomitant right to a jury trial, the Court of Appeals condensed the issues presented on appeal. The circuit court had fully adjudicated in a bench trial whether Donald Kann breached his fiduciary duties, converted funds from the Louis Trust, committed malfeasance, or defrauded Regina. Therefore, the Court of Appeals could not vacate the trial court's decision unless

155. Given that the Kann court "disapproved" of Hartlove's creation of an omnibus action at law to redress breaches of fiduciary duty, Kann, 344 Md. at 713, 690 A.2d at 521, the Court of Special Appeals, reconsidering Hartlove on remand, reversed its earlier decision endorsing a separate tort action for breach of fiduciary duty and found that a personal representative, like a trustee, cannot be held accountable for breaches of fiduciary duty under an independent cause of action at law. Hartlove v. Maryland Sch. for the Blind, No. 1706, slip op. at 7, 15 (Md. Ct. Spec. App. Aug. 6, 1997) (per curiam).
156. Kann, 344 Md. at 698, 690 A.2d at 511.
157. Id. at 703, 690 A.2d at 516 (quoting Scott & Fratcher, supra note 60, § 197, at 188).
158. Id.; see also Md. Code Ann., Est. & Trusts § 14-101 (1991) ("A court having equity jurisdiction has general superintending power with respect to trusts.").
159. Kann, 344 Md. at 713, 690 A.2d at 521.
160. Id. at 712-13, 690 A.2d at 520-21.
161. In Maryland, equity recognizes no right to trial by jury. See supra note 56 and accompanying text.
162. Kann, 344 Md. at 699, 690 A.2d at 514.
163. Id. at 698, 690 A.2d at 513-14.
any one of Regina's claims should have been tried to a jury. If a
bench trial had been appropriate, the only remaining issue would
concern whether the circuit court declined erroneously to hold that
the claim against the Louis Trust was time barred.

After encapsulating the issues, the court delved into a historical
analysis of the law-equity dichotomy, commenting that
"[d]etermining which actions belong[ ] to law and which to equity
for the purpose of delimiting the jury trial right continues to be one
of the most perplexing questions of trial administration." First, the
Court of Appeals explained that Article 23 of the Declaration of
Rights preserves the right to a jury trial of issues in a civil proceeding
where the amount in controversy exceeds the $5000 threshold.

Although the trial court's ruling on Donald's declaratory judg-
ment claim was not being reviewed, the Court of Appeals next probed
the jury trial right in declaratory judgment actions because the court
felt it demonstrative of Regina's right to a jury trial on her counter-
claim. The court stated that in declaratory judgment actions in
Maryland, trial courts must look to the substance of a claim to deter-
mine if an accompanying jury trial right exists. In the instant case,
the underlying substantive claims surrounded the administration of a
trust—claims that historically sounded in equity. There was conse-
quently no attendant right to a jury trial on Donald's declaratory judg-
ment claim alone.

The court then addressed Regina's principal argument—that she
advanced issues in her counterclaim triable by right to a jury—and
resolved that her counterclaim, like the declaratory judgment action,

164. Id. at 699, 690 A.2d at 514. Regina's counterclaim failed for lack of proof, but the
circuit court determined that Donald had not breached his duties. Id. at 698, 690 A.2d at
514.
165. Id. at 699, 690 A.2d at 514 (citing Md. Code Ann., Est. & Trusts § 8-103 (Supp.
1996)).
166. Id. at 699-702, 690 A.2d at 514-15.
167. Id. at 699, 690 A.2d at 514 (alterations in original) (quoting 9 CHARLES ALAN
WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302, at 18 (2d ed.
1995)).
168. Id.
169. Id. at 700-01, 690 A.2d at 514-15. Regina did not contend that she was entitled to a
jury trial—absent her counterclaim—on the declaratory judgment action alone. Id. at 700,
690 A.2d at 514.
170. Id. at 700, 690 A.2d at 514-15.
171. Id. at 701, 690 A.2d at 515.
172. Id. at 700-01, 690 A.2d at 514-15.
173. Id. at 702, 690 A.2d at 515. Had the trial of this matter involved both legal and
equitable issues, the common issues would have been submitted to a jury. See Higgins v.
Barnes, 310 Md. 592, 551, 530 A.2d 724, 733 (1987).
was grounded solely in equity. Because all of Regina's assertions were those of a beneficiary against a trustee for breach of the trustee's fiduciary duties, the court reasoned that the remedies available to her were exclusively equitable. The court confirmed that "equity has original and complete jurisdiction over trusts and will enforce the rights of a beneficiary because they arise out of a trust." The Court of Appeals observed that it has only recognized an exception to this rule when the trustee is obligated to immediately and unconditionally pay money or transfer chattel to the beneficiary. Although Regina was entitled to "the net income of the Residuary Trust, in monthly or quarterly installments as nearly equal as may be practical," the court noted that she was not entitled to receipt of any income unconditionally or immediately—that is, distribution of the income was within Donald's sole discretion. Accordingly, the court held that Regina's claims did not fall within an exception to the rule that actions brought by beneficiaries against the trustee are within equity's exclusive jurisdiction.

Likewise, the court concluded that the joinder of Venable and Lewis in Regina's counterclaim failed to convert the action from an equitable to a legal claim. If Regina had brought suit against the attorney respondents alone, asserting similar allegations, she would have had no jury trial right. Unless a beneficiary is "entitled to possession of the trust property when bringing [a] possessory action[, she] 'cannot maintain an action at law against a third person who commits a tort or other wrong with respect to the trust property.'"

174. Kann, 344 Md. at 702, 690 A.2d at 515.
175. Id. at 702-03, 690 A.2d at 515-16. Regina was an income beneficiary of the Louis Trust and could not be considered a legatee under Louis's will. Id. at 702, 690 A.2d at 515-16; see Md. Code Ann., Est. & Trusts § 1-101(k) (1991) (stating that the trustee, not the trust beneficiary, receives the legacy under a will).
176. Kann, 344 Md. at 703, 690 A.2d at 516.
177. Id. at 703-04, 690 A.2d at 516 (quoting George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 870, at 136 (rev. 2d ed. repl. vol. 1995) (internal quotation marks omitted)).
178. Id. at 708, 690 A.2d at 516; Restatement (Second) of Trusts §§ 197, 198 (1959). The Court of Special Appeals made "[y]et another exception . . . when the trustee has made improper investments. In such a case, the action is one at law, triable by jury." Kahle v. John McDonough Builders, Inc., 85 Md. App. 141, 152, 582 A.2d 557, 562 (1990).
179. Joint Record Extract at E18, Kann (No. 22) (Last Will and Testament of Louis M. Kann, Jr.).
180. Kann, 344 Md. at 703, 690 A.2d at 516.
181. Kann, No. 621, slip op. at 1-2.
182. Kann, 344 Md. at 703, 690 A.2d at 516.
183. Id. at 705, 690 A.2d at 517.
184. Id.
185. Id. (quoting Scott & Fratcher, supra note 60, § 281, at 21).
Although all of Regina's claims sounded in equity and were devoid of any jury trial right under conventional Maryland jurisprudence, she advocated Maryland's adoption of breach of fiduciary duty as an independent action at law, triable by right to a jury and buttressed by the ability to sustain punitive damages in suitable cases.\textsuperscript{186} The Court of Appeals remarked that it had countenanced comparable contentions in the past, but always assumed, "solely for the purpose of discussion," the existence of such an action without passing on its actual legal presence.\textsuperscript{187}

Regina's proposition that Maryland should embrace a universal cause of action for breach of fiduciary duty relied on the \textit{Restatement (Second) of Torts}.\textsuperscript{188} The \textit{Kann} court, however, was not ready to concede that the \textit{Restatement} recognized a jury trial right in every breach of fiduciary duty action.\textsuperscript{189} The court reasoned that the \textit{Restatement} meant to refer state courts to local rules of procedure and the nature of the underlying situation to determine if a beneficiary is entitled to redress through a jury trial.\textsuperscript{190}

Regina also relied on \textit{Hartlove} because it purported to uphold the legitimacy of a generic cause of action for breach of fiduciary duty.\textsuperscript{191} In that case, however, the Court of Special Appeals never reached the issue of whether such an action was necessarily coupled with a right to trial by jury.\textsuperscript{192} The Court of Appeals resolved that both Regina and the \textit{Hartlove} court "read too much into § 874 of the Restatement."\textsuperscript{193} The court also noted that other jurisdictions do not appear to have loosened the grip that equity has over trusts.\textsuperscript{194}

Besides displacing the court's inherent domain when it sits in equity by transferring to a jury its right to determine questions of fact, Regina also attempted to amplify a beneficiary's remedies to include

\begin{footnotesize}
\begin{enumerate}
\item[186.] \textit{Id.} at 706, 690 A.2d at 517.
\item[187.] \textit{Id.}
\item[188.] \textit{Id.} "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." \textit{Restatement (Second) of Torts} § 874 (1977) (entitled "Violation of Fiduciary Duty").
\item[189.] \textit{Kann}, 344 Md. at 707, 690 A.2d at 518.
\item[190.] \textit{Id.} Comment b to section 874 states: "The local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity. The remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity . . .." \textit{Restatement (Second) of Torts} § 874 cmt. b.
\item[191.] \textit{Kann}, 344 Md. at 708, 690 A.2d at 518.
\item[192.] \textit{Id.} at 709, 690 A.2d at 519.
\item[193.] \textit{Id.} at 710, 690 A.2d at 519.
\item[194.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
punitive damages as well as reparations for emotional distress.\textsuperscript{195} The court dismissed each of these suggestions as deviations from the essential character of trusts and the traditional province of equity to preside over such instruments.\textsuperscript{196} The Court of Appeals perceived it inconceivable that, by recognizing a universal cause of action in tort for breach of fiduciary duty, a trustee may be held liable for the beneficiary’s emotional distress damages resulting from the breach despite the fact that the trustee committed the breach mistakenly or non-negligently.\textsuperscript{197} The court maintained that punitive damages are completely unrecoverable in equity.\textsuperscript{198} Rather, a trial court may sanction the trustee by reducing the trustee’s commissions in cases of “serious, but not necessarily criminal, breaches of trust.”\textsuperscript{199}

The court contended that both Regina and the Court of Special Appeals in \textit{Hartlove} attempted to alter entrenched aspects of Maryland law without examining what relationships will be controlled by this “new tort” and how it will be applied to those relationships.\textsuperscript{200} The Court of Appeals has been willing to recognize new torts when there was no available legal remedy\textsuperscript{201} or when existing remedies were inadequate,\textsuperscript{202} but it found neither of these exigencies in the instant case.\textsuperscript{203} In order to guard Learned Hand’s maxim that “[t]he law ought not make trusteeship so hazardous that responsible individuals

\begin{enumerate}
\item Id. at 711, 690 A.2d at 520; \textit{see supra} note 38 and accompanying text (reporting Regina’s demands for relief). The equitable remedies generally available to a trust beneficiary are:
\begin{enumerate}
\item to compel the trustee to perform his duties as trustee;
\item to enjoin the trustee from committing a breach of trust;
\item to compel the trustee to redress a breach of trust;
\item to appoint a receiver to take possession of the trust property and administer the trust;
\item to remove the trustee.
\end{enumerate}
\item \textit{Restatement (Second) of Trusts} § 199 (1959).
\item \textit{Kann}, 344 Md. at 711-12, 690 A.2d at 520.
\item Id. at 711, 690 A.2d at 520.
\item Id. at 712, 690 A.2d at 520.
\item Id.
\item Id.
\item Id. (citing Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (strict liability in tort)).
\item Id. at 712-13, 690 A.2d at 520.
\end{enumerate}
and corporations will shy away from it,"204 the Kann court disapproved Hartlove to the extent that it conflicted with the ruling in Kann205 and held:

[T]hat there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries. This does not mean that there is no claim or cause of action available for breach of fiduciary duty. Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem. Whether the cause or causes of action selected carry the right to a jury trial will have to be determined by an historical analysis. Counsel do not have available for use in any and all cases a unisex action, triable to a jury.206

Though the court adjudged that she was not entitled to a jury trial, Regina alternatively claimed that Donald breached his fiduciary duty in failing to timely oppose the transfer of the segregated funds on the grounds that the transfer was time-barred by section 8-103(a) of the Estates and Trusts Article.207 However, the court held that the time limitations of section 8-103(a) are not unyielding and a personal representative may unintentionally waive or be estopped from asserting a defense under this statute.208 Donald either waived the ability to raise this defense or was estopped from raising it because, in his capacity as personal representative of Louis's estate, he allowed the trustee of the Frances Trust (himself) to investigate Louis Kann's misappropriations (or investigated them while acting as personal representative

204. Id. at 710, 690 A.2d at 519 (alteration in original) (internal quotation marks omitted) (quoting InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 914 (Tex. App. 1987, no writ) (quoting Dabney v. Chase Nat'l Bank, 196 F.2d 668, 675 (2d Cir. 1952))).
205. Id. at 713, 690 A.2d at 521.
206. Id.
207. Id. at 713-14, 690 A.2d at 521. The statute states:

[A]ll claims against an estate of a decedent . . . are forever barred against the estate, the personal representative, and the heirs and legatees, unless presented within the earlier of the following dates:

(1) 6 months after the date of the decedent's death; or

(2) Two months after the personal representative mails or otherwise delivers to the creditor a copy of a notice . . . notifying the creditor that his claim will be barred unless he presents the claim within 2 months from the mailing or other delivery of the notice.

208. Kann, 344 Md. at 714-15, 690 A.2d at 521-22.
of Louis’s estate). Because Donald, in his capacity as personal representative of Louis’s estate, was aware of his own ongoing investigation, he was estopped from later asserting the section 8-103(a) bar or deemed to have waived the protection of this provision. Finding no error on the part of the trial court, the Court of Appeals affirmed the circuit court’s ruling on Donald’s declaratory judgment action.

4. Analysis.—In Kann v. Kann, the Court of Appeals decreed that Maryland does not recognize a universal tort to redress every breach of fiduciary duty. First, the court denounced any deviation from the longstanding maxim that equity has exclusive jurisdiction with respect to the administration of trusts. The court then condemned a generic cause of action at law by stating that adequate equitable remedies will not be superseded by discarding equity’s entrenched dominion over trusts. In so holding, the court failed to realize the inadequacy of the existing equitable remedies available to a beneficiary when the trustee breaches his fiduciary duties. The court also disregarded Donald Kann’s glaring breaches of duty, acknowledgment of which would have allowed the court to reach a just and equitable resolution without undermining equity’s jurisdiction over trusts.

a. Conflicting Interests.—Regina’s principal argument before the Court of Appeals was that her counterclaim raised issues entitling her to a jury trial. The court, therefore, never reached the question of whether Donald actually breached his fiduciary duties. Had the court considered Donald’s actions as trustee of the Louis Trust, it should have overruled as clearly erroneous the trial court’s ruling that Donald fulfilled his duties to Regina. Such a judgment would not compel the creation of a new tort for breach of fiduciary duty, and the Court of Appeals could have restricted the trial court, on remand, to administering only established equitable remedies for Donald’s breaches of his fiduciary duties.

209. Id. at 715, 690 A.2d at 522. The court assumed that Donald, the personal representative of Louis’s trust, and Donald, the trustee of Frances Trust, were two different people in order to illustrate this argument. Id.

210. Id. at 715-16, 690 A.2d at 522.

211. Id. at 716, 690 A.2d at 522.

212. Id. at 693, 690 A.2d at 511.

213. Id. at 710, 690 A.2d at 519.

214. Id. at 712-13, 690 A.2d at 520-21.

215. Id. at 697-98, 690 A.2d at 513.

216. Id. The issue of whether Donald had breached his fiduciary duties, however, was before the Court of Special Appeals. Kann, No. 621, slip op. at 5.
By late 1992 or early 1993, Donald had discovered instances of apparently improper transfers from the Frances Trust to a joint bank account held by Louis and Regina.\textsuperscript{217} When he discovered that his father may have removed funds from the Frances Trust, a trust in which he had a one-half interest, Donald's loyalties were divided—he knew that the trust he was appointed to oversee may have embezzled funds earmarked for him. Although Donald's loyalties became divided the instant he realized the potential of a defalcation, this discovery and Donald's failure to resign from his position as trustee may not have constituted a breach of his fiduciary duties in and of themselves. When Louis decided to make Donald the trustee of his testamentary trust in 1992, Louis, as the trustee of the Frances Trust for nearly sixteen years, was aware that Donald was a beneficiary of that trust.\textsuperscript{218} Any conflict of interest that might have resulted by virtue of Donald's position as trustee of the Louis Trust and beneficiary of the Frances Trust was within Louis's comprehension when he created his trust and therefore did not amount to a breach of Donald's fiduciary duties to Regina.\textsuperscript{219}

Donald did, however, breach his duties to Regina by neglecting to inform her immediately of his discovery and his subsequent removal from the Louis Trust of all of the funds he deemed misappropriated.\textsuperscript{220} In so doing, Donald withheld information that doubtless would seriously impact Regina's interests and then used that information for his personal benefit—the more money Donald believed Louis wrongly removed from the Frances Trust, the more Donald, as a beneficiary of the Frances Trust, stood to gain. In his capacity as trustee of the Louis Trust, Donald owed Regina an unwavering duty of loyalty, but instead of acting solely for Regina's benefit, Donald pursued his own interests at the expense of the trust estate.

Before segregating the assets, had Donald applied to the court for guidance, resigned from his position as trustee of the Louis Trust, or informed Regina promptly of his discovery, allowing her the opportunity to seek his removal, he could have exculpated himself from

\textsuperscript{217} Kann, 344 Md. at 694, 690 A.2d at 511.

\textsuperscript{218} See Motion to Dismiss and Brief of Appellee Donald R. Kann at 42, Kann (No. 22).

\textsuperscript{219} See Goldman v. Rubin, 292 Md. 693, 706, 441 A.2d 713, 720 (1982) (noting that a presumption of invalidity as a result of a fiduciary's self-dealing does not attach when the instrument that created the trust contemplates a conflict of interest).

\textsuperscript{220} See Restatement (Second) of Trusts § 170(2) (1959) ("The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary . . . to communicate to him all material facts in connection with the transaction . . . ").
wrongdoing.\textsuperscript{221} To the contrary, while continuing to act as trustee for both of his parents' trusts, Donald investigated his father's finances for nearly ten months without consulting Regina.\textsuperscript{222} He then filed a supplemental inventory in order to extract from the Louis Trust those funds he believed were misappropriated from the Frances Trust.\textsuperscript{223} Donald waited until Regina could no longer oppose the supplemental inventory and the segregation of nearly $200,000 before informing her of what had transpired.\textsuperscript{224} All of these actions demonstrate Donald's improper motivation: He did not want Regina to know of the transfer because he knew that she would ardently oppose it.\textsuperscript{225} Whether Donald's actions were deemed proper, however, is irrelevant,\textsuperscript{226} and the simple fact that he stood to benefit from any funds transferred to the Frances Trust from the Louis Trust was enough to make the transfer voidable.\textsuperscript{227} Donald's circumstances were such that it was impossible for him to deal fairly with both trusts, and he breached his duties both by failing to allow Regina or the court the opportunity to oversee the segregation and by profiting from the transfer.

Throughout the litigation that followed Donald's segregation of the misappropriated funds, he continued to breach his duties to Regina. In faithfully pursuing the interests of the beneficiary, the trustee must defend against any claim that may occasion a loss to the trust estate.\textsuperscript{228} Donald not only failed to defend the Louis Trust, but he also represented an interest adverse to Regina's. In this regard, the intermediate appellate court's opinion is telling because it proclaims that, "[a]t the declaratory judgment proceeding . . . , Donald presented significant evidence demonstrating how and when Louis improperly withdrew money from the Frances Trust. Alternatively, Regina was unable to explain what had happened to the missing

\begin{itemize}
\item \textsuperscript{221} See id. \S 170(2) \& cmt. r. Comment r states: "If the circumstances are such that the interests of the beneficiaries of [two trusts with a common trustee] are so conflicting that the trustee cannot deal fairly with respect to both trusts, he cannot properly act without applying to the court for instructions." Id. \S 170 cmt. r.
\item \textsuperscript{222} Kann, 344 Md. at 694, 690 A.2d at 511.
\item \textsuperscript{223} Id. at 694-95, 690 A.2d at 512.
\item \textsuperscript{224} Id. at 695, 690 A.2d at 512.
\item \textsuperscript{225} But see id. at 695 \& n.2, 690 A.2d at 512 \& n.2 (indicating that Regina was not entitled to notice of the Orphan's Court proceedings).
\item \textsuperscript{226} Compare supra notes 40, 47 and accompanying text, stating that Donald's actions were deemed proper at trial, with supra note 88 and accompanying text, noting that a determination of the propriety of a trustee's actions is irrelevant where the trustee's personal interests may conflict with those of the beneficiary.
\item \textsuperscript{227} See supra notes 107-117 and accompanying text.
\item \textsuperscript{228} \textsc{Restatement (Second) of Trusts} \S 178 (1959).
\end{itemize}
money."

The Court of Special Appeals erroneously placed the burden of defending the trust estate on the beneficiary when in actuality the trustee was obligated to defend against any adverse claims. As trustee for both trusts, Donald had a duty to defend the Louis Trust and the Frances Trust, despite the fact that the two trusts were adverse parties in this litigation. Donald breached his duty to defend by sitting at both the plaintiffs' and defendant's tables at trial while exclusively representing the interests of the Frances Trust (and his own beneficial interest in that trust) in a manner adverse to Regina's interests.

Donald, however, would not have breached his duties if it were reasonable for him to segregate the funds and settle the Frances Trust's claim against the Louis Trust. The trustee is required to defend against adverse claims and cannot settle any claims "unless under all the circumstances it is reasonable not to make such defense." In the instant case, the reasonableness of contesting the claim is best demonstrated by assuming that the two trusts were administered by different trustees and that the trustee of the Louis Trust had no interest in the assets of the Frances Trust. If that were the case, the trustee of the Louis Trust would unquestionably have disputed the removal of nearly $200,000 from the corpus of the trust. Even if some amount of money was clearly misappropriated, it was still unreasonable not to challenge the calculation of interest and income that had accrued as well as the computation of the amount of the defalcation. Had the trustee of the Louis Trust been anyone other than a beneficiary of the Frances Trust, that trustee would have defended the Louis Trust estate. Therefore, Donald's duty to defend the Louis Trust against a loss was not affected by his ability to settle, because it would have been unreasonable for him to do so.

Although the propriety of Donald's actions was not an issue presented to the Court of Appeals for consideration, by adjudging Donald in breach of his duties to Regina, the court could have reached the result that justice required without disturbing equity's longstanding jurisdiction over trusts. The trial court's determination that Donald had not breached his fiduciary duties was clearly erroneous and inconsistent with Maryland precedent, given Donald's benefi-

229. Kann, No. 621, slip op. at 3-4.
230. Restatement (Second) of Trusts § 178.
231. Id.
232. Id. § 178 & cmt. c; cf. Joint Record Extract at E266, Kann (No. 22) (oral opinion of the Circuit Court for Baltimore City, Jan. 20, 1995) (stating that fiduciaries are not required to "blindly defend" against all claims).
cial interest in the Frances Trust and his hostile actions towards the beneficiary of the Louis Trust. Accordingly, the Court of Appeals should have found Donald in breach of trust, removed him from his position as trustee of the Louis Trust, deemed the segregation of purportedly misappropriated assets a nullity, and remanded the case to the trial court for a determination of the appropriate equitable remedies. To this end, the Court of Appeals could have required that the assets in question be kept separate (or under the court’s supervision) until such time as an impartial appointee determined the amount of funds misappropriated from the Frances Trust. Regina, consequently, would have been provided with a trustee who advocated her interests; at the same time, Louis’s misappropriations would not have escaped correction.

b. A New Tort for Breach of Fiduciary Duty.—In Kann, the Court of Appeals’s refusal to recognize a ubiquitous tort to redress all breaches of fiduciary duty was consistent with Maryland law, the Restatement (Second) of Trusts, treatises, and the majority of other jurisdictions. Trusts have long been regarded as exclusively equitable instruments, and the promulgation of an action at law with a jury trial

233. The trial court, sitting in equity, may award any relief necessary to correct the wrongs committed. McKeever v. Washington Heights Realty Corp., 183 Md. 216, 224, 37 A.2d 305, 310 (1944). Therefore, this form of relief would be well within the equity court’s power.

234. See supra notes 60-65 and accompanying text.

235. See Restatement (Second) of Trusts §§ 197, 198.

236. See Bogert & Bogert, supra note 177, § 870, at 136; Scott & Fratcher, supra note 60, § 197, at 188.

237. Other jurisdictions have recognized breach of fiduciary duty as a tort. See supra note 149 and accompanying text. However, few courts have explicitly supported a beneficiary’s ability to bring an action at law against the trustee of a testamentary trust for breach of fiduciary duty. See, e.g., Cartee v. Lesley, 350 S.E.2d 388, 389-90 (S.C. 1986) (treating breach of fiduciary duty as a tort). The majority of jurisdictions follow the traditional view that trusts are creatures of equity and actions for breach of trust are not triable of right to a jury. See Ex parte Holt, 599 So. 2d 12, 15 (Ala. 1992) (holding that an action concerning a trustee’s breach of fiduciary duty sounds in equity and is not attended by a jury trial right); Carstens v. Central Nat’l Bank & Trust Co., 461 N.W.2d 331, 333 (Iowa 1990) (“Generally, the remedies of a beneficiary against the trustee are exclusively equitable.” (citing Restatement (Second) of Trusts § 197)); Magill v. Dutchess Bank & Trust Co., 541 N.Y.S.2d 437, 438 (App. Div. 1989) (stating that a beneficiary ordinarily has no right to a jury trial in an action against the trustee because such an action is governed by equity). These jurisdictions, devoted to the general rule that trusts are equitable instruments, only recognize a jury trial right pursuant to the exceptions enumerated in the Restatement. See Kaitz v. District Court, Second Judicial Dist., 650 P.2d 553, 555 (Colo. 1982) (en banc) (noting that a beneficiary may maintain an action at law if the trustee is obligated to immediately and unconditionally transfer chattels to the beneficiary); Uselman v. Uselman, 464 N.W.2d 130, 137 (Minn. 1990) (en banc) (stating that an exception may exist if the trustee is under a duty to unconditionally and immediately pay money to the beneficiary).
right for breach of fiduciary duty would necessarily displace equity’s autonomous authority over trusts.\textsuperscript{238} Because the court never denounced the availability of a jury trial in all actions for breach of fiduciary duty, however, actions for breach of fiduciary duty in which there inheres a historical right to a trial by jury will retain that right.\textsuperscript{239} The court, therefore, did not actually limit the right to a jury trial, but merely refused to extend the jury trial right to \textit{all} actions for breach of fiduciary duty.\textsuperscript{240}

By confining actions concerning the administration of trusts to the equity courts, the Court of Appeals not only declined to extend the right to a jury trial beyond the exceptions to the rule that equity has exclusive jurisdiction over trusts, but also eliminated the possibility of imposing punitive damages on a trustee.\textsuperscript{241} The penalties a trustee faces for breaching his fiduciary duties are limited to the following: compelling the trustee to perform his duties, removing him from his position as trustee, forcing him to redress the trust estate for his breach of duty, or reducing or eliminating his commission.\textsuperscript{242} A-

Regardless of the power that equity has historically exercised over trusts, some courts have strayed from the prevailing rule. See \textit{Fortune v. First Union Nat'l Bank}, 371 S.E.2d 483, 485 (N.C. 1988) (treating breaches of fiduciary duty as torts because the court could “see no reason why a beneficiary may not sue . . . for damages if the . . . trustee has mismanaged the property he holds in a fiduciary capacity”); \textit{Cartee}, 350 S.E.2d at 390 (recognizing the right of a beneficiary to bring an action at law for the trustee’s breach of fiduciary duty); \textit{InterFirst Bank Dallas, N.A. v. Risser}, 739 S.W.2d 882, 907 (Tex. App. 1987, no writ) (regarding breach of fiduciary duty as a tort). These jurisdictions have allowed a jury to intervene when a beneficiary sues the trustee and have also sustained the possibility of attaching punitive damages where the trustee acted in bad faith toward the rights of the beneficiaries. See \textit{Cartee}, 350 S.E.2d at 390 (“Punitive damages may be imposed upon a trustee where there is evidence his management of the estate was in bad faith or conscious indifference to the rights of the beneficiaries.”); \textit{InterFirst Bank}, 739 S.W.2d at 907 (“[A]n intentional breach of a fiduciary duty is a tort justifying the award of exemplary damages.”). In \textit{InterFirst Bank Dallas, N.A. v. Risser}, for example, the beneficiary claimed that the trustee was guilty of self-dealing and had therefore sold trust assets for too low a price. \textit{Id.} at 887-88. The Texas Court of Appeals affirmed the jury’s compensatory award and remitted the jury’s exemplary damages award. \textit{Id.} at 909. The \textit{InterFirst Bank} court stated that the fundamental duties of a trustee include loyalty to the beneficiary and the use of the care, skill, and prudence that an ordinary person would exercise in conducting his or her own affairs. \textit{Id.} at 888. A trustee’s transgression of these duties, the court reasoned, warrants the imposition of compensatory and, in certain instances, punitive damages. \textit{Id.} at 888-89, 907.

\textsuperscript{238} This is because equity does not recognize the right to a jury trial. See \textit{supra} note 56 and accompanying text.

\textsuperscript{239} \textit{Kann}, 344 Md. at 713, 690 A.2d at 521.

\textsuperscript{240} \textit{Id.}

\textsuperscript{241} See \textit{Superior Constr. Co. v. Elmo}, 204 Md. 1, 20, 26, 104 A.2d 581, 585, 588 (1954) (reversing an equity court’s decree awarding punitive damages because equity’s purpose in awarding relief is to compensate for the wrong committed).

\textsuperscript{242} \textit{Restatement (Second) of Trusts} § 199.
Accordingly, if the trustee’s breach of duty is discovered and adjudicated unlawful, at worst he may be denied compensation, told never to do that again, or be forced to put the cookies back in the cookie jar. These penalties provide little incentive for the trustee to remain steadfast when faced with the opportunity to profit from a transaction that may constitute a breach of fiduciary duty. The Kann court observed that trusteeship should not be so hazardous as to make honest corporations and individuals hesitant about assuming the role of trustee. The court, however, failed to observe that the penalties for breaches of fiduciary duty by a trustee may be so lenient that profiting at the expense of the trust estate is not effectively deterred. Therefore, in its zeal to protect honest trustees, the court protected some dishonest trustees as well.

Because the standard of care required of a trustee is considerable, the penalties for transgressing the duty owed should reflect the moment of the relationship. Nonetheless, a court of equity cannot go beyond compensation in awarding relief. In an equitable action by a beneficiary against a trustee, a punitive-damages award is apparently the only relief entirely unavailable to the beneficiary. In order to hold the trustee accountable for intentional breaches of his fiduciary duty, exemplary damages should be accessible. Because only a court of law may impose punitive damages, the Court of Appeals should have ventured to declare the existence of an action at law to redress breaches of fiduciary duty by a trustee. It is untenable that Maryland has endorsed an exception for situations in which the

243. See supra note 204 and accompanying text.
244. See supra notes 81-84 and accompanying text.
245. Both Regina and the Hartlove court proffered similar arguments by stating that fiduciaries should be held accountable for their breaches of duty under an independent action targeted at quelling such nefarious conduct. Hartlove v. Maryland Sch. for the Blind, 111 Md. App. 310, 331, 681 A.2d 584, 593 (1996), vacated per curiam, 344 Md. 720, 690 A.2d 526 (1997); Brief of Appellant at 9-10, Kann (No. 22). Regina further argued that the law as it stands creates an inverse relationship between the duty owed and the liability for breaching that duty. Id.
246. See Elmo, 204 Md. at 20, 26, 104 A.2d at 585, 588.
247. See supra notes 57-59 and accompanying text (stating that only a court of law may award punitive damages, but also stating that a court of equity may grant complete relief).
248. The Court of Appeals expressed concern regarding the imposition of punitive damages on a trustee for a non-negligent or mistaken breach of fiduciary duty. Kann, 344 Md. at 711, 690 A.2d at 520. The court’s fears are not warranted, however, because punitive damages are only recoverable when the wrongful act is accompanied by “an element of fraud, or malice, or evil intent, or oppression.” Philadelphia, Wilm., & Balt. R.R. Co. v. Hoeflich, 62 Md. 300, 307 (1884); accord Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 462, 601 A.2d 633, 653 (1992) (referring to the standard for recovering punitive damages as “actual malice”).
249. Elmo, 204 Md. at 20, 26, 104 A.2d at 585, 588.
trustee merely mismanages the trust assets,\textsuperscript{250} but the court now refuses to afford the beneficiary an action at law when the trustee has forsaken his duties altogether.

Moreover, a beneficiary’s ability to bring an action for damages at law would not be a “wholesale”\textsuperscript{251} departure from Maryland law because the court could simply announce another exception (or expand existing exceptions) to the rule that equity presides over the administration of trusts.\textsuperscript{252} The court could limit the availability of such an action to beneficiaries of testamentary trusts and need not declare a universal tort maintainable against all fiduciaries.\textsuperscript{253} Neither would the pronouncement of a legal remedy for a trustee’s breach of fiduciary duty entirely displace equity’s ability to preside over actions concerning trusts. When faced with a prayer for punitive damages in an action by a beneficiary against the trustee for breach of the trustee’s duties, the trial court could submit the issue of punitive damages to the jury while reserving its opinion on any remaining equitable issues until after the jury renders a verdict.\textsuperscript{254} This approach would not displace the equity courts’ power with respect to the administration of trusts but would provide the relief necessary to forestall breaches of duty.

5. Conclusion.—Although the issue of whether Donald Kann breached his fiduciary duties to Regina Kann was not reviewed by the Court of Appeals, had the court endeavored to examine Donald’s actions, it should have determined that he did in fact transgress his duties. Because Donald “might wind up with more money”\textsuperscript{255} as a result of this ordeal, the propriety of his actions should have been inquired


\textsuperscript{251} Kann, 344 Md. at 713, 690 A.2d at 520 (emphasis added).

\textsuperscript{252} Kahle, 85 Md. App. at 152, 582 A.2d at 562 (noting the availability of an action at law when the trustee has made improper investments); RESTATEMENT (SECOND) OF TRUSTS §§ 197, 198 (1959) (allowing an action at law when the trustee is required to unconditionally remit money or chattels to the beneficiary).

\textsuperscript{253} But see Kann, 344 Md. at 713, 690 A.2d at 521 (stating that the court will not adopt a cause of action at law for all breaches of fiduciary duty by every type of fiduciary). By simply creating or expanding the list of exceptions, the Court of Appeals could heed the Hartlove dissent’s warning that recognition of an independent tort for breach of fiduciary duty would have sweeping implications. Hartlove v. Maryland Sch. for the Blind, 111 Md. App. 310, 355-56, 681 A.2d 584, 605-06 (1996) (Cathell, J., dissenting), vacated, 344 Md. 720, 690 A.2d 526 (1997).

\textsuperscript{254} See Higgins v. Barnes, 310 Md. 532, 551-52, 530 A.2d 724, 733-34 (1987) (holding that a right of trial by jury must be preserved as to legal issues where both legal and equitable issues are presented in a single case).

\textsuperscript{255} Joint Record Extract at E270, Kann (No. 22) (oral opinion of the Circuit Court for Baltimore City, Jan. 20, 1995).
into by the trial court. Not only did he have an interest in the funds removed from the corpus of the Louis Trust, but Donald also failed to faithfully defend that trust against adverse claims—though they were claims he himself was making. Donald breached his duties to Regina by profiting from the transfer of assets he believed were misappropriated and by disregarding his duty to defend the Louis Trust. Therefore, the Court of Appeals could have sidestepped discussing the creation of a new tort by adjudging Donald in breach of trust and labeling the trial court’s opinion to the contrary clearly erroneous.

In refusing to sanction a generic tort and a jury trial right for breach of fiduciary duty, the Court of Appeals rigidly conformed to the traditional rule as well as established Maryland law. In clinging to the rule that trusts are within equity’s exclusive province, however, the court failed to perceive the insufficiency of existing equitable remedies. A court of equity should not constrain itself to traditional forms of relief if they are inadequate. Nonethelss, the only relief currently unavailable to a beneficiary in any action against the trustee is punitive damages. Because a punitive-damages award may only be imposed by a court of law, the Court of Appeals should have advocated a beneficiary’s ability to combat breaches of fiduciary duty by a trustee through an action at law.

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256. See Wells v. Price, 183 Md. 443, 452, 37 A.2d 888, 893 (1944) (”[E]quity suffers no right to be without a remedy.” (internal quotation marks omitted))).
Recent Decisions
The United States Court of Appeals for the Fourth Circuit

I. Bankruptcy

A. Rendering Section 707(b) the Equivalent of a Good Faith Requirement for Chapter 7 Debtors

In the case of *In re Kestell*, the United States Court of Appeals for the Fourth Circuit upheld the denial of a Chapter 7 debtor’s discharge in bankruptcy under sections 105(a) and 707(b) of the Bankruptcy Code. In so holding, the Fourth Circuit rendered section 707(b), which allows a court to dismiss a Chapter 7 debtor’s bankruptcy petition if the court finds that granting relief would be a “substantial abuse” of the bankruptcy process, the equivalent of a good faith requirement for debtors seeking a Chapter 7 discharge. By eliminating any consideration of the debtor’s future income in making its determination, the Fourth Circuit moved further away from the future income test promulgated by the Ninth Circuit in *In re Kelly*. The court also demonstrated a clear intent to employ section 707(b) to realize a primary goal of the Bankruptcy Code, namely, “to prevent the use of the bankruptcy process to achieve illicit objectives.”

1. The Case.—In 1993, Janet Atkinson received a divorce from her husband of twenty-seven years, Robert Kestell. As a result of the divorce judgment, Kestell was obligated to pay Atkinson alimony, child support, a lump sum award, attorney’s fees, and a share of prof-

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1. 99 F.3d 146 (4th Cir. 1996).
2. Id. at 149.
3. See 11 U.S.C. § 707(b) (1994). This section states:
   After a notice and a hearing, the court, on its own motion ... but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.
4. 841 F.2d 908 (9th Cir. 1988).
5. *Kestell*, 99 F.3d at 149.
6. Id. at 147.
its from a rental property. Just thirteen days after the divorce judgment, Kestell, who earned $193,000 in 1993, filed for Chapter 7 bankruptcy.

One month subsequent to his filing for bankruptcy, Kestell attended a creditors' meeting where he stated that he intended to reaffirm all of his debts except a small credit card debt and the dischargeable portion of the debt that he owed to Atkinson. Also at this meeting, Kestell remarked that he did not want his ex-wife "to have anything," and he swore under oath that, to the best of his knowledge, he had accurately listed all of his assets and debts. In reality, however, Kestell not only failed to list on the bankruptcy schedules his anticipated receipt of a $13,000 income tax reimbursement from his employer, but he also neglected to amend the schedule when he received the money. Kestell also failed to report sick leave benefits that he received from his employer in March 1994. After a one-day trial, the bankruptcy court ruled that the benefits and the reimbursement qualified as property of the estate. Moreover, the court found that Kestell should have amended the bankruptcy schedules to reflect these payments and turned the proceeds over to the bankruptcy trustee. The court also determined that Kestell's actions evidenced an intent to defraud a creditor, namely Atkinson. As a result of these findings, the bankruptcy court found fraudulent concealment in violation of 11 U.S.C. § 727(a)(2)(B)

7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id. Kestell received the sick leave benefits, which he had initially anticipated receiving only upon resignation or retirement, in March 1994 as a result of a modification in company policy. After attempting to return the check so that he could receive his benefits at a later date, Kestell cashed the check and deposited the money in a checking account in Jamaica. Id.
13. Id.
14. Id.
15. Id.
16. This section provides:
(a) The court shall grant the debtor a discharge, unless—

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(B) property of the estate, after the date of the filing of the petition; . . . 11 U.S.C. § 727(a)(2)(B) (1994).
and denied Kestell's petition for a bankruptcy discharge.\(^{17}\) On appeal, the United States District Court for the District of Maryland affirmed the lower court's decision, and Kestell subsequently appealed to the United States Court of Appeals for the Fourth Circuit.\(^{18}\)

2. **Legal Background.**

   a. **Legislative History of 11 U.S.C. § 707(b).**—In 1984, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984,\(^{19}\) which added section 707(b) to the Bankruptcy Code.\(^{20}\) Section 707(b) allows a court to dismiss a case filed under Chapter 7 of the Bankruptcy Code if the "granting of relief would be a substantial abuse of the provisions of [Chapter 7]."\(^{21}\) Section 707(b) was one of several consumer credit amendments that Congress added to the Bankruptcy Code in an effort to lessen the increasing number of Chapter 7 petitions filed by debtors who did not truly need relief.\(^{22}\) Prior to the enactment of section 707(b), the only obstacles to relief under Chapter 7 for debtors were the exceptions to discharge found in section 523(a),\(^{23}\) grounds for dismissal in 707(a),\(^{24}\) and objections

\[\text{References:\textsuperscript{17} Kestell, 99 F.3d at 147.}\]
\[\text{\textsuperscript{18} Id.}\]
\[\text{\textsuperscript{20} In re Green, 934 F.2d 568, 570 (4th Cir. 1991).}\]
\[\text{\textsuperscript{21} 11 U.S.C. § 707(b).}\]
\[\text{\textsuperscript{22} See Green, 934 F.2d at 570.}\]
\[\text{\textsuperscript{23} 11 U.S.C. § 523(a) (1994 & Supp. II 1996). Section 523 provides exceptions to discharge for debts that fall into 18 enumerated categories. Id. § 523(a). Such nondischargeable debts include debts "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record..." Id. § 523(a)(5). In In re Kestell, the Bankruptcy Court determined that the portion of the Divorce Judgement consisting of a $111,475 monetary award was not in the nature of alimony, maintenance or support and therefore was dischargeable, and that the state court award of $20,000.00 for attorneys' fees was nondischargeable, under 11 U.S.C. § 523(a)(5). Neither party filed an appeal from this portion of the Bankruptcy Court's decision. Brief of Appellee at 11 n.1, In re Kestell, 99 F.3d 146 (4th Cir. 1996) (No. 95-2925) (citation omitted).}\]
\[\text{\textsuperscript{24} 11 U.S.C. § 707(a) (1994). Section 707(a) provides:}\]
\[\text{(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—}\]
\[\text{(1) unreasonable delay by the debtor that is prejudicial to creditors;}\]
\[\text{(2) nonpayment of any fees or charges required under chapter 123 of title 28 [28 U.S.C. § 1911-31 (1994)]; and}\]
\[\text{(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.}\]
to discharge listed in 727(a). Section 707(b) also provided an additional impediment to Chapter 7 relief by affording bankruptcy courts a weapon against debtors who sought to utilize the processes of the court in order to take advantage of creditors.

The quest for the true meaning of "substantial abuse" in 707(b) has been likened to the search for the Holy Grail. This is largely the result of the scarcity of legislative history that accompanied the enactment of section 707(b). Not only did Congress fail to define "substantial abuse" in the text of the amendment, but there are also no committee reports on the ultimate version of the Act. Furthermore, the uncertainty surrounding the meaning of "substantial abuse" was

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25. 11 U.S.C. § 727(a). Section 727(a) provides grounds for denying the debtor a discharge in bankruptcy. Among such reasons for dismissing a debtor's Chapter 7 petition are situations in which the debtor has done the following:

(2) ... transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor ... or

(B) property of the estate ...

(4) ... knowingly and fraudulently ...

(A) made a false oath or account; (B) presented or used a false claim; (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs ...

§ 727(a) (2)-(4).

26. See Green, 934 F.2d at 570 ("Section 707(b) introduced an additional restraint upon a debtor's ability to gain Chapter 7 relief, by allowing a bankruptcy court to deal equitably with the situation in which an unscrupulous debtor seeks to gain the court's assistance in a scheme to take unfair advantage of his creditors.").

27. See In re Butts, 148 B.R. 878 (N.D. Ind. 1992). The court said:

One of the most enduring sagas from the middle ages involves the search for the Holy Grail, the mystical cup of Christ from the last supper. Whether in the form ofChrétien's unfinished poem, Wolfram's completed tale, Wagner's opera, Monte [sic] Python, Indiana Jones or any of its other incarnations, the story of this quest continues to delight and enthrall. The matter now before the court involves the quest for a grail of another kind. The United States Trustee does not seek the cup of Christ but, instead, searches for the magical point at which a debtor's ability to repay its creditors, without more, becomes a substantial abuse of the provisions of Chapter 7, justifying dismissal of the case.

Id. at 878.

28. See Green, 934 F.2d at 570-71. Courts have concluded that the ambiguity in the statutory language reflects the inability of Congress to agree on a definition of "substantial abuse" that would achieve a proper balance between the fundamental policy goal of the Bankruptcy Code—affording the debtor a fresh start—and the interests of the consumer credit industry in curbing abuse of the bankruptcy system. See id. at 571.
augmented when Congress contemplated including, but ultimately declined to include, a threshold test of future income or ability to repay one's debts as a prerequisite for consumer debtors wishing to obtain Chapter 7 relief.  

In attempting to construe “substantial abuse,” courts have looked to the Report on Senate Bill 445, an earlier draft of the 1984 amendments. Senate Bill 445 specifically states that “if a debtor can meet his debts without difficulty as they come due, use of Chapter 7 would represent a substantial abuse.” However, this report is inconclusive on the issue because it fails to explain the meaning of “meet[ ] [his] debts without difficulty.” Moreover, it makes no reference to the directly contradictory legislative history of section 707(a), in which the drafters asserted that the “section does not contemplate ... that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal.”

b. Disagreement Among the Circuits on the Meaning of “Substantial Abuse.”—Largely as a result of the ambiguity surrounding the enactment of section 707(b), there has been a significant divergence among the circuits over the proper meaning of “substantial abuse.” The Eighth and Ninth Circuits have held that the mere ability of a Chapter 7 debtor to repay his debts constitutes per se substantial abuse of the bankruptcy process. In contrast, the Fourth and Sixth Circuits have adopted a “totality of the circumstances” test in which the debtor’s ability to repay his debts is but one of many factors for the courts to consider. Despite the Sixth Circuit’s adoption of the totality of the circumstances test, the court agrees with the Eighth and Ninth Circuits that a finding of a debtor’s ability to pay is sufficient to warrant dismissal; yet, the Fourth Circuit departs from this reason-

29. See id. This language was proposed in S. 2000, 97th Cong. (1982). Green, 934 F.2d at 571 n.5.
30. See Green, 934 F.2d at 571 & n.3 (referring to S. Rep. No. 98-65, at 54 (1983)). Senate Bill 445 was not passed by the Senate or the House of Representatives. Id.
31. Id. at 571 (quoting S. Rep. No. 98-65, at 54 (1983)).
34. In re Walton, 866 F.2d 981, 985 (8th Cir. 1989); In re Kelly, 841 F.2d 908, 915 (9th Cir. 1988).
35. Green, 934 F.2d at 572; In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989).
36. Krohn, 886 F.2d at 126.
ing altogether and concludes that this factor alone is an insufficient basis for a finding of substantial abuse. 37

In In re Kelly, 38 the United States Court of Appeals for the Ninth Circuit held that the ability of a debtor to repay his debts, as evidenced by the debtor’s capacity to fund a Chapter 13 plan, 39 is the primary factor courts should consider in determining whether the granting of Chapter 7 relief constitutes a “substantial abuse” of the process. 40 The court stated: “This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.” 41 In so ruling, the court examined the legislative history of section 707(b) and determined that, while the Senate Judiciary Committee abandoned a precise formula that would determine when a debtor’s ability to repay his debts warranted dismissal, the broader language of “substantial abuse” should be construed to use the debtor’s ability to pay his debts as the primary factor in determining whether to dismiss a Chapter 7 petition. 42

Similarly, the Eighth Circuit, adopting the reasoning of the Ninth Circuit’s decision in In re Kelly, has held that a finding that a debtor has the ability to repay his debts, standing alone, is sufficient to warrant a dismissal for substantial abuse. 43 In In re Walton, 44 the court concluded that when Congress deleted the requirement of the inability to repay debts out of future income as a prerequisite to Chapter 7 relief, “Congress simply replaced a rigid test with a flexible ‘substantial abuse’ standard that does not foreclose the courts from considering, inter alia, the debtor’s ability to pay his debts out of his future income.” 45 The court further acknowledged that, while a court may

37. Green, 934 F.2d at 572.
38. 841 F.2d 908 (9th Cir. 1988).
40. Kelly, 841 F.2d at 914.
41. Id. at 915. Later, this interpretation came to be known as the “per se” test. See infra notes 56-59 and accompanying text.
42. Kelly, 841 F.2d at 914.
43. See In re Walton, 866 F.2d 981, 985 (8th Cir. 1989).
44. 866 F.2d 981 (8th Cir. 1989).
45. Id. at 983 (citing Kelly, 841 F.2d at 914). In Walton, the debtor filed for Chapter 7 relief in July 1985. Id. at 982. After a hearing to determine whether the debtor’s petition constituted substantial abuse under section 707(b), the Bankruptcy Court found inaccuracies in the debtor’s schedules of income and expenditures. Moreover, the court deter-
take the petitioner’s good faith and unique hardships into consideration in determining “substantial abuse,” an interpretation of section 707(b) that would essentially render “substantial abuse” nothing more than the equivalent of “bad faith” would unnecessarily duplicate other provisions of the Code that already required good faith on the part of debtors. Moreover, the court noted that this narrow interpretation would also greatly decrease the power of bankruptcy courts to dismiss cases filed by debtors who are honest, but not truly needy. Thus, in dismissing the debtor’s petition, the court adopted the reasoning of the Ninth Circuit, stating that “it is obvious that the primary, if not exclusive, focus of the court would be on the debtor’s projected income and expenses as indicated on the schedules and the availability of that future income to pay off prepetition debts.”

The Sixth Circuit, in In re Krohn, also considered the question of what behavior constitutes substantial abuse. In Krohn, the court held
that, in determining whether a Chapter 7 petition should be granted under section 707(b), the totality of the circumstances should be examined when considering whether the individual debtor was taking unfair advantage of his creditors, and whether the debtor's financial situation warranted Chapter 7 relief.\textsuperscript{51} Specifically, the court ruled that in making such an assessment, bankruptcy courts should consider whether the debtor exhibited good faith and honesty in filing schedules, whether the bankruptcy petition resulted from an unforeseen or catastrophic event, and whether the debtor possessed the ability to repay his debts out of future earnings.\textsuperscript{52}

Like the Eighth and Ninth Circuits, the Sixth Circuit held that the debtor's ability to repay his debts alone may be sufficient to allow a dismissal under 707(b).\textsuperscript{53} In \textit{Krohn}, the court dismissed the debtor's bankruptcy petition as a result of a combination of factors.\textsuperscript{54} In particular, the court noted the debtor's ample source of future income, his bad faith (evidenced by his lack of a serious effort to repay his debts or reduce his expenses), his callous attitude toward his debtors, and his intentional indulgence in a lifestyle that exceeded a reasonable standard of living.\textsuperscript{55}

In 1991, in \textit{In re Green},\textsuperscript{56} the United States Court of Appeals for the Fourth Circuit eschewed the per se rule first enunciated by the \textit{Kelly} court\textsuperscript{57} in favor of a more flexible standard for determining substantial abuse.\textsuperscript{58} In so doing, the court acknowledged that, in the ma-

\textsuperscript{51} In \textit{Kelly}, the court dismissed the debtor's bankruptcy petition as a result of a combination of factors: (1) whether the debtor possesses a reliable source of future income, (2) whether the debtor can fund a Chapter 13 plan, (3) whether state remedies exist to assist the debtor, (4) whether the debtor could obtain relief through private negotiations, and (5) whether the debtor could reduce his expenses without depriving him of necessities.

\textsuperscript{52} \textit{Kelly}, 934 F.2d at 568-572. In \textit{Kelly}, the debtor, Walter Green, filed a voluntary petition for Chapter 7 relief in March 1989. \textit{Id.} at 569. The Bankruptcy Court determined that Green, who worked as a bus driver, had income in 1988 of $46,000, but because of a

\textsuperscript{53} \textit{Kelly}, 934 F.2d at 571-72. In \textit{Kelly}, the debtor, Walter Green, filed a voluntary petition for Chapter 7 relief in March 1989. \textit{Id.} at 569. The Bankruptcy Court determined that Green, who worked as a bus driver, had income in 1988 of $46,000, but because of a
majority of cases in which the question had been considered, courts viewed the debtor's ability to repay his debts as the primary factor. Yet, the court noted that the consensus among these courts was that they must determine "substantial abuse" on a case-by-case basis, in light of the totality of the circumstances. Moreover, the court stated that by examining these factors, as well as the debtor's ability to repay his future debts, courts could accurately determine whether dismissal of the particular case would accomplish the real purpose behind section 707(b), i.e., preventing the abuse of the bankruptcy process by debtors who desire to avoid their creditors. In light of the statutory presumption that the debtor's request for relief should be granted, the court held that the sole factor of a debtor's solvency does not suffice to dismiss a Chapter 7 petition for substantial abuse.

   c. Substantial Abuse in Cases Arising from Divorce.—In two cases that addressed substantial abuse in bankruptcy filings arising out of divorce, the courts based dismissal of the Chapter 7 petitions on a combination of factors. In *In re Shands* and *In re Palmer*, the courts stressed both the debtors' ability to repay their debts and also the debtors' illicit motivation in filing for Chapter 7 relief. In *Shands*, the United States Bankruptcy Court for the Eastern District of

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... leg injury preventing him from working overtime, he estimated that his income in 1989 would be $26,000. *Id.* The court found that Green possessed $40,000 in unsecured debt, and his monthly income exceeded his necessary expenses by $638 per month. *Id.* The court found that Green had no dependents, that he had filed for bankruptcy in 1973, and that many of his unsecured debtors were expensive department stores, jewelers, and consumer loan companies. *Id.* at 569-70. Moreover, Green's largest debt of $21,900 had been accumulating for ten years. *Id.*

59. *Id.* at 572.

60. *Id.* The court stated that the totality of the circumstances approach involves an examination of the following factors, among others:

   (1) Whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;
   
   (2) Whether the debtor incurred cash advances and made consumer purchases far in excess of his ability to repay;
   
   (3) Whether the debtor's proposed family budget is excessive or unreasonable;
   
   (4) Whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition; and
   
   (5) Whether the petition was filed in good faith.

61. *Id.*

62. *Id.*

63. See infra notes 67-75 and accompanying text.


66. *Id.* at 446-48; *Shands*, 63 B.R. at 124.
Michigan dismissed a voluntary petition for relief in Chapter 7, filed by Nancy A. Shands, after a finding of "substantial abuse." In dismissing her petition, the court refused to adopt a rule by which a Chapter 7 debtor's ability to repay one-hundred percent of her debts within a three-year period would constitute substantial abuse per se. Rather, the court held that a debtor's ability to repay her debts through a Chapter 13 plan, coupled with certain egregious circumstances (such as the spiteful intent to "file bankruptcy 'against her ex-husband'"), sufficiently warranted a dismissal under section 707(b).

In Palmer, a case involving an attempt by a Chapter 7 debtor to avoid paying a former spouse amounts arising from a marriage dissolution decree, the United States Bankruptcy Court for the Northern District of Iowa dismissed the debtor's bankruptcy petition for Chapter 7 relief for substantial abuse. The court, looking to the factors set forth by the Eighth Circuit in In re Walton, examined the facts surrounding the debtor's petition for bankruptcy. First, the court considered the fact that the debtor's schedule of income and expenses did not present an accurate statement of the debtor's income. From the additional income that the debtor failed to report on the schedule, the debtor would have possessed the necessary amount of money to fund a Chapter 13 plan. As such, the court concluded that enabling the debtor to discharge $35,000 of unsecured debt and leave bankruptcy with $86,000 of exempt property would result in abuse of the system by a debtor who, contrary to the aims of the Bankruptcy Code, did not need a fresh start, but desired to use the process to achieve his own illicit objectives. Second, the court found that the debtor's sole

67. Shands, 63 B.R. at 124. Specifically, the court found that the following two factors constituted "substantial abuse": (1) that Mrs. Shands's admitted purpose for filing bankruptcy was to discharge her debt to her former husband, and (2) she had the ability to fund a Chapter 13 plan. Id.
68. Id.
69. Id.
70. Palmer, 117 B.R. at 447-48. In Palmer, as a result of a Decree of Dissolution of Marriage, Beverly Palmer, the wife of debtor William Palmer, was awarded a cash lump sum of $24,000. Id. at 445. The debtor filed for Chapter 7 relief in February 1990, and the schedules of assets and liabilities indicated that the debtor possessed $86,565 in property and $35,018.36 in unsecured debts. Id. The cash lump sum settlement owed to Beverly Palmer and a debt owed to William Palmer's father constituted 90 percent of the debt, and the debtor's assets exceeded his debts by more than $50,000. Id.
71. Id. at 445. The court determined that while the debtor included $525 per month in expenses related to farming, he did not include any amount for the income related to farming in the computation of his total income. Id. The court stated that if the debtor included the expenses in the schedule of expenses, he should also have included the gross income from the farming on the income side of the ledger. Id.
72. Id. at 446-47.
73. Id. at 447-48.
motivation in filing for bankruptcy was to "avoid paying his former spouse the amounts the Iowa District Court had previously determined are legitimately owed." Ultimately, the court ruled that these two factors were sufficient to constitute substantial abuse, and therefore, a dismissal of the debtor's petition was warranted.

3. The Court's Reasoning.—In In re Kestell, the United States Court of Appeals for the Fourth Circuit held that the United States District Court for the District of Maryland properly denied Robert Kestell's petition for a Chapter 7 discharge. The court began its analysis by asserting, as Kestell urged, that the main thrust of the Bankruptcy Code is to afford debtors a fresh start. The court clarified, however, that this right is predicated on the "honest and forthright invocation of the Code's protections." Moreover, the court added that the structure of the Bankruptcy Code itself, both in general form and specific provisions, affords bankruptcy courts the authority to forestall the use of the bankruptcy process to achieve improper objectives. In particular, the court referred to sections 707(b) and 727(a) (which provide grounds for dismissal of a Chapter 7 petition), section 1112(b) (which allows dismissal or conversion to Chapter 7 of a Chapter 11 petition), and sections 1325(a) and 1307 (which impose a good faith requirement and provide for dismissal or conversion of a

74. Id. at 448.
75. Id.
76. Kestell, 99 F.3d at 146-47.
77. Id. at 147.
78. Id. at 149.
79. Id. (explaining that bankruptcy courts are authorized, in both general and specific provisions of the Bankruptcy Code, to prevent debtors from taking advantage of the process).
80. See supra notes 3, 25.
81. 11 U.S.C. § 1112(b) (1994). Section 1112(b) provides 10 specified grounds for the dismissal or conversion to Chapter 7 of a Chapter 11 petition "for cause," including "inability to effectuate a plan," "unreasonable delay by the debtor that is prejudicial to creditors," and "material default by the debtor with respect to a confirmed plan." § 1112(b)(2), (3), (8).
82. This section provides in pertinent part:
(a) Except as provided in subsection (b), the court shall confirm a plan if—

(3) the plan has been proposed in good faith and not by any means forbidden by law;
83. 11 U.S.C. § 1307 (1994). Section 1307 provides that courts may dismiss or convert a Chapter 13 case to liquidation "for cause." § 1307(c). Among the 10 reasons cited as examples of adequate cause are "unreasonable delay by the debtor that is prejudicial to creditors" and "failure to commence making timely payments under section 1326 of this title." § 1307(c)(1), (4).
Chapter 13 petition). Lastly, the court referred to section 105(a), which it described as

"an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction."

Such provisions illustrate the power that the Bankruptcy Code grants courts to combat possible abuse by debtors. With such general principles in mind, the court examined whether the bankruptcy court’s findings were sufficient to warrant the denial of the petitioner’s discharge under any of the listed provisions. The court determined that the case should be dismissed under sections 707(b) and 105(a), rather than dismissed because of fraudulent concealment under section 727(a)(2). The court reasoned that Kestell was an individual debtor under 707(b), and his debts qualified as consumer debts for the purposes of the statute. In determining whether Kestell’s actions amounted to "substantial abuse," the court reiterated its previous adoption of the "totality of the circumstances" approach in Green and concluded that the record supported the conclusion that the debtor’s behavior established "substantial abuse" under section 707(b) and "abuse of process" under section 105(a). In determining that Kestell’s behavior constituted "substantial abuse," the court concentrated first on Kestell’s obvious lack of intent to distribute his assets equally among his creditors, as evidenced by his plan to avoid payment of his financial obligation to his former wife while satisfying

84. Kestell, 99 F.3d at 148.
85. Id. Section 105(a) provides:
The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
86. Kestell, 99 F.3d at 148 (quoting 2 Collier on Bankruptcy § 105.01, at 105-3 (Lawrence P. King ed., 15th ed. 1996)).
87. Id. at 149.
88. Id.
89. Id.
90. Id.
91. Id.; see also supra notes 56-62 and accompanying text (discussing the "totality of the circumstances" test enunciated by the Fourth Circuit in Green).
92. Kestell, 99 F.3d at 149.
his other debts.\textsuperscript{93} The court found, after considering Kestell's expressed desire that Atkinson receive no money and his failure to accurately disclose his assets, that Kestell's sole purpose in filing for Chapter 7 relief was to avoid paying the debt he owed to Atkinson.\textsuperscript{94}

The Fourth Circuit declined, however, to address whether the disputed assets were property of the bankruptcy estate, a determination that would have been necessary to warrant dismissal under section 727(a)(2).\textsuperscript{95} The court concluded that, given the findings of the trial court that demonstrated Kestell's bad faith use of the bankruptcy process, dismissal under sections 105(a) and 707(b) was more appropriate.\textsuperscript{96}

4. Analysis.—In In re Kestell, the Fourth Circuit held that the dismissal of Robert Kestell's petition for Chapter 7 relief was proper under sections 707(b) and 105(a) of the Bankruptcy Code.\textsuperscript{97} In so doing, the Fourth Circuit rendered 707(b) the equivalent of a good faith requirement for debtors filing for bankruptcy under Chapter 7. By omitting any consideration of the debtor's ability to repay his debts from future income, a primary factor to be considered under the "totality of the circumstances" test enunciated in 1991 by the Fourth Circuit,\textsuperscript{98} the court enlarged the power of the lower courts to dismiss the petitions of unscrupulous debtors under section 707(b). Moreover, the court further distanced itself from the per se rule promulgated by the Ninth Circuit in Kelly.

a. "Substantial Abuse" Rendered the Equivalent of "Bad Faith."

The Fourth Circuit's decision in Kestell to abandon altogether any con-

\textsuperscript{93} Id. at 149:50.
\textsuperscript{94} Id. at 150.
\textsuperscript{95} Id.
\textsuperscript{96} Id. Kestell argued that his petition should not be dismissed because he relied in good faith on the advice of his attorneys, who advised him that it was not necessary for him to include the sick leave benefits and tax reimbursement in his list of assets. Id. The bankruptcy judge concluded first that the manifest evidence of fraudulent intent in Kestell's testimony sufficed to defeat any claim of good faith trust in the advice of legal counsel. Id. Moreover, the court added that if Kestell harbored doubts concerning whether to include the amounts in his schedule of assets, he could have resolved such doubts simply by informing the trustee that he had received such payments subsequent to the filing of his Chapter 7 petition. Id. By disclosing such information to the trustee, Kestell could have demonstrated his intent to comply with the bankruptcy process and allowed a just resolution of whether the funds should have been listed as part of the estate. Id. Thus, the court reasoned that Kestell's lack of honesty and his failure to disclose information, two factors essential to the main goal of the bankruptcy process—the equitable distribution of assets among creditors—clearly evidenced Kestell's abuse of the process. Id.

\textsuperscript{97} Id. at 149.
\textsuperscript{98} See supra notes 59-61 and accompanying text.
sideration of the debtor's ability to repay his debts in determining substantial abuse represents a significant departure from precedent. In Kestell, the court expanded the power of lower courts to dismiss cases for substantial abuse by allowing them to focus solely on good faith. The necessity of such an expansion is particularly evident in cases such as Kestell, which arise from the improper motives of debtors who choose to file for bankruptcy to avoid paying obligations that emanated from divorce. In Kestell, the Fourth Circuit chose to dismiss the debtor's bankruptcy petition under sections 707(b) and 105(a) rather than address the question decided by the district court—whether Kestell's actions amounted to fraudulent concealment, thus justifying dismissal under section 727(a)(2). This voluntary choice by the court indicates the court's willingness to rely on 707(b) in combating abuse of the bankruptcy process. Rather than affirm the reasoning of the district court below, the Fourth Circuit invoked section 105(a), which the court admitted serves as a rather broad provision giving bankruptcy courts the general authority to promote the provisions of the Bankruptcy Code, and section 707(b), a provision of the Code whose meaning and application have become the source of significant dispute.

The court prefaced its departure from its prior ruling in In re Green by affirming the "totality of the circumstances" test and quoting specific language in Green in which the court recognized "a strong indication that Section 707(b) was intended to explicitly recognize the court's ability to dismiss a Chapter 7 petition for lack of good faith." Thus, the court concluded that, in making its determination whether Kestell's actions constituted substantial abuse, it "need only consider whether Kestell's handling of the two benefits, both of which were earned prior to the bankruptcy petition, evidenced a good faith invocation of the bankruptcy process." Clearly lacking in the court's discussion of substantial abuse, however, was any discussion of Kestell's ability to pay his debts out of future income. For example, while the court did refer in its factual discussion to Kestell's reported

99. Kestell, 99 F.3d at 149.
100. Id. at 148-49.
101. See Michael D. Bruckman, Note, The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air?, 2 AM. BANKR. INST. L. REV. 193, 194-95 (1994) (stating that the reason for this dispute was Congress's failure to define "specific abuse" when it added section 707(b) to the Bankruptcy Code).
102. Kestell, 99 F.3d at 149.
103. Id. (quoting In re Green, 934 F.2d 568, 572 (4th Cir. 1991)).
104. Id. (emphasis added).
earnings in 1993 as $193,000,\textsuperscript{105} it is clear from the text of the opinion that the court did not consider whether Kestell would possess the financial capacity to repay his debts in the future as a factor in making its substantial abuse determination.

The \textit{Kestell} court departed from Fourth Circuit precedent when it declined to consider the financial condition of the debtor. In \textit{Green}, the court stressed that although solvency may raise an inference of substantial abuse, in light of the statutory presumption in favor of the debtor, solvency alone does not establish substantial abuse.\textsuperscript{106} Moreover, the \textit{Green} court stated that in making a substantial abuse determination, the court must explore a totality of the circumstances, "as well as the relation of the debtor's future income to his future necessary expenses."\textsuperscript{107} Thus, while the \textit{Green} court clearly declined to adopt the Ninth Circuit's \textit{per se} rule in favor of a more flexible standard by which additional factors other than ability to pay must be considered in order to dismiss a petition under section 707(b), the court nonetheless agreed in \textit{Green} that future income is the primary factor for the courts to consider in rendering a "substantial abuse" decision.\textsuperscript{108} With the exception of \textit{Kestell}, courts following the totality of the circumstances approach articulated in \textit{Green} have considered future income as a significant factor in making their determinations.\textsuperscript{109}

By failing to consider ability to pay one's debts, the court in \textit{Kestell} provided lower courts with greater freedom to combat the rampant

\textsuperscript{105} \textit{Id.} at 147.
\textsuperscript{106} \textit{Green}, 934 F.2d at 572.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} Another court has interpreted the \textit{Green} holding as follows:

Under all three tests [the \textit{per se} rule, the totality of the circumstances test, and a hybrid approach], the primary factor to be considered is the debtor's ability to pay off his debts with his disposable earnings. The only difference is that the Sixth, Eighth, and Ninth Circuits believe that this factor alone may be dispositive of the "substantial abuse" issue, while the Fourth Circuit in \textit{Green} requires \textit{something more}. That something more appears to be bad faith.


\textsuperscript{109} One court held:

\[1\] In ruling on motions under this section, there should be consideration of all relevant factors bearing on the debtor's relationship with its creditors. If, from this consideration it appears that the debtor is seeking to obtain an unfair advantage over his or her creditors, in that the debtor could have paid his or her debts as they became due, without difficulty, then the motion to dismiss should be granted.

\textit{In re} Balaja, 190 B.R. 335, 341 (Bankr. N.D. Ill. 1996); \textit{accord In re} Higuera, 199 B.R. 196, 199 (Bankr. W.D. Okla. 1996) ("In the totality of the circumstances test, the ability to pay is but one of the factors to be taken into consideration."); \textit{In re} Traub, 140 B.R. 286, 290 (Bankr. D.N.M. 1992) ("The court in \textit{Green} stated that in addition to the ability to pay, it would consider the 'totality of the circumstances' . . . .").
abuse that so often arises out of cases involving divorce. The court properly stressed that "[b]ecause favoritism of one creditor over another is antithetical to the goal of equitable distribution, the Bankruptcy Code cannot be used as a vehicle for advancing personal antagonisms against an ex-spouse." As such, the court evidenced an unwillingness to tolerate the abuse of the process that occurs when debtors use the provisions of the Bankruptcy Code, not because they need a fresh start, but rather because they wish to avoid paying a former spouse amounts arising from a divorce judgement. In a case such as Kestell, there should be no obligation to examine the financial condition of the debtor. Rather, the debtor’s unconscionable intent alone should suffice to justify dismissal of his bankruptcy petition. Thus, in both Shands and Palmer, the court should have based its dismissal of the debtors’ petitions for relief solely on the debtors’ admitted intent to discharge debts owed to former spouses. In light of this professed intent, any discussion of the debtors’ financial situations, including whether the debtors possessed the requisite means to fund Chapter 13 plans, was not necessary in determining whether “the granting of relief would be a substantial abuse of the provisions of [Chapter 7].”

By opting to base its determination solely on the grounds of bad faith, the Fourth Circuit in Kestell adopted an approach that the Eighth Circuit in In re Walton warned “would drastically reduce the bankruptcy courts’ ability to dismiss cases filed by debtors who are not dishonest, but who also are not needy.” Rather than reducing the power of the courts, however, the Fourth Circuit’s ruling in Kestell appropriately expanded the power of the courts to combat “the real concern behind Section 707(b): abuse of the bankruptcy process by a debtor seeking to take unfair advantage of his creditors.” Indeed, the Bankruptcy Code does not require that a debtor be insolvent to file for bankruptcy. Section 109 of the Code, unchanged by the 1984 amendments, allows debtors to file for bankruptcy under Chapter 7 unless they fall within one of the listed exceptions, none of which apply to consumer debtors or predicate relief upon the ability to repay

110. See supra notes 63-67 and accompanying text (giving examples of rampant abuse in divorce cases).
111. Kestell, 99 F.3d at 150.
112. See generally supra notes 67-75 and accompanying text.
114. In re Walton, 866 F.2d 981, 983 (8th Cir. 1989).
115. In re Green, 934 F.2d 568, 572 (4th Cir. 1991).
debts in the future. Rather, section 109, when considered with the legislative history of section 707(b), indicates that section 707(b) "was intended to explicitly recognize the court's ability to dismiss a Chapter 7 petition for lack of good faith—when the total picture is abusive." Perhaps the clearest example of lack of good faith is a case in which the debtor attempts to shirk responsibility to a former spouse by invoking the bankruptcy process.

b. The Fourth Circuit Moves Further Away from the Ninth Circuit's Per Se Test.—In contrast with the per se test adopted by the Ninth Circuit in Kelly, the Fourth Circuit determined in Green that a debtor's ability to pay his debts is not a satisfactory basis for a finding of substantial abuse, absent a consideration of other factors. By moving beyond Green in Kestell, the Fourth Circuit further widened the gap between its position on substantial abuse and that of the Sixth, Eighth, and Ninth Circuits. In so doing, the Fourth Circuit properly shifted the focus of section 707(b) from the debtor's ability to pay to the debtor's good faith utilization of the bankruptcy process.

In In re Kelly, the Ninth Circuit held that "inability to pay will [not] shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." In reaching this conclusion, the court relied heavily on the committee reports of Senate Bill 445, an earlier draft of the amendments, which included a threshold formula for determining the point at which a debtor's ability to pay his debts would preclude the debtor from obtaining Chapter 7 relief. The report stated that "if a debtor can meet his debts without difficulty as they come due, use of Chapter 7 would represent a substantial abuse." The Ninth Circuit determined that because no committee reports on the final amendment existed, the report of Senate Bill 445 best evidenced congressional intent. In contrast, the Green court focused on the rejection by Congress of the threshold test and the failure of Congress to explain the meaning of the language "meet his debts without difficulty as they

117. Id.; see 11 U.S.C. § 109(a) ("[A] person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.").
118. Green, 934 F.2d at 572 (internal quotation marks omitted).
119. See supra note 60 and accompanying text.
120. In re Kelly, 841 F.2d 908, 915 (9th Cir. 1988).
121. Id. at 914.
122. Id. (quoting S. Rep. No. 98-65, at 54 (1983)).
123. Id. at 915 & n.7.
come due."' In addition, the court in Green emphasized the legislative history of section 707(a), left intact by the 1984 amendments, which explicitly stated that section 707 did not intend that the ability of a debtor to repay his debts constituted sufficient grounds for dismissal. The court concluded that, as a result of these factors, "solventy alone is not a sufficient basis for a finding that the debtor has in fact substantially abused the provisions of Chapter 7."126

By moving beyond Green in Kestell, the Fourth Circuit further distanced itself from the approach adopted by the Eighth and Ninth Circuits, respectively, in Walton and Kelly, and partially adopted by the Sixth Circuit in Krohn. The approach of the Fourth Circuit in Kestell, which compels investigation of the debtor's intentions on a case-by-case basis, better serves to "effectuate the policies of debtor rehabilitation and creditor protection, which are fundamental to the bankruptcy process."128 The bankruptcy courts should protect creditors from debtors who seek to exploit the Chapter 7 process; "[n]onetheless, an honest debtor, who traditionally [has] been protected by the bankruptcy system, should not be compelled to forfeit his or her entitlement to a chapter 7 discharge."129 By concentrating primarily on the debtor's good faith as opposed to focusing mainly on the debtor's ability to repay his debts, the court in Kestell properly interpreted the language and congressional intent behind section 707(b) by enlarging the court's power to dismiss cases filed by debtors who, regardless of their ability to repay their debts, seek to exploit the bankruptcy process to achieve unethical objectives.

126. Id. at 572.
127. See supra notes 39-55 and accompanying text.
128. Carlos J. Cuevas, Amending Section 707(b), 4 Am. Bankr. Inst. L. Rev. 507, 508 (1996). Cuevas argues that as a result of the poor drafting of section 707(b), "the courts have struggled with the issue of what constitutes 'substantial abuse' and some courts have faltered." Id. at 507. Cuevas asserts that the Ninth Circuit misinterpreted the language of section 707(b):

[T]he Ninth Circuit did not cite any specific provision of the statute or any definitive legislative history to reach its conclusion. To the contrary, the Ninth Circuit relied primarily on decisions rendered by bankruptcy courts. As a matter of bankruptcy policy Kelly is contrary to the fundamental policy of the debtor's fresh start. Indeed, under Kelly it is unnecessary for a debtor to engage in any fraudulent or any other type of dishonest behavior to be denied a chapter 7 discharge. The Ninth Circuit's ruling would deny an honest debtor a chapter 7 discharge, which is inimical to bankruptcy policy.

Id.
129. Id. at 508.
5. Conclusion.—By failing to consider the debtor’s ability to repay his debts in determining substantial abuse under section 707(b), the Fourth Circuit in *Kestell* altered the focus of courts that apply the “totality of the circumstances” test. In so ruling, the Fourth Circuit provided bankruptcy courts with an additional weapon in combating the rising number of cases filed by unscrupulous debtors, and it ensured that relief will be awarded only to debtors who attempt “a good faith invocation of the bankruptcy process.” The court’s ruling appropriately affords lower courts a license to dismiss such cases arising from divorce solely on the basis of the unscrupulous intent of the debtors. Such a ruling represents an essential step in terminating an egregious example of abuse of the bankruptcy process.

NICOLE L. RIPKEN

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130. *Kestell*, 99 F.3d at 150.
II. CONSTITUTIONAL LAW

A. The Fourth Circuit Properly Overturns a Ban on Lawyer Advertising, but Troubling Issues Remain

In *Ficker v. Curran*,\(^1\) the United States Court of Appeals for the Fourth Circuit held that a Maryland statute\(^2\) requiring lawyers to wait thirty days before sending direct mail solicitations to criminal defendants or incarcerable traffic defendants violated the First Amendment's protection of commercial speech because it failed to advance directly a substantial state interest.\(^3\) On the basis of a correct interpretation of the case law, the court reached an appropriately narrow holding, limited to the facts of the case.\(^4\) While the court properly avoided addressing the deeper, more troubling issues posed by lawyer advertising, it did acknowledge that the legal profession's reputation is a substantial state interest.\(^5\) Thus, the court left room for the Maryland legislature to protect the integrity of the legal profession, when other forms of advertising threaten it, by enacting reasonably fitting restrictions that directly advance this interest.

1. *The Case.*—During its 1996 session, the Maryland General Assembly enacted a law restricting lawyer advertising in two circumstances.\(^6\) Section 10-605.1(a)(1) of the Business Occupations and Professions Article (section 1) required lawyers to wait thirty days before sending written solicitations\(^7\) to victims of an accident or disaster, or to their relatives.\(^8\) This section was modeled on a Florida Bar rule\(^9\) that the United States Supreme Court upheld as a constitutional restriction on commercial speech in *Florida Bar v. Went For It, Inc.*, \(^10\) The Maryland General Assembly, however, added the following restriction in 10-605.1(a)(2) (section 2):

(a) A lawyer may not send a written communication, directly or through an agent, to a prospective client for the

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1. 119 F.3d 1150 (4th Cir. 1997).
3. *Ficker*, 119 F.3d at 1156.
4. *See id.*; *see also infra* note 200 and accompanying text.
5. *Ficker*, 119 F.3d at 1153. The United States Supreme Court first unambiguously accepted the legal profession’s reputation as a substantial state interest in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995).
7. Written solicitations addressed to a potential client known to have a specific legal problem are known as “targeted mailings.” *See infra* text accompanying note 115.
9. *See Went For It*, 515 U.S. at 620 (setting forth Florida Bar Rule 4-7.4(b)(1)).
10. 515 U.S. 618 (1995); *see infra* notes 127-144 and accompanying text.
purpose of obtaining professional employment if the com-

(2) a criminal prosecution, or a prosecution of a traffic
offense that carries a period of incarceration, involving the
person to whom the communication is addressed or the per-
son's relative, unless the charging document was filed more
than 30 days before the date the communication is mailed.11

The Maryland Senate intended section 2 of the statute to protect the
same interests as those safeguarded by section 1, namely, the privacy
of the recipient, and the legal profession's reputation or integrity.12
After hearing testimony, the Senate found that targeted solicitation
harmed these interests,13 the legitimacy of which had been recognized
by the United States Supreme Court in Went For It.14

Robin Ficker, a Maryland attorney alleging that he obtained virtu-
ally all of his clients through direct mail solicitations of those charged
with incarcerable traffic offenses, filed suit in the United States Dis-
trict Court for the District of Maryland against Maryland Attorney
General Joseph Curran.15 Seeking declaratory and injunctive relief,
Ficker filed a motion for summary judgment challenging the constitu-
tionality of section 2 under the First and Fourteenth Amendments
of the United States Constitution.16 The district court held that section
2 was an unconstitutional restriction of speech.17

excepts communications requested by the client. Id. § 10-605.1(b). A lawyer who violates
section 10-605.1(a)(2) may be found guilty of a misdemeanor punishable by a fine of up to
one thousand dollars, incarceration for up to one year, or both. See id. § 10-606(c).
Sess. (Md. 1996) (discussing the intent of section 2).
13. Id.
14. 515 U.S. at 625.
1997). Ficker was joined by Natalie Boehm, the owner and operator of a company that
produces and mails direct mail solicitations from attorneys to those who have been
charged with jailable traffic offenses. Id.
16. Id. at 123-24. The First Amendment is applicable to the states through the Four-
teenth Amendment. Schneider v. New Jersey, 308 U.S. 147, 160 (1939). In lawyer advertis-
ing cases generally, restrictions constitute an abridgment of speech by the government in
one of two ways. The restriction may be a state statute, as in Ficker itself. See Ficker, 950 F.
Supp. at 124. Alternatively, the restriction may be a state bar rule that is imposed and
enforced by the state's supreme court. See, e.g., Bates v. State Bar, 433 U.S. 350, 353, 355,
17. Ficker, 950 F. Supp. at 129.
The district court applied the rule that has become standard in commercial speech cases, namely, the test developed by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission. According to this test, the government may restrict commercial speech only by a narrowly drawn restriction that directly and materially advances a substantial state interest. While acknowledging the state's interests in protecting both privacy and the integrity of the legal profession, the district court found that section 2 failed to advance these interests "in a direct and material way." First, the court determined that the privacy interests of the accident victim and the arrestee were not analogous: While the former is outraged when confronted with the solicitation in a time of grief or trauma, the latter is not outraged by the receipt of the solicitation, but is embarrassed simply by the fact that the attorney has learned of his arrest through consulting the public police records. Relying on Shapero v. Kentucky Bar Ass'n, the district court found that this kind of intrusion upon privacy is insufficient to support a restriction on commercial speech. Second, because one arrested for an incarcerable traffic offense has much less time in which to assert his legal rights than the victim of an accident, the district court found that the thirty-day restriction amounted to a total ban of direct mailings, which the United States Supreme Court had held unconstitutional in Shapero. Finally, the district court reasoned that while the state could rehabilitate the image of lawyers, this interest was subordinate to the fair administration of justice, which was served by the free flow of information to arrestees in critical need of it.

Because section 2 did not properly advance the state's interests, the district court found it to be an unconstitutional restriction of commercial speech. Maryland appealed to the United States Court of

18. Commercial speech is speech that proposes a commercial transaction. See infra note 35 and accompanying text.
19. 447 U.S. 557 (1980); see also infra notes 62-70 and accompanying text.
21. Id. at 126. The district court noted that it was constrained to recognize these interests under Went For It. Id.
22. Id. at 129.
23. Id. at 127-28.
24. 486 U.S. 466 (1988); see infra notes 114-126 and accompanying text.
26. Id.
27. Id. at 129.
28. Id.
Appeals for the Fourth Circuit in order to review the district court’s ruling that the law violated the First Amendment.  

2. Legal Background.

a. Application of the First Amendment to Commercial Speech.

The First Amendment of the United States Constitution states in relevant part, “Congress shall make no law . . . abridging the freedom of speech.” As the text indicates, the First Amendment does not protect all speech, but freedom of speech. An early scholar of the First Amendment, Alexander Meiklejohn, argued that because this protection derived from “the necessities of the program of self-government,” it was limited to freedom of ideas, specifically, “ideas about the common good.” Because courts did not consider advertising to be essential to the function of self-government, they were reluctant to extend First Amendment protection to commercial speech, that is, speech proposing a commercial transaction.

The United States Supreme Court first considered the constitutionality of restrictions by states on commercial speech in Valentine v. Chrestensen. The defendant, after police had informed him that the New York City Sanitary Code prohibited the distribution of handbills in the street, reprinted his previously distributed advertisement with a

29. Ficher, 119 F.3d at 1151.
30. U.S. Const. amend. I.
31. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19 (1960). “Congress is not debared from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it.” Id.
32. Id. at 27.
33. Id. at 28. Even now, the court distinguishes “core political speech” from other kinds of speech receiving less protection under the First Amendment. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

34. See THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 234 (1985) (discussing how distrust of exaggerated commercial messages and the idea that commercial speech is of little social value influenced the reluctance of courts to expand First Amendment protection to commercial expression); see also MEIKLEJOHN, supra note 31, at 37 (distinguishing “a merchant advertising his wares” as a private right of speech, incident to the Fifth Amendment protection of life and liberty, from “[the utterance] of a citizen who is planning for the general welfare” as a public right of speech protected by the First Amendment’s unlimited guarantee of public discussion).

35. See Fox, 492 U.S. at 473-74 (defining commercial speech as the sort that proposes a commercial transaction).
protest on the reverse side of it. The Court identified the reprinted version of the handbill as commercial speech, not by its content, but instead by Chrestensen's purpose in distributing it, which was to evade the Sanitary Code for his private profit. Reasoning that advertising is an incident of business, the regulation of which is a matter of legislative judgment, the Court held that "the Constitution imposes no such restraint on government as respects purely commercial advertising." The view that commercial speech receives no constitutional protection prevailed for over twenty years, with some modifications in the test for identifying commercial speech.

The Court reconsidered its position with respect to commercial speech in 1975, in Bigelow v. Virginia. The defendant had published an advertisement in Virginia for abortion services performed in New York, where the procedure was legal at the time. The Court held that a Virginia law prohibiting advertisements that encouraged abortion was, as applied to the defendant, a violation of the First Amendment. The Court pointed out that the advertisement, besides proposing a commercial transaction, contained material of public interest on the issue of abortion. Unwilling simply to dismiss the advertisement as unprotected commercial speech, the Court balanced the defendant's First Amendment interest at stake with the public interest asserted by Virginia. Thus, instead of a categorical approach to commercial speech based on the primary purpose of the speaker (or writer), the Court substituted a balancing test based on the con-

37. Chrestensen, 316 U.S. at 53. Chrestensen's handbill solicited visitors, for an admission fee, to a former Navy submarine, which he owned and had moored at a state pier. Id.

38. Id. at 55; see also Louise L. Hill, Lawyer Advertising 24 (1993) (stating that the "primary purpose" definition of unprotected commercial speech "focused on the motives or objectives of the speaker").

39. See Chrestensen, 316 U.S. at 54 ("Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.").

40. Id.

41. See Hill, supra note 38, at 25-30 (discussing the shift in focus from the motive of the speech to its content).

42. 421 U.S. 809 (1975).

43. Id. at 811-12.

44. Id. at 829.

45. Id. at 822.

46. Id. at 826.

47. Id. The State argued that abortion referral agencies engaged in practices, such as fee splitting, that tended to affect adversely the quality of medical services. Id. at 827. The Court rejected this argument, however, because the medical services at issue were performed out of state. Id.
tent of the speech. As a result, speech no longer lost its First Amendment protection simply because it was an advertisement or because it proposed a commercial transaction.

Within a year, the Court strengthened its protection for commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. The Court considered the constitutionality of a state law providing that a licensed pharmacist was guilty of unprofessional conduct for publishing the price of prescription drugs. The Court observed that, in contrast to the advertisement in Bigelow, which provided information about a constitutionally protected activity, an advertisement for prescription drug prices was purely commercial. The Court held, nonetheless, that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity."

The Court reasoned that, although Virginia had an interest in maintaining the professionalism of its licensed pharmacists, the state could not properly advance this interest by keeping its citizens in ignorance. Moreover, this state interest was outweighed by the combination of the advertiser's economic interest, the consumer's interest in

48. See id. at 826 (noting that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation"). In this light, the Court reinterpreted Chrestensen as a narrow case permitting a regulation of the manner of advertising rather than a "sweeping proposition that advertising is unprotected per se." Id. at 820; see also Hill, supra note 38, at 30-31 (explaining that Bigelow "essentially reduced Chrestensen to a general balancing process").

49. See Bigelow, 421 U.S. at 818.


51. Id. at 749-50. The State justified the law as a way to maintain two related interests: the professionalism of pharmacists and consumer health. Id. at 767-68. The Virginia State Board of Pharmacy argued that the latter interest would be jeopardized by the aggressive price competition resulting from advertising. Id.

52. See supra text accompanying note 45.

53. Virginia Pharmacy, 425 U.S. at 761. "The 'idea' [the pharmacist] wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' Our question, then, is whether this communication is wholly outside the protection of the First Amendment." Id.

54. Id. at 773. But see id. at 781-83 (Rehnquist, J., dissenting) (arguing that the First Amendment protects public decisionmaking rather than private economic choices, the regulation of which is presumptively the concern of the state legislature, and that the Court's decision would diminish the states' capacity to regulate all professions within their borders).

55. Virginia Pharmacy, 425 U.S. at 766.

56. Id. at 769. Also, the Court reasoned that advertising did not really jeopardize this interest because modern pharmacists usually dispense standardized products rather than specialized services, which can be of such a diverse nature and variety as to make advertisements about them confusing and deceptive. Id. at 773 n.25.

57. Id. at 762.
knowing prices, and society's free-enterprise interest in efficiently allocating resources, which requires the free flow of commercial information. Thus, for the first time, the Court established constitutional protection for purely commercial speech.

While Virginia Pharmacy gave some constitutional protection to commercial speech, the Court, in subsequent decisions, reaffirmed that commercial speech was not entitled to the same level of First Amendment protection as "core political speech." In Central Hudson Gas & Electric Corp. v. Public Service Commission, the Court articulated a test for determining the constitutionality of restrictions on commercial speech. First, the court must determine whether the commercial speech at issue is protected by the First Amendment, that is, whether it concerns lawful activity and is not misleading. If so, the court must apply a three-part test. First, the state must assert a substantial interest in regulating the speech. Second, the regulation must directly advance the asserted state interest. Third, the regulation must not be more extensive than is necessary to serve that interest. This third prong, which on its face seems to require the least restrictive means, was later interpreted in Board of Trustees of the State

58. Id. at 763. The Court justified its concern for the listener, rather than the speaker, on the ground that First Amendment protection is afforded to "the communication, to its source and to its recipients both." Id. at 756. More specifically, the Court took notice of the fact that prescription prices could vary by as much as 650% within one city. Id. at 754. Thus, the consumer's "interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Id. at 763.

59. Id. at 765.


61. See supra note 33.


63. Id. at 566. The standard of judicial review for evaluating restrictions on commercial speech later came to be called "intermediate scrutiny." See Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995). This standard is implemented simply by applying the Central Hudson test. Id. at 623-24.

64. Central Hudson, 447 U.S. at 566. In contrast to political speech, whose truth or falsity the Court does not consider, misleading commercial speech does not receive any protection because the rationale for protecting commercial speech is the accuracy of information in society's effort to allocate resources efficiently. Id. at 561-63.

65. Id. at 566.

66. Id.

67. Id.

68. Id.
University of New York v. Fox\footnote{69} to require a “reasonable fit” between the state’s interest and the regulation chosen to implement it.\footnote{70}

b. First Amendment Protection of Attorney Advertising as Commercial Speech Prior to the Central Hudson Test.—In 1977, three years before Central Hudson, the Court first extended constitutional protection to lawyer advertising as a form of commercial speech in Bates v. State Bar.\footnote{71} Two Arizona lawyers, who advertised prices for routine legal services such as uncontested divorces, challenged a State Bar rule\footnote{72} prohibiting this practice.\footnote{73} In a five-to-four decision with respect to the First Amendment issue, the Court applied Virginia Pharmacy and held that the State Bar could not prevent the publication in a newspaper of truthful advertisements concerning routine legal services.\footnote{74}

The Court relied on Virginia Pharmacy’s articulation of the interests of the consumer and society in the free flow of commercial information\footnote{75} and rejected the State Bar’s six proffered justifications for restricting attorney price advertising.\footnote{76} In particular, the Court rejected two arguments significant for subsequent decisions. First, the Court rejected the argument that advertising of routine legal prices is inherently misleading.\footnote{77} Second, the Court rejected the claim that

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\begin{itemize}
\item \footnote{69} 492 U.S. 469 (1989).
\item \footnote{70} Id. at 480 (“What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.” (citation and internal quotation marks omitted)).
\item The Court modified the third prong on the grounds that (1) the application of the Central Hudson test was analogous to restrictions on time, place, and manner, which do not require the least restrictive means, and (2) such a test would place an undue burden on the state’s ample regulatory authority in commercial matters. \textit{Id.} at 477.
\item 433 U.S. 350 (1977).
\item For a brief history of Arizona’s adoption of the disciplinary rule at issue in this case, see Vanderwater, \textit{supra} note 60, at 774.
\item Bates, 433 U.S. at 353-55. The rule was issued by the state supreme court pursuant to its constitutional authority to do so. \textit{Id.} at 360.
\item Id. at 384.
\item Id. at 363-65.
\item Id. at 372-73. The State Bar argued that attorney advertising is inherently misleading because (1) legal services are unique and cannot be compared based on advertisements, (2) consumers do not know which legal services they need, and (3) price advertisements omit the important factor of attorney skill. \textit{Id.} at 372. The Court rejected this argument by looking to the record, which included the fact that the State Bar spon-
advertising would adversely affect professionalism, characterizing the argument as an elitist or hypocritical presumption "that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."  

Thus, Bates extended constitutional protection to lawyer advertising. At the same time, however, Bates held open the possibility of restricting deceptive advertising, or the mode of truthful advertising, so that the issue became what kind of restriction could pass constitutional muster.

In In re Primus, the Court held that South Carolina's rule prohibiting in-person solicitation was unconstitutional as applied to an American Civil Liberties Union (ACLU) lawyer. The lawyer had sent the client a letter offering free legal representation after a meeting, attended by both the lawyer and the client, about the rights of mothers who were allegedly being sterilized as a condition of receiving public medical assistance. In a manner reminiscent of Chrestensen's "primary purpose" test, the Court distinguished this case from impermissible in-person solicitation by virtue of the lawyer's motive, namely, "engag[ing] in litigation as a vehicle for effective political expression." This case, then, did not concern commercial speech at all, but instead "core First Amendment rights," the exercise of which, even in the form of solicitation, was protected to a greater degree than commercial speech.

sored a program in which attorneys provided legal services for a standardized fee. Id. at 373.

78. Id. at 368. But see id. at 401 n.11 (Powell, J., concurring in part and dissenting in part) (arguing that opposition to lawyer advertising rests on a valid concern for professionalism rather than on elitism).

79. But see id. at 391-92, 403 (Powell, J., concurring in part and dissenting in part) (arguing that the Court's decision struck both at professionalism and federalism, by depriving the states of opportunities to experiment with making legal services more widely known and available without advertising, the putative justification for which presumes a false analogy between professional services and tangible goods).

80. See Bates, 433 U.S. at 384 (noting that "there may be reasonable restrictions on the time, place, and manner of [lawyer] advertising"). After Bates, the ABA rewrote its model disciplinary rules on advertising, which were adopted by most states. See Hill, supra note 38, at 59-60.


82. Id. at 439.

83. Id. at 414-17.

84. See supra note 38 and accompanying text.

85. Primus, 436 U.S. at 431.

86. Id. at 432 (internal quotation marks omitted).

87. See id. at 434 ("Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs.").
In its next lawyer advertising case, *Ohralik v. Ohio State Bar Ass'n*,\(^8\) the Court held that the State, or the Bar acting with state authorization, "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."\(^8^9\) The Court distinguished *Ohralik* from *In re Primus* in terms of *Ohralik's* commercial motives,\(^9^0\) which placed his conduct in the distinct and subordinate category of commercial speech.\(^9^1\) Also, the Court distinguished *Ohralik* from *Bates* by the mode of communication and the advancement of state interests.\(^9^2\) First, in contrast to a newspaper advertisement, "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."\(^9^3\) Second, unlike the prohibition in *Bates*, the prohibition against in-person solicitation actually advanced two state interests: (1) maintaining the professionalism of lawyers,\(^9^4\) an interest whose legitimacy the Court had recognized in *Bates*,\(^9^5\) and (2) protecting consumers from the dangers posed by in-person solicitation, namely, intrusion and over-reaching.\(^9^6\) Hence the Court upheld the ban as applied in *Ohralik*.\(^9^7\)

c. Application of the Central Hudson Test to Attorney Advertising.—The Court first applied the Central Hudson test\(^9^8\) to attorney advertising in *In re R.M.J.*\(^9^9\) A lawyer challenged a Missouri Supreme Court rule that both prohibited mass mailings and limited to precise

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89. *Id.* at 449. The lawyer visited two young women, one of whom was in the hospital, after a car accident. *Id.* at 449-50. After one woman discharged the lawyer, he sued her for breach of contract. *Id.* at 452.
90. *Id.* at 458-59 (noting that *Ohralik's* conduct did not involve any exercise of political expression, because it was motivated solely by the hope of remunerative employment).
91. *Id.* at 455-56.
92. *Id.* at 457-58, 460-62.
93. *Id.* at 457. The Court noted that, in light of the lack of opportunity for comparison, in-person solicitation could undermine the very rationale for protecting commercial speech, namely, facilitating informed decisionmaking. *Id.* at 457-58.
94. See *id.* at 460 ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975))).
97. *Id.* at 468. The Court did not require a finding of actual harm in order to justify the State's prophylactic ban on in-person solicitation, but was satisfied by the State's presumption of harm because such conduct, not being open to public scrutiny, is hard to regulate. *Id.* at 465-66.
98. See *supra* notes 62-70 and accompanying text.
terms the words that an attorney could use to describe her practice in newspapers, yellow pages, and other publications. The Court held that the absolute prohibition of these forms of advertising, in the absence of a finding that they were misleading, was unconstitutional.

The Court first determined that the lawyer's failure to use the precise terms required by the rule (for example, "tort law" instead of "personal injury"), and his mass mailing, were not inherently or actually misleading, so that the advertisements were entitled to some First Amendment protection. The Court then found that the State had failed to assert any substantial interest in the prohibitions, and that it could have used less restrictive regulations, such as requiring registration of general mailings with the state advisory committee. Failing even the first prong of the Central Hudson test, the outright ban on these forms of advertising was unconstitutional.

In Zauderer v. Office of Disciplinary Counsel, the Court overturned Ohio's reprimand of a lawyer for publishing a newspaper advertisement offering to represent women in litigation concerning the Dalkon Shield. Unlike the advertisement in Bates, which simply offered routine legal services, Zauderer's advertisement contained information about a specific legal problem, contrary to the rule against self-recommendation as interpreted by the Ohio Supreme Court.

The Court, finding that the advertisement was not false or deceptive, required the State to assert a substantial interest. The State's assertion of the same interests as those in Ohralik, namely, preventing undue influence and invasion of privacy, did not apply to a newspaper advertisement, which the Court found to be more conducive to reflection than in-person solicitation. The Court also rejected an interest in preventing the generation of litigation, on the ground that

100. Id. at 194-98.
101. Id. at 206-07.
102. Id. at 205-07.
103. Id. at 205.
104. Id. at 206.
105. Id. at 207.
107. Id. at 655-56; see also id. at 631 (quoting the advertisement, which publicized the fact that the Dalkon Shield was an intrauterine birth control device that had caused complications for some of its users).
108. Id. at 639. The advertisement, which included a drawing of the Dalkon Shield, also violated state rules requiring advertisements to be dignified and prohibiting the use of illustrations. Id. at 631-32.
109. Id. at 641.
110. See supra notes 88-97 and accompanying text.
111. Zauderer, 471 U.S. at 641-42.
access to courts is a commendable attribute of our system of justice. Because the State failed to assert a substantial interest, the Court overturned the reprimand without reaching the issue of whether a prophylactic ban on such advertising was a suitable means.

In *Shapero v. Kentucky Bar Ass'n*, the Court invalidated a Kentucky Supreme Court ban against all targeted mail advertising, that is, communications with potential clients known to have specific legal problems. By analogy to the ban on in-person solicitation upheld in *Ohralik*, the Kentucky Bar Association asserted a state interest in preventing overreaching and undue influence. While admitting that a targeted letter could pose an increased risk of deception, the Court rejected the ban for being overbroad and for failing to advance the asserted state interest.

The Court reasoned, first, that a targeted letter was simply a more efficient form of the general mailing permitted in *In re R.M.J.* Second, the Court rejected the analogy between in-person solicitation and targeted mail on two grounds. First, the Court found that direct mail can be dealt with reflectively, or simply ignored. Second, such mail stands open to public scrutiny, so that the Bar could regulate it in a less restrictive fashion, for example, by requiring targeted letters to be filed with a state agency. Finally, the Court rejected the notion that a targeted letter invades the recipient's privacy, be-

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112. Id. at 642-43.
113. Id. at 644. But see id. at 673-74 (O'Connor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the Dalkon Shield advertisement was unsolicited legal advice, and that the State had two persuasive reasons for restricting lawyers from accepting employment resulting from such advice: (1) unsolicited legal advice is not analogous to a free sample used to promote the sale of standardized consumer products, and it creates an enhanced risk of confusion; and (2) the lawyer's interest in obtaining business may color his advice, so that it is not complete or disinterested).
115. Id. at 469-70, 480. The attorney applied to the Kentucky Attorneys Advertising Commission for approval of a letter he wished to send to potential clients who had foreclosure suits filed against them. Id. at 469. Although the Commission did not find the letter false or misleading, the Commission denied him permission to send it, citing a rule prohibiting advertisements sent to people known to have specific legal problems. Id. at 469-70.
116. See supra notes 88-97 and accompanying text.
118. Id. at 476.
119. Id. at 479.
120. Id. at 473. “But the First Amendment does not permit a ban on certain speech merely because it is more efficient.” Id. But see id. at 481-82 (O'Connor, J., dissenting) (discussing the dangers of targeted mail as a unique mode of communication, e.g., its suggestion that a lawyer may have personal knowledge of and concern for the recipient).
121. *Shapero*, 486 U.S. at 475.
122. Id. at 475-76.
123. Id. at 476.
cause the intrusion, if any, occurs when the attorney learns of the recipient’s legal affairs, not when he confronts the recipient with this knowledge.\textsuperscript{124} Hence the Court found the ban on all direct mail advertising unconstitutional.\textsuperscript{125} So far, then, the Supreme Court had established that a complete ban on truthful lawyer advertising violated the First Amendment, while maintaining that, under the \textit{Central Hudson} test, narrowly drawn regulations would be permissible if the state could show that they served a substantial state interest.\textsuperscript{126}

The Court next confronted a case involving narrowly drawn regulations that did serve a substantial state interest. In \textit{Florida Bar v. Went For It, Inc.},\textsuperscript{127} in a five-to-four decision, the Court upheld a Florida Bar rule that prohibited lawyers from sending targeted, direct mail solicitations to victims and their relatives for thirty days following an accident or disaster.\textsuperscript{128}

Applying the \textit{Central Hudson} test,\textsuperscript{129} the Court accepted as substantial the Bar’s interests in protecting both the privacy of personal injury victims and the legal profession’s integrity.\textsuperscript{130} To demonstrate that this regulation advanced its interests directly, the Florida Bar offered a 106-page summary of a two-year study it conducted.\textsuperscript{131} The study contained statistical and anecdotal data showing that the public, and especially particular individuals who had been solicited in the wake of an accident, had poor regard for the legal profession as a result of this practice.\textsuperscript{132} Lastly, the Court determined that, as a

\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} at 480. \textit{But see} \textit{id.} at 485-86 (O’Connor, J., dissenting) (arguing that the \textit{Central Hudson} test should be applied with more deference to the state’s legislative judgment, so that a legal advertisement need only be \textit{potentially} misleading to support the state’s interest in regulating the advertisement).
\item \textsuperscript{126} \textit{See} Vanderwater, \textit{supra} note 60, at 780 (noting that while the Court was willing to allow regulation of attorney advertising, state bar associations repeatedly failed to enact a regulation that satisfied the requirements of \textit{Central Hudson}).
\item \textsuperscript{127} 515 U.S. 618 (1995).
\item \textsuperscript{128} \textit{Id.} at 620.
\item \textsuperscript{129} \textit{Id.} at 625. Writing for the majority, Justice O’Connor, despite prior dissents in such cases, \textit{see} \textit{supra} notes 113, 120, and 125, noted that intermediate-level scrutiny, First Amendment protection for attorney advertising was “well established.” \textit{Went For It}, 515 U.S. at 623.
\item \textsuperscript{130} \textit{Went For It}, 515 U.S. at 624-25. These interests are related: When lawyers invade the privacy of accident victims, the profession’s reputation suffers. \textit{Id.} The Court did not determine the legitimacy of these interests directly, but instead relied on precedent that had done so. \textit{Id.} at 625 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (noting the broad power of states to establish standards for professions in light of the states’ compelling interests in them)).
\item \textsuperscript{131} \textit{Id.} at 626-27.
\item \textsuperscript{132} \textit{Id.} at 626-28. The Court emphasized, however, that such studies are not always necessary to demonstrate the factual basis for regulations on speech. \textit{Id.} at 628. The state
means, the thirty-day restriction was a reasonable fit with the asserted ends. The Court rejected two claims of overbreadth. First, the Court did not think that the restriction could be narrowed so as to permit targeted mailings to those with more minor injuries or grief, because this line would be too difficult to draw. Second, the Court rejected the claim that the restriction prevented citizens from learning about their legal options, because the restriction was limited to a brief time, and because there were many other ways, including advertisements in the media, for citizens to learn about these options. Thus, the Florida Bar’s thirty-day ban on sending targeted mail to accident or disaster victims and their relatives passed the Central Hudson test.

The Court distinguished this case from Shapero’s prohibition of direct mail in three respects. First, unlike Kentucky in Shapero, the Florida Bar presented evidence of actual harm caused by the direct mail. Second, unlike the total ban in Shapero, the Florida Bar’s restriction was limited by time and audience. Most importantly, the Court found inapplicable Shapero’s argument that, because the intrusion occurs when the lawyer first learns of the recipient’s plight, targeted mail does not violate privacy. Instead, the Court reasoned that, in the case of accident victims, the harm occurs upon receipt and cannot be undone simply by throwing the letter away, because receipt triggers the recipient’s outrage with the legal profession for soliciting him at all in such a condition.

need only show that the harm is non-speculative, which it may do through history, consensus, and common sense. Id. For a criticism of the Florida Bar study, see Ronald D. Rotunda, Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 Ark. L. Rev. 703, 729-32 (1997). For evidence contrary to the Florida Bar study, see A.B.A. Comm. On Advertising, Lawyer Advertising at the Crossroads: Professional Policy Considerations 76 (1995), which reported research showing that “consumers are significantly more positive about lawyer advertising than lawyers.”

133. Went For It, 515 U.S. at 634.
134. Id. at 635.
135. For criticism of the Court on this ground, see id. at 643-44 (Kennedy, J., dissenting), in which Justice Kennedy asserted that the restriction deprives victims of information needed to make their claims at a time when insurance adjustors may be pressing victims to settle their claims.
136. Went for It, 515 U.S. at 638-34.
137. Id. at 635.
138. See supra notes 114-126 and accompanying text.
139. Went For It, 515 U.S. at 629-30.
140. Id.
141. Id. at 630. The Court considered Shapero’s treatment of privacy “casual” because the State in that case had not asserted privacy as a substantial interest. Id. at 629.
142. Id. at 630.
ida's thirty-day restriction passed constitutional muster.\textsuperscript{143} While four
Justices dissented, the basis of the disagreement was \textit{not} the principle that, under the \textit{Central Hudson} test, regulation of attorney advertising is subject to narrowly drawn restrictions that serve substantial state interests, but instead the application of the \textit{Central Hudson} test to the facts of this case.\textsuperscript{144}

3. \textit{The Court's Reasoning}.—In \textit{Ficker v. Curran}, the United States Court of Appeals for the Fourth Circuit held that section 10-605.1(a)(2) of the Business Occupations and Professions Article,\textsuperscript{145} requiring that lawyers wait thirty days before sending direct mail solicitations to those arrested for a criminal offense or a jailable traffic offense, unconstitutionally restricted commercial speech.\textsuperscript{146} After briefly reviewing legal precedent,\textsuperscript{147} the court examined the First Amendment interests at stake, applied the \textit{Central Hudson} test,\textsuperscript{148} and then distinguished the instant case from \textit{Florida Bar v. Went For It, Inc.}\textsuperscript{149}

First, the court reasoned that both the recipients and the senders of the direct mailing have First Amendment interests.\textsuperscript{150} Criminal and traffic defendants have a right to receive the mailings, even when the information that they provide could be acquired by other means, because the dissemination of advertising “facilitates the consumer's access to legal services and thus better serves the administration of justice.”\textsuperscript{151} Similarly, attorneys have the right to “speak[ ] in the com-

\textsuperscript{143} \textit{Id.} at 635. \textit{But see id.} at 637 (Kennedy, J., dissenting) (arguing that, with respect to the privacy interest, the relevant inquiry is not the condition of the recipient, but the mode of communication, namely, the direct mail that \textit{Shapero} had held could not be banned).

\textsuperscript{144} \textit{Compare Went For It}, 515 U.S. at 623 (noting that it is “well established” that lawyer advertising is commercial speech subject to First Amendment protection under the \textit{Central Hudson} test) \textit{with id.} at 637-45 (Kennedy, J., dissenting) (arguing that Florida's restriction fails each prong of the \textit{Central Hudson} test).

\textsuperscript{145} \textit{See supra} note 11 and accompanying text.

\textsuperscript{146} \textit{Ficker}, 119 F.3d at 1156.

\textsuperscript{147} \textit{Id.} at 1151-53. The court emphasized two points in this review. First, regulation of attorney advertising is permitted “only in the limited class of circumstances where state interests are strong and the potential harm of nonregulation severe.” \textit{Id.} at 1152. Second, the holding in \textit{Florida Bar v. Went For It, Inc.} is confined to its facts, and not intended “to abridge previously-recognized First Amendment advertising rights outside the accident victim context.” \textit{Id.} at 1152-53.

\textsuperscript{148} \textit{See supra} notes 62-70 and accompanying text.

\textsuperscript{149} \textit{Ficker}, 119 F.3d at 1153-56.

\textsuperscript{150} \textit{Id.} at 1153.

\textsuperscript{151} \textit{Id.} (quoting \textit{Peel v. Attorney Registration & Disciplinary Comm'n}, 496 U.S. 91, 110 (1990)).
mercial marketplace of attorney services." A ban on direct mailing, by favoring those who are already known or who can afford television advertising, operates as an indirect barrier to entering the profession. In view of these First Amendment interests, the court next applied the three-part Central Hudson test.

First, the court recognized the state's substantial interests: "shielding recipients from undue influence or confusion, guarding [the] recipients' privacy, and protecting the reputation of the legal profession." The court reasoned, however, that the restriction failed to advance directly these interests on account of the following facts: (1) a direct mailing, as distinct from in-person solicitation, can be dealt with reflectively or ignored, and therefore does not pose the danger of undue influence; (2) the criminal or traffic defendant's privacy is already compromised because his arrest is known through the public record and in other ways; (3) even if mailings to criminal and traffic defendants cause disrespect for the legal profession, this disrespect is not rooted in the solicitation's timing (as with accident victims), but in a general distaste for direct mailing itself, which the United States Supreme Court had already permitted. Finally, the Ficker court found that there was not a reasonable fit between the means and ends of the restriction, because less burdensome alternatives were available, such as requiring the text of any advertisement to be filed with a state agency.

After applying the Central Hudson test, the court distinguished Ficker from Went For It, which upheld the same restriction in the case of accident victims, in four ways: (1) the waiting period in Went For It was justified by the victim's need to grieve, whereas the arrestee has

152. Id. The court reiterated that, under Virginia Pharmacy, the fact that the speech is motivated by pecuniary gain, or contains merely the proposal of a commercial transaction, does not disqualify the speech from First Amendment protection. Id.
153. Id.
154. Id.
155. Id.
156. Id. (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988)).
157. Id. at 1154. The court noted that in some jurisdictions a list of arrestees is published in the local newspaper, and that Maryland permits direct mail solicitation for representation in administrative hearings in DWI cases. Id.
158. Id. Attorney General Curran pointed to a study of the North Carolina Bar claiming to show that such direct mailings do diminish the reputation of the legal profession. Id. However, three members of the North Carolina Bar, as amici, submitted a different North Carolina survey purporting to show the opposite. Id. The court refused to "resolve this battle of the studies" on the ground that, even if the reputational harm were real, the restriction did not directly advance the state's interest in alleviating it. Id.
159. Id. (citing Shapero).
160. Id. at 1155.
no such need;\textsuperscript{161} (2) accident victims have three years in which to assert their rights, whereas criminal defendants can lose theirs within thirty days;\textsuperscript{162} (3) an accident victim can choose to avoid public scrutiny, whereas the criminal defendant has already had his privacy compromised;\textsuperscript{163} and (4) unlike a civil litigant, a criminal defendant has a Sixth Amendment right to counsel, and the State cannot lightly deprive the defendant of information that might assist in the exercise of this right.\textsuperscript{164} Because section 10-605.1(a)(2) was distinguishable from the regulation in \textit{Went For It}, and unable to pass the \textit{Central Hudson} test in its own right, the court held it to be a violation of the First Amendment.\textsuperscript{165}

4. \textit{Analysis.—In Ficker v. Curran}, the Court of Appeals for the Fourth Circuit held that a thirty-day ban on attorney direct mailings to criminal defendants or jailable traffic defendants was unconstitutional.\textsuperscript{166} The court reached this predictable\textsuperscript{167} and properly narrow holding in a manner consistent with United States Supreme Court precedent.

\textit{a. The Court Correctly Interpreted Supreme Court Precedent.—The Ficker} district court observed that the plaintiffs and the defendant relied heavily on different cases; Ficker and Boehm on \textit{Shapero v. Kentucky Bar Ass'n},\textsuperscript{168} Maryland Attorney General Curran on \textit{Florida Bar v. Went For It, Inc.}\textsuperscript{169} The Court of Appeals for the Fourth Circuit correctly construed these cases by refusing to draw a dichotomy between them.

In all its recent lawyer advertising cases, the United States Supreme Court has recognized that, under the \textit{Central Hudson} test, a

\begin{footnotes}
\footnote{161. \textit{Id.}}
\footnote{162. \textit{Id.}}
\footnote{163. \textit{Id.} at 1156.}
\footnote{164. \textit{Id.}}
\footnote{165. \textit{Id.}}
\footnote{166. \textit{Id.}}
\footnote{167. The court found “little difficulty in concluding that the Maryland law implicates First Amendment interests.” \textit{Id.} at 1153. There is another factor indicating the decision’s predictability. Attorney General Curran himself wrote a letter on May 16, 1996 to the governor, expressing the view that section 10-605.1(a)(2) was unconstitutional, but that the bill as a whole should be signed because section 2 was severable from section 1, which regulated solicitation of personal injury plaintiffs. \textit{See Ficker}, 950 F. Supp. at 124-25 (quoting portions of the letter). The attorney general originally submitted this letter to show that section 2 would not be enforced but, after the court did not deny Ficker’s motion for preliminary injunction, the attorney general argued for the constitutionality of section 2. \textit{Id.} at 124-25, 125 n.3.}
\footnote{168. \textit{See supra} notes 114-126 and accompanying text.}
\footnote{169. \textit{See supra} notes 127-144 and accompanying text.}
\end{footnotes}
state may impose narrowly drawn restrictions on commercial speech if the restrictions directly serve a substantial state interest.\textsuperscript{170} The Court in \textit{Went For It} reaffirmed this proposition: "Nearly two decades of cases have built upon the foundation laid by \textit{Bates}. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection."\textsuperscript{171} Thus, \textit{Went For It} did not unsettle the case law,\textsuperscript{172} or allow tighter restrictions on lawyer advertising in general.\textsuperscript{173} It simply held that, in the case of \textit{accident victims}, a temporary ban on direct mail solicitation satisfied the \textit{Central Hudson} test.\textsuperscript{174} Because this test determined the inquiry in both \textit{Shapero}\textsuperscript{175} and \textit{Went For It},\textsuperscript{176} and still controls today, the \textit{Ficker} court rightly refused to decide the constitutionality of Maryland's statute by exclusive reference to one case or the other. Instead, the court applied the \textit{Central Hudson} test, and in so doing, distinguished the case before it from \textit{Went For It} in three important ways.

First, the privacy interest is distinct. The Court in \textit{Went For It} found it permissible for the State to protect intrusions upon the grief of accident victims or their relatives.\textsuperscript{177} The \textit{mere receipt} of a direct mail solicitation in this context is a harmful invasion.\textsuperscript{178} By contrast, the individual arrested for driving while intoxicated\textsuperscript{179} is primarily embarrassed, and wishes to keep his arrest secret.\textsuperscript{180} Direct mail may deepen this embarrassment in two ways.

On the one hand, direct mail may embarrass the recipient by making family members aware of the arrest, either inadvertently, or as a result of a family member's searching the mail. In this case, how-

\begin{itemize}
  \item \textsuperscript{170} See supra note 126 and accompanying text.
  \item \textsuperscript{171} Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).
  \item \textsuperscript{172} Id. at 631 n.2.
  \item \textsuperscript{173} See \textit{Ficker}, 950 F. Supp. at 125 n.4 (refusing to read "sweeping implications" into \textit{Went For It}).
  \item \textsuperscript{174} \textit{Went For It}, 515 U.S. at 635.
  \item \textsuperscript{175} See supra notes 114-126 and accompanying text.
  \item \textsuperscript{176} See supra notes 127-144 and accompanying text.
  \item \textsuperscript{177} \textit{Went For It}, 515 U.S. at 631-32.
  \item \textsuperscript{178} Id. at 631.
  \item \textsuperscript{179} This offense is the most appropriate example in light of the fact that the vast majority of Ficker's direct mail business concerns those arrested for jailable traffic offenses, such as driving while intoxicated. See \textit{Ficker}, 950 F. Supp. at 124.
  \item \textsuperscript{180} Attorney General Curran cited in his brief a May 3, 1994 editorial by Bob Greene in the \textit{Cincinnati Enquirer}. This report concerned a 41-year-old man who lived with his mother, and who had been arrested for driving under the influence. He found it "very upsetting" that direct mail solicitations had made his mother aware of his arrest. Addenda to Brief of Appellant at A-10 to A-12, \textit{Ficker v. Curran}, 119 F.3d 1150 (4th Cir. 1997) (No. 96-2724) (citing Bob Greene, \textit{Lawyers Court Clients by Mail}, \textit{CIN. ENQUIRER}, May 3, 1994, at A6, available in 1994 WL 6263987).
\end{itemize}
ever, the First Amendment interest of lawyers outweighs whatever interest the state may have in protecting the recipient against intra-family conflicts that arise upon disclosure of the truth.

On the other hand, direct mail may make the recipient aware that lawyers combing through the public records know of the arrest. In this event, the intrusion has already occurred, if at all, when the lawyer discovered the recipient's name in the public records, in a way analogous to Shapero. Because these records are public, however, and because this same intrusion would occur on the thirty-first day, Maryland's restriction fails to advance directly the interest it was intended to protect. For precisely this reason, the Maryland restriction is distinguishable from the one upheld in Went For It.

Second, the timing is distinct. Because Went For It concerned civil litigants who had three years in which to pursue their rights, a thirty-day ban on direct mail did not prejudice these rights. A person charged with driving while intoxicated, however, must act quickly to preserve certain rights. If he refuses to take an alcohol concentration test, or scores greater than .10 on this test, the police must confiscate his license and issue him a forty-five-day temporary license. The Motor Vehicle Administration must suspend his license. The defendant, however, may, within thirty days from the time of the stop, request a hearing to show cause why his license should not be suspended. But if he does not do so within the first ten days, the defendant waives the right to have this hearing scheduled within forty-five days and the temporary license may expire. In this situation, the failure to assert legal rights within thirty days results in the automatic suspension of the license for a period of time, and the failure to do so within ten days could result in the temporary loss of the privilege to drive.

181. See supra notes 114-128 and accompanying text.
182. Ficker, 119 F.3d at 1154.
183. Id. at 1153-54.
187. Id. § 16-205.1(b)(1). The duration of the suspension varies with the circumstances. Id.
188. Id. § 16-205.1(b)(3)(v)(2).
189. Id.
In light of these administrative deadlines, it is true that, even if the criminal prosecution of drunk driving offenses usually takes longer than thirty days, a person charged with this offense can waive rights and privileges within the thirty days covered by Maryland's ban on direct mail. For this reason, a thirty-day ban is, in effect, less like the limited restriction upheld in Went For It, and more analogous to the total ban on direct mailing invalidated as overbroad in Shapero.

Third, there is a difference between the civil litigant and the criminal defendant, because the latter has a Sixth Amendment right to counsel. The exercise of this right is essential to the fair administration of justice, the fundamental interest from which the state's interest in the reputation of the legal profession derives. By making the Sixth Amendment right more difficult to exercise, the Maryland restriction attempts—unintelligibly—to advance a derivative interest at the expense of a more fundamental one. Thus, this restriction is distinguishable from the one upheld in Went For It, which did not implicate a more fundamental state interest.

Put differently, the Maryland restriction is reminiscent of In re Primus, in which the Supreme Court determined that an ACLU lawyer's solicitation was protected as a type of "political expression." While the lawyer who sends direct mail presumably has a commercial

190. See Brief of Appellant at 13, 21, Ficker (No. 96-2724) (noting that most DWI criminal cases take substantially longer than 30 days) (citing NATIONAL CENTER FOR STATE COURTS, DWI/DUI SENTENCING EVALUATION—MARYLAND DISTRICT COURT—FINAL REPORT 14 (1990)).

191. Ficker, 119 F.3d at 1154. The Ficker court observed that "Maryland already permits immediate direct-mail solicitation for representation in administrative license proceedings, so any interest in privacy from attorney intrusion is already compromised during the initial month." Id. While direct mail for this purpose does compromise the privacy interest, it does not mean that the timing of these proceedings is irrelevant to the issue of prohibiting direct mail solicitations for criminal representation, because defendants have an interest in being represented by the same attorney in both contexts.

192. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 632-34 (1995) (asserting that the 30-day period following accidents poses no significant harm to those in need of an attorney).

193. See Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476 (1988) (noting that the state can regulate the dangers of direct mail solicitation through less restrictive means than a total ban).

194. Ficker, 119 F.3d at 1156 (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)).

195. Id. at 1154.

196. Went For It, 515 U.S. at 634-35 (noting that the Florida Bar regulation did not concern "speech by attorneys on public issues" but instead "pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment").

197. See supra notes 81-87 and accompanying text.

motive, rather than a political one, the First Amendment protects the recipient of the communication as well. The recipient in this case, the criminal defendant, has a non-commercial, political interest in the exercise of his Sixth Amendment right to counsel. This political interest distinguishes the criminal defendant from the accident victim with respect to whom the thirty-day ban on direct mail was upheld in *Went For It*.

In light of these fundamental distinctions, the *Ficker* court was correct not to expand the scope of *Went For It* beyond its facts merely because section 10-605.1(a)(2) was a formally similar thirty-day ban on direct mailing. Instead, the court properly scrutinized the underlying issue, namely, the relation between the mode of communication and the interest served by restricting it *with respect* to criminal and incarcerable traffic defendants. Reached through a fact-specific application of the *Central Hudson* test, the holding was correctly confined to the facts of the case.

b. *Unaddressed Problems of Lawyer Advertising and the Future of Such Decisions.*—In light of its properly narrow holding and the conformity of this holding with Supreme Court precedent, the circuit court in *Ficker* cannot be faulted for not addressing the “general distaste for such solicitation[s]” felt by some members of the bar and the public. Instead, this fault lies with the precedent itself. As Justice Rehnquist recognized in *Virginia Pharmacy*, once the United States Supreme Court determined that advertising was “speech,” rather than an incident of business subject to state regulation, it was almost inevitable that the Court would strongly limit the capacity of the states to regulate the professions within their borders in this respect. Because *Virginia Pharmacy* served as the foundation for the lawyer advertising cases, this decision, and the consequences that follow from it, should be briefly considered in order to grasp the deeper issues at stake in such cases.

*Virginia Pharmacy* invalidated a state regulation on the basis of economic interests: the advertiser’s commercial interest, the customer’s interest in knowing prices, and society’s free-market interest in effi-

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199. See supra note 58.
200. *Ficker*, 119 F.3d at 1156 (“Our holding is a narrow one. . . . We do not bar the state from regulating lawyer advertising which is inaccurate or misleading. We merely find that Maryland’s thirty day ban on direct-mail solicitation to traffic and criminal defendants cannot withstand review.”).
201. *Id.* at 1154.
ciently allocating resources. But because the First Amendment had been traditionally limited to protecting political decisionmaking in a representative democracy, and individual fulfillment through free expression, freedom of speech was not a sound basis for overturning economic regulations—even if, as the Court noted, the consumer's "interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Although the Court's remark implies that the United States is more an aggregate of consumers than a nation of citizens, "in a democracy, the economic is subordinate to the political." Viewed in this light, *Virginia Pharmacy* amounts to a resurrection of *Lochner*-era economic due process under the guise of the First Amendment.

This sort of intrusion into state economic regulation is contrary to the spirit of federalism. For example, in *Bates v. State Bar*, the first case to extend constitutional protection to lawyer advertising, Chief Justice Burger noted that the organized bar was at that very time making reforms with respect to increasing the availability of legal services. The capacity for states to experiment in this regard is, of course, "one of the great virtues of federalism." When, contrary to federalism, states are deprived of sufficient leeway to regulate economic matters, they also lose the ability to maintain the standards of the professions within their borders.

With respect to the legal profession's standards, opposition to advertising need not be motivated by the hypocritical pretense that law-

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203. See supra notes 57-59 and accompanying text.
204. See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 25 (1979) (arguing that *Virginia Pharmacy* was wrongly decided because, in light of these traditional bases for First Amendment protection, freedom of speech could not be used to justify the Court's intrusion into state economic matters).
207. Jackson & Jeffries, supra note 204, at 30-31; see also *Central Hudson*, 447 U.S. at 589 (Rehnquist, J., dissenting) (describing the Court's striking down of prohibitions against advertising by state-created electrical utilities as a return to "the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies").
208. See supra notes 54 and 79.
210. *Id.* at 388 (Burger, C.J., concurring in part and dissenting in part).
211. *Id.* at 403 (Powell, J., concurring in part and dissenting in part).
212. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 485-86 (1988) (O'Connor, J., dissenting) (arguing that deference to state interests is necessary to preserve the ethical dimension of the legal profession); see also supra note 79.
yers do not make money,\textsuperscript{213} or by elitism.\textsuperscript{214} Instead, such opposition may be motivated by the recognition that advertising can place lawyers' pecuniary self-interest at odds with their obligation to serve their clients' best interests.\textsuperscript{215} For example, an advertisement containing specific information about a legal problem may be colored by the lawyer's interest in obtaining business, so that the advice is not complete or disinterested.\textsuperscript{216} Or targeted mail—the mode of communication at issue in \textit{Ficker}—may misleadingly suggest that a lawyer has some personal knowledge of and concern for the recipient.\textsuperscript{217} By potentially opposing a lawyer's pecuniary motives and his ethical obligation, advertising can undermine not only the reputation of the legal profession, but the profession itself, which as such "entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced . . . through the discipline of the market."\textsuperscript{218} These ethical, professional, and federalist issues are the source of the "general distaste for such solicitation"\textsuperscript{219} that the \textit{Ficker} court properly did not address.

Even in light of these unaddressed issues, however, one can view \textit{Ficker} as a correct decision, because the case implicated a political right—the Sixth Amendment right to counsel—the exercise of which the First Amendment is suited to protect from undue state regulation.\textsuperscript{220} While \textit{Ficker} did not address these issues, it showed that, for better or worse, they are indeed settled.\textsuperscript{221} For this very reason, \textit{Ficker} is a good indicator of the likely result in future lawyer advertising cases. Cases involving restrictions of purely commercial speech, such as \textit{Florida Bar v. Went For It, Inc.}, will be decided by narrow margins on the issue of how much, if any, regulation is permitted under the \textit{Cen-
tral Hudson test. Cases involving any restrictions impinging on political rights will be more easily decided in the manner of Ficker itself.

5. Conclusion.—The Ficker court’s holding—that requiring lawyers to wait thirty days before sending direct mail solicitation to criminal or incarcerable traffic defendants violated the First Amendment—is consistent with twenty years of “well established”222 Supreme Court precedent and properly confined to the facts of the case.

On account of this narrow holding, the court’s ruling should not discourage the legislature from regulating lawyer advertising in other ways by means of reasonably fitting restrictions that directly advance substantial state interests. For example, direct mail solicitations to criminal or incarcerable traffic defendants may confuse such a recipient, by leading him to believe that he has been assigned a public defender or a low-fee panel attorney.223 Because the court acknowledged the state’s substantial interest in preventing confusion,224 and because the court mentioned more reasonably fitting means for doing so—for example, requiring direct mail to be labeled as an advertisement225—such a label would be likely to pass constitutional muster.

Finally, because the Court of Appeals for the Fourth Circuit reaffirmed that the legal profession’s integrity is a substantial state interest,226 the Maryland General Assembly may, and should, remain alert to practices that endanger the profession’s integrity, and take measures to protect the profession when it can do so in a constitutionally appropriate manner.

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223. In hearings before the Senate Judicial Proceedings Committee on January 18, 1996, a member of the Maryland Criminal Defense Attorneys Association testified, in support of the 30-day ban, that at least one defendant had made this assumption. Brief of Appellant at 6, Ficker (No. 96-2724).
224. Ficker, 119 F.3d at 1153.
225. Id. at 1155.
226. Id. at 1153.
III. COPYRIGHTS AND TRADEMARKS

A. Expanding the Distribution Right in Copyright Infringement

In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, the United States Court of Appeals for the Fourth Circuit considered whether a copyright owner presented sufficient evidence to show that the defendant's library committed an infringing act within the three-year statute of limitations of the Copyright Act. In that case, the library had placed an unauthorized copy of the copyrighted microfiche in its collection, included the copy in its catalog or index system, and made the copy available to the public. A divided panel for the court determined that, in doing so, the library "distributed" the published work in violation of the Copyright Act of 1976, thereby infringing the copyright owner's exclusive distribution right.

In so ruling, the court appropriately interpreted a copyright owner's distribution right by reasoning that making the unauthorized copy available to the public for use within the library was sufficient to violate the Copyright Act. Further, the court ruled that there was sufficient evidence that the infringement occurred within the three-year statute of limitations, thereby achieving the correct result by protecting the rights of copyright owners to recover for infringing acts occurring within three years of filing suit.

1. The Case.—The plaintiffs, Donna Hotaling, William Hotaling, Jr., James Maher, and Dorothy Sherwood (collectively the Hotalings), compiled and copyrighted a number of genealogical materials. An independent publisher, All-Ireland Heritage, Inc., marketed and published the copyrighted works in microfiche form with a black
background. Between 1985 and 1989, the defendant, the Church of Jesus Christ of Latter-Day Saints (the Church), purchased a legitimate microfiche copy and added the copy to its main library collection in Salt Lake City, Utah. Sometime before 1992, without the Hotalings’ permission, the Church made microfiche copies of the materials and distributed them to several of its branch libraries throughout the country. The microfiche copies made by the Church contained a purple background, as distinguished from the legitimate copy that contained a black background.

In July 1991, Donna Hotaling learned that the Church copied and distributed the works to its branch libraries. She contacted the Church and demanded that the Church stop this unauthorized activity. After receiving her complaint, the Church recalled and destroyed many of the copies distributed to the branch libraries.

In 1992, All-Ireland Heritage, Inc. filed suit in federal court against the Church for copyright infringement based on the Church’s copying and distribution of the Hotalings’ works. Because All-Ireland Heritage, Inc. did not own the copyright to the Hotalings’ works, the district court dismissed the action.

In 1993, the Church sent a memorandum to its branch libraries asking them to search their microfiche inventories for any other unauthorized copies of the Hotalings’ works. In response to the memo-

9. Hotaling, 118 F.3d at 201.
10. Id. The main library referred to is a not-for-profit genealogical research library maintained by the Church’s Family History Department. Brief of Appellee at 4, Hotaling (No. 96-1399). There are several other smaller genealogical family history center “branch” libraries located in Church buildings in the United States and overseas. Id. The libraries contain millions of rolls of microfilm and microfiche, which mostly contain public birth and death records and other public records. Id. The libraries are open to the public free of charge. Id.
11. Hotaling, 118 F.3d at 201.
12. Id.
13. Id.
14. Id.
15. Id. In addition to recalling and destroying the copies, the Church listed the microfiche as restricted, meaning that any requests for paper or other copies were not approved. Brief of Appellee at 5, Hotaling (No. 96-1399). The Family History Department monitored the availability and handling of the microfiche to ensure that no unauthorized copies were made after July 1991. Id. The court accepted that the Church did not make any copies of the material after July 1991. Hotaling, 118 F.3d at 202.
17. Id. Judge Albert V. Bryan, Jr., district judge in the Eastern District of Virginia, granted the Church’s motion for summary judgment on May 7, 1993, on the ground that the copyrights were incorrectly registered and All-Ireland Heritage, Inc. was not the copyright owner. Brief of Appellants at 5, Hotaling (No. 96-1399).
18. Hotaling, 118 F.3d at 202. During the course of the prior litigation, the Church determined that some of its branch libraries may have obtained copies of the microfiches.
randum, six of the branch libraries found and returned one copy each of the microfiche.\textsuperscript{19} The main library promptly destroyed the copies returned by the branch libraries.\textsuperscript{20}

Subsequent to the Church's monitoring and preventative actions, Donna Hotaling visited a Rhode Island branch library in 1994 and found a paper copy of one of the Hotalings' works in an infrequently used section of the library.\textsuperscript{21} According to the branch library director, a library patron made the paper copy unbeknownst to the library staff, and the director destroyed the paper copy immediately after it was discovered.\textsuperscript{22} Following her discovery of the paper copy in the Rhode Island branch library, Donna Hotaling visited the Church's main library in Utah in 1995, where she viewed a microfiche copy of the works.\textsuperscript{23} The copy she viewed was not the authorized copy purchased by the Church, because the copy's background was purple.\textsuperscript{24} The Church acknowledged that the copy it kept in its main library was one that it made because the original was destroyed inadvertently.\textsuperscript{25}

As a result of these discoveries, the Hotalings filed suit against the Church in August 1995, alleging copyright infringement.\textsuperscript{26} Shortly after the Hotalings filed suit but before the parties conducted discovery, the Church moved for summary judgment.\textsuperscript{27} Judge Claude M. Hilton denied the motion without prejudice on the ground that the Hotalings stated a valid claim with genuine issues of material fact in dispute.\textsuperscript{28}

Following discovery, the Church again moved for summary judgment.\textsuperscript{29} This time, the district court granted the motion because the

\textsuperscript{19} Hotaling, 118 F.3d at 202.
\textsuperscript{20} Id. The six copies returned by the branch libraries for destruction were made prior to 1990. Brief of Appellee at 6, Hotaling (No. 96-1399).
\textsuperscript{21} Hotaling, 118 F.3d at 202.
\textsuperscript{22} Id. Prior to April 1992, the branch library had returned the microfiche copy from which the patron made the paper copy. \textit{Id.}
\textsuperscript{23} Id.
\textsuperscript{24} Id.; see \textit{supra} text accompanying note 12.
\textsuperscript{25} Hotaling, 118 F.3d at 202.
\textsuperscript{26} Id. In their complaint, the Hotalings alleged that since sometime after 1986, the Church "continuously" copied the microfiche in violation of their registered copyright. Brief of Appellee at 6, Hotaling (No. 96-1399). In a sworn affidavit, Donna Hotaling stated that the Church "continuously" copied the microfiche without permission from 1986 through the time suit was filed in 1995. \textit{Id.}
\textsuperscript{27} Brief of Appellants at 3, Hotaling (No. 96-1399).
\textsuperscript{28} Id.
\textsuperscript{29} Brief of Appellee at 2, Hotaling (No. 96-1399). During discovery, Donna Hotaling admitted in her deposition testimony that she knew of no instance in which the Church
record contained no evidence of an infringing act within the three-year limitations period. The district court denied the Hotalings' request for reconsideration, and the Hotalings appealed to the United States Court of Appeals for the Fourth Circuit, challenging the district court's decision that the claim was barred due to insufficient evidence within the limitations period.

2. Legal Background. —

a. Distribution as an Infringing Act.—The United States Constitution provides that: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Constitution assigns to Congress the task of defining the scope of the limited monopoly that is granted to authors, balancing the author's interest in controlling her work product with the public's interest in gaining access to it. Congress met this constitutional task by enacting the Copyright Act of 1976 (the Act).

had copied the microfiche since August 1992. Plaintiffs James Maher, Dorothy Sherwood, and William Hotaling, Jr. likewise testified in their respective depositions to their lack of knowledge of any instances of copying by the Church since August 1992. Other discovery materials, such as interrogatories, document requests, and requests for admissions supported the Church's contention that none of the plaintiffs had specific knowledge or evidence of any acts of infringement by the Church since that time.

31. Id.

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.
The Act establishes specific enumerated exclusive rights for the copyright owner. The "bundle of rights" granted in section 106 sets forth the owner's rights in broad terms. One of the copyright owner's exclusive rights in the "bundle" is the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Elaborating on the impact of this right, legislative reports accompanying the Copyright Act explained that, under the distribution right, the copyright owner "has the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement." After establishing a copyright owner's exclusive rights, the Act addresses copyright infringement: "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118... is an infringer of the copyright or right of the author, as the case may be." Despite the statutory language and the congressional explanation of the distribution right, the Act fails to define "distribute" in the context of an action for infringement. One commentator suggests that "distribute" is not defined in the Act because the statute lists the types of distribution covered. Even listing the types of distribution cov-

35. 17 U.S.C. § 106. When the Act refers to the copyright owner, this reference does not necessarily mean the author of the copyrighted material. John M. Kernochan, The Distribution Right in the United States of America: Review and Reflections, 42 VAND. L. REV. 1407, 1409-10 (1989) (considering three approaches that would change the distribution right to make the author's right more substantial). The copyright owner may be the author or an heir or anyone to whom the title to the copyright is transferred, whether by sale, will, gift, operation of law, or otherwise. Id. at 1409. The first suit brought by All-Ireland Heritage, Inc. against the Church was dismissed on the ground that All-Ireland Heritage, Inc. was not the copyright owner. See supra note 17 and accompanying text.


39. 17 U.S.C. § 501(a). Therefore, by operation of section 501(a), anyone who violates a copyright owner's section 106(3) distribution right is liable for infringement. Id. § 106(3).

40. See id. § 101 (defining terms used throughout the Act). Notwithstanding the lack of a definition for the "distribution" right, section 101 does contain definitions for some of the copyright owner's other exclusive rights, including the right to perform or display a work "publicly" and to perform a work. Id.

41. See 2 PATRY, supra note 38, at 840.
ered in the Act still presents difficulties in the infringement context because the types of distributions themselves are not defined by the Act. For instance, what constitutes "lending" is not defined in the Act.

Because of the Act's failure to elaborate on the meaning of "distribute," Congress has implicitly left the task of interpreting its meaning to the courts. Several jurisdictions have considered the question of what constitutes infringement of the distribution right. In Paramount Pictures Corp. v. Labus, a federal district court in Wisconsin ruled that renting nine unauthorized copies of videocassettes constituted nine infringements of the copyright owner's distribution right. The copyright owner argued that an infringement occurred each time the defendant offered the unauthorized copies for rental. The court disagreed, holding that a copyright infringement occurs upon actual rental only; an offer to distribute the tapes to members of the public does not constitute infringement.

Similarly, in Obolensky v. G.P. Putnam's Sons, the District Court for the Southern District of New York stated that a copyright violation does not occur when "the defendant offers to sell copyrighted materials but does not consummate a sale; equally, there is no infringement of the [distribution] right where there is copying, but no sale of the material copied." In Obolensky, the defendant publisher entered into negotiations with the plaintiff copyright owner for publication of a book. Due to failed negotiations, the defendant canceled over three thousand outstanding public orders for the book and never published nor distributed any copies of the book. During the negotiation time period, several independent publication indexes listed the defendant

42. See, e.g., National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426 (8th Cir. 1993) (construing the pleadings to state a breach of contract claim where actual distribution of the copyright owner's program did not occur); Paramount Pictures Corp. v. Labus, 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. 1990) (considering whether the rental of unlawful copies of videocassettes to resort guests constituted an infringement of the distribution right); Obolensky v. G.P. Putnam's Sons, 628 F. Supp. 1552 (S.D.N.Y.) (determining whether offering a book for sale and listing the book in a publications index was within the Act's meaning of distribution), aff'd, 795 F.2d 1005 (2d Cir. 1986); F.E.L. Publications, Ltd. v. Catholic Bishop, 199 U.S.P.Q. (BNA) 85 (N.D. Ill. 1978) (finding that the handing out of unlawful copies of hymnals at church services infringed the distribution right).
43. 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. 1990).
44. Id. at 1147.
45. Id. at 1143.
46. Id. at 1144.
47. 628 F. Supp. 1552 (S.D.N.Y.), aff'd, 795 F.2d 1005 (2d Cir. 1986).
48. Id. at 1555 (footnote omitted).
49. Id. at 1554.
50. Id.
incorrectly as the publisher of the book. 51 The plaintiff filed suit alleging, inter alia, that listing the book in publication indexes, subsequently notifying the index publishers that the book was canceled, and offering the book for sale to the public infringed his distribution right. 52 Although the plaintiff complained that the defendant’s actions made it impossible to disseminate the book, the court found that those actions did not fall within the Copyright Act’s meaning of “distribution.” 53

At least one federal appellate court has attempted to define the “distribution” right in the infringement context. In National Car Rental System, Inc. v. Computer Associates International, Inc., 54 the United States Court of Appeals for the Eighth Circuit held that an “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.” 55 In National Car Rental, the court ruled that dissemination did not occur when National Car Rental, without authorization, allowed third parties to use Computer Associates International’s program. 56 The third parties were not given unauthorized copies of the program, but, instead, were allowed to use the program while National Car Rental retained possession of the program. 57 The court ruled that the use of the program without actual distribution may have breached a licensing agreement, but did not amount to a copyright violation. 58

A federal district court in Illinois ruled that a distribution requires a public dissemination. In F.E.L. Publications, Ltd. v. Catholic Bishop, 59 the court considered whether the act of using unauthorized copies of hymnals during church services constituted a “distribution” under the Act. 60 Even though the copies never left the church, the court concluded that this type of distribution was an infringing act. 61 The court reasoned that the definition of “distribution” was tied to the nature of the work in question and the use for which it was intended. 62 The court disagreed with the defendant’s argument that no

51. Id. at 1555.
52. Id.
53. Id. at 1555-56.
54. 991 F.2d 426 (8th Cir. 1993).
55. Id. at 434 (alterations in original) (internal quotation marks omitted).
56. Id. at 430.
57. Id. at 428.
58. Id. at 434.
60. Id. at 85.
61. Id. at 86. The copying of the hymnals occurred more than three years before the suit was brought. Id.
62. Id.
infringing act occurred because the unauthorized copying occurred outside the statute of limitations period. Rather, the court noted that "under [the] defendants' theory a church could make illegal copies of a copyrighted work, put them in storage for three years, and thereafter use them during religious services without incurring liability." At least one federal district court has found an infringing distribution without the proof of an actual dissemination of the copyrighted material to the public. In *Brode v. Tax Management, Inc.*, a federal district court in Illinois held that leaving the plaintiff's copyrighted tax portfolio available on LEXIS and making the portfolio available to subscribers may constitute an infringing distribution, even though the plaintiff did not introduce any evidence that any subscriber had actually "called up" the portfolio.

Because the Act fails to define "distribute" in the context of an action for infringement, several federal courts have considered the question of what constitutes infringement of the distribution right. Uniformly, the courts considering the question have stated that an offer to sell unauthorized copies of copyrighted material does not constitute infringement. For a court to find a distribution within the Act, it generally looks to several factors including whether an actual, public dissemination of the unauthorized material occurred and the nature and intended use of the unauthorized material.

b. The Limitations Period.—The Copyright Act states that: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." Congress added a statute of limitations provision to the Copyright Act to establish uniformity among the courts and to discourage forum shopping among litigating parties. In addition, the long-established principle governing the limitations period is that the statute "bars

63. *Id.*
64. *Id.*
65. *14 U.S.P.Q.2d (BNA) 1195 (N.D. Ill. 1990).*
66. *Id. at 1199.*
67. *17 U.S.C. § 507(b) (1994).* The first Copyright Act, enacted by Congress in 1909, did not contain a statute of limitations for civil copyright infringement actions; however, the 1909 Act established a three-year statute of limitations for criminal copyright infringement. David E. Harrell, Comment, *Difficulty Counting Backwards from Three: Conflicting Interpretations of the Statute of Limitations on Civil Copyright Infringement*, 48 SMU L. Rev. 669, 671 (1995) (reviewing court decisions that applied the Act's statute of limitations). Therefore, before the 1957 amendment of the Act, courts applied the statute of limitations of the state in which the civil suit was filed. *Id.*
remedies, not the assertion of rights." 69 Even bearing in mind Congress's reasons for adding the limitations provision and the principle behind such a provision, courts continue to struggle with its application. 70

Although the Fourth Circuit had not addressed the statute of limitations in the civil copyright infringement context prior to Hotaling, the district court for the Eastern District of Virginia had addressed the issue. The plaintiff in Hoey v. Dexel Systems Corp., 71 James Hoey, granted Dexel Systems an exclusive marketing license in September 1981 to distribute his copyrighted computer software. 72 Hoey alleged that, subsequent to this date, Dexel infringed his copyright when it began to advertise, offer for sale, and distribute computer software and manuals that were substantially similar to Hoey's copyrighted software and manuals. 73

Dexel countered that the statute of limitations barred the copyright infringement claim because the limitations period expired before Hoey filed suit on May 5, 1989, and Hoey allegedly knew of at least one of the alleged infringing acts more than three years prior to filing suit. 74 Hoey urged the court to apply a "rolling statute of limitations" theory. 75 "Under such a theory, so long as any allegedly infringing conduct occurs within the three years preceding the filing of the action, the plaintiff may reach back and sue for damages or other relief for all allegedly infringing acts." 76 The court disagreed with both arguments, stating that the limitations period was "clear on its face." 77

The court elaborated on this point:

[Section 507(b) of the Copyright Act] does not provide for a waiver of infringing acts within the limitations period if earlier infringements were discovered and not sued upon, nor

69. Stone v. Williams, 970 F.2d 1043, 1051 (2d Cir. 1992) (stating that "[t]his principle applies to the Copyright Act").
72. Id. at 223.
73. Id. The court's opinion does not give the specific date on which the alleged infringing actions began. Id.
74. Id.
75. Id.
76. Id. See generally Taylor v. Meirick, 712 F.2d 1112, 1119 (7th Cir. 1983) ("When the final act of an unlawful course of conduct occurs within the statutory period, these purposes are adequately served, in balance with the plaintiff's interest in not having to bring successive suits by . . . letting him reach back and get damages for the entire duration of the alleged violation." (emphasis added)).
77. Hoey, 716 F. Supp. at 223.
does it provide for any reach back if an act of infringement occurs within the statutory period. In a case of continuing copyright infringements an action may be brought for all acts which accrued within the three years preceding the filing of the suit.\textsuperscript{78}

Consequently, the court allowed Hoey to proceed with his cause of action for any infringing acts that occurred within the three-year period preceding the filing date, and it dismissed the claims accruing outside the three-year period.\textsuperscript{79}

The Court of Appeals for the Ninth Circuit followed Hoey's reasoning in Roley v. New World Pictures, Ltd.\textsuperscript{80} In Roley, the court held that the plaintiff's action was time barred because the plaintiff knew the infringement occurred in August 1987, but waited until February 1991 to file suit.\textsuperscript{81} In 1985, the plaintiff, Roley, wrote a screenplay and gave a copy of the original work to a producer friend.\textsuperscript{82} Roley's friend declined to produce the screenplay at that time.\textsuperscript{83} Two years later, however, in August 1987, the friend invited Roley to the screening of his new movie financed by New World.\textsuperscript{84} After viewing the film, Roley claimed the movie was a production of his screenplay.\textsuperscript{85} Roley waited until February 1991 to file suit for copyright infringement, over three years later.\textsuperscript{86}

Like the plaintiff in Hoey, Roley urged the court to accept a "rolling statute of limitations" theory.\textsuperscript{87} The court declined to accept this theory, and instead followed the reasoning of the Hoey court.\textsuperscript{88} The Roley court stated that "[t]his interpretation is consistent with the prevailing view that the statute bars recovery on any claim for damages that accrued more than three years before commencement of [the] suit."\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 224.
\item \textsuperscript{80} 19 F.3d 479 (9th Cir. 1994).
\item \textsuperscript{81} Id. at 481-82.
\item \textsuperscript{82} Id. at 480.
\item \textsuperscript{83} Id.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 481.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id.; accord Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992) ("Recovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts."); Hoste v. Radio Corp. of Am., 654 F.2d 11, 11 (6th Cir. 1981) (per curiam) (barring a claim that accrued in 1965 when the suit was filed thirteen years later in 1978); Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108, 1110-11 (2d Cir. 1977) (allowing recovery for only the claim that occurred within the three years prior to filing the
When applying the statute of limitations, courts have differed on when a cause of action arises and when a claim accrues. For example, the court in *Roley* defined when a copyright infringement action accrues.  

"A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge."  

Other courts have stated that the statute of limitations begins to run when the last act of infringement occurs. Still others measure the limitations period "from the time 'the claim accrued,' which is the time that the infringement upon which the suit is based occurred." A party may sustain a cause of action so long as the underlying infringing act occurred within three years prior to filing the suit. The cause of action is valid even if other infringing acts are barred because those acts occurred outside the three year period, by the same defendant, regarding the same work.

In addition, the courts are "sharply divided" over the issue of determining how to treat cases in which multiple infringing acts occur over a period of time. The Court of Appeals for the Second Circuit addressed this issue in *Stone v. Williams*, ruling that "[e]ach act of infringement is a distinct harm giving rise to an independent claim for relief." The court further clarified this notion by stating "[t]his does not mean that when infringements occur during the limitations period recovery may be had for past infringements. Recovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts."

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90. *Roley*, 19 F.3d at 481.
91. Id.; see also *Stone*, 970 F.2d at 1048 ("A cause of action accrues when a plaintiff knows or has reason to know of the injury upon which the claim is premised."; *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980) (discussing tolling the statute of limitations for fraudulent concealment).
92. See, e.g., *Baxter v. Curtis Indus., Inc.*, 201 F. Supp. 100, 101 (N.D. Ohio 1962) (reviewing the legislative history of the Copyright Act, and concluding that the three-year limitation period begins to run from the date of the last infringing act).
93. 3 *Nimmer & Nimmer*, supra note 89, § 12.05[A], at 12-112 (footnotes omitted).
94. Id.
95. Id.
96. GORMAN & GINSBURG, supra note 70, at 680.
98. Id. at 1049-50 (citing *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108, 1110-11 (2d Cir. 1977)).
The District Court for the Eastern District of New York expanded this concept in *Singh v. Famous Overseas, Inc.* The court discussed the issue at length:

Each separate act of infringement is, of course, an "infringement" within the meaning of the statute, and in a literal sense perhaps such an act might be said to have "commenced" (and ended) on the day of its perpetration.

The word "infringement" can be used in two senses. As noted, it can mean both a single act of infringement, and it can also mean several or continuous or repeated acts of infringement. However, it would be peculiar if not inaccurate to use the word "commenced" to describe a single act. That verb generally presupposes as a subject some kind of activity that begins at one time and continues or reoccurs thereafter.

In contrast, the Court of Appeals for the Seventh Circuit has determined that the three-year statute of limitations will not bar either the action or the recovery if the infringement constitutes a "continuing wrong." In *Taylor v. Meirick*, the copyright owner of fishermen's maps filed an infringement action on May 8, 1980, alleging that the defendant copied the maps without authorization in 1976 and 1977. The plaintiff copyright owner did not learn of the unauthorized maps until 1979, when the maps were still being sold by the defendant or his dealers. The Seventh Circuit concluded that because all such acts constitute a continuing wrong, only the last infringing act need be within the three-year statutory period. Because one infringing act occurred within the three-year period, the court allowed the copyright owner to reach back and recover for all of the infringing acts. The majority of circuits, including the Fourth Circuit, reject the "continuing wrong" theory and do not allow plaintiffs to recover for acts outside of the limitations period.

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100. Id. at 535.
101. 712 F.2d 1112 (7th Cir. 1983).
102. Id. at 1117.
103. Id. at 1119.
104. Id. at 1118-19.
105. Id. at 1119.
106. See Hotaling, 118 F.3d at 202.
107. See, e.g., Hoste v. Radio Corp. of Am., 654 F.2d 11 (6th Cir. 1981) (per curiam) (disregarding allegations that a potentially infringing song continued to be performed); Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108, 1111 (2d Cir. 1977) ("Any infringe-
3. The Court’s Reasoning.—In Hotaling, the Fourth Circuit held that when a library places an unauthorized copy of a copyrighted work in its collection, lists the work in its index, and makes the work available to the public, all within the three-year statute of limitations period, that a distribution occurs within the meaning of the Copyright Act, thereby infringing the copyright owner’s distribution right. In so ruling, the court interpreted a copyright owner’s distribution right to include lending an unauthorized work without proof of actual use by a member of the public. Upon characterizing the defendant’s actions as a distribution within the meaning of the Copyright Act, the court next found that the statute of limitations barred suit on all but one of the Church’s actions.

After reviewing the facts in a light most favorable to the Hotalings, the court initially considered whether the suit was barred by the Act’s three-year statute of limitations. The court stated that a plaintiff does not lose her right to bring a cause of action for infringements accruing within the three-year limitations period, even if related claims accruing beyond the three-year period were not asserted. The court declined, however, to accept a “reach back” theory, which would allow a party, based on claims that accrued within the limitations period, to “reach back” and recover for infringing acts accruing outside of the limitations period. The court, quoting a Ninth Circuit case, next determined that “[a] cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.” Applying these concepts to the Hotalings’ claim, the court ruled that the statute of limitations barred recovery for any claims that accrued before August 1992, three years from the date the Hotalings filed suit. Any claim based on the Church’s original copying and distributing of the works accrued in 1991, when Donna Hotaling learned about those activities, and was therefore barred by the statute of limitations.

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108. 118 F.3d at 201.
109. Id. at 203.
110. Id. at 204.
111. Id. at 202.
112. Id.
113. Id.
114. Id. (quoting Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994)).
The court did not further examine the implications of the Roley holding. Id.
115. Id.
116. Id.
Next, the court turned to the issue of what constitutes a copyright infringement.\(^{117}\) Defining a copyright infringement as "a violation of 'any of the exclusive rights of the copyright owner,'"\(^ {118}\) the court observed that one of the exclusive rights is the right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]."\(^ {119}\) The court concluded that the distribution right is infringed when a party distributes an unlawful copy of a copyrighted work.\(^ {120}\)

The court proceeded to an analysis of what constitutes "distribution" within the meaning of the Act.\(^ {121}\) Relying on *National Car Rental System, Inc. v. Computer Associates International, Inc.*,\(^ {122}\) the court stated that "[i]n order to establish 'distribution' of a copyrighted work, a party must show that an unlawful copy was disseminated 'to the public.'"\(^ {123}\) The Hotalings conceded that the record did not contain any evidence demonstrating specific instances in which the Church loaned the unlawful copies to members of the public.\(^ {124}\) Notwithstanding this concession, the Hotalings urged the court to rule that evidence that the library held the unlawful work in its collection, where the work was available to the public, was sufficient to constitute a "distribution."\(^ {125}\) Conversely, the Church argued that, at most, its actions constituted only an offer to distribute the work.\(^ {126}\) Specifically, the Church argued that proof that the public accepted the offer was required for distribution.\(^ {127}\)

The majority dismissed the Church's argument, stating that a library could avoid distributing an unauthorized work merely by failing to keep records of public use.\(^ {128}\) In this case, the libraries did not record public use of the microfiche.\(^ {129}\) The court reasoned that the library's failure to keep these records would allow it to unjustly profit by their omission.\(^ {130}\) The court ruled that a library completes all the

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117. *Id.* at 203.
118. *Id.* (quoting 17 U.S.C. § 501(a) (1994)).
119. *Id.* (ellipsis and alteration in original) (quoting 17 U.S.C. § 106(3)).
120. *Id.*
121. *Id.*
122. See supra notes 54-58 and accompanying text.
123. *Hotaling*, 118 F.3d at 203 (quoting 17 U.S.C. § 106(3)). Remarkably, the court did not examine *National Car Rental* or any other case discussing the requirements of "distribution" within the meaning of the Act.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
steps necessary for public distribution when the copyrighted work is added to the collection, listed in the index or catalog, and made available to the borrowing or browsing public.\textsuperscript{131}

Relying on a narrow interpretation of the statute, Judge Hall dissented from the majority's interpretation of "distribution."\textsuperscript{132} Judge Hall emphasized that, according to the Act, the distribution right includes only the right to distribute the work "by sale or other transfer of ownership, or by rental, lease or lending."\textsuperscript{133} Hall reasoned that because the microfiche was non-circulating, the Church did not "lend" the works to the public by simply allowing the public to consult the works at the library.\textsuperscript{134} Thus, he concluded that because it did not sell, give, rent, lease, or lend an unauthorized copy to the public, the Church did not infringe the distribution right.\textsuperscript{135}

After determining what constituted "distribution" within the meaning of the Act, the majority examined three different infringing acts to determine whether there was sufficient evidence for a reasonable jury to conclude that the Church infringed the Hotalings' rights.\textsuperscript{136} The court observed that the evidence of only one of those acts was sufficient to show that an unauthorized copy was distributed to the public.\textsuperscript{137} Specifically, the court noted Donna Hotaling's observation that the copy was part of the library's collection, was listed in the card file, and was available to the public.\textsuperscript{138}

\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 205 (Hall, J., dissenting).
\textsuperscript{133} \textit{Id.} (quoting 17 U.S.C. § 106(3) (1994)).
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Hotaling}, 118 F.3d at 203-04. The three acts the majority examined were the microfiche copy Donna Hotaling examined in Salt Lake City in 1995, the paper copy she found in Rhode Island in 1994, and the six copies that were returned and destroyed by the Church in 1993. \textit{Id.} at 203.

\textsuperscript{137} \textit{Id.} at 203. Donna Hotaling personally observed an infringing act at the Church's main library in 1995. \textit{Id.}

\textsuperscript{138} \textit{Id.} The Church acknowledged that the sole copy of the work maintained in the main library was not the copy it originally obtained from All-Ireland Heritage, Inc. \textit{Id.} at 204. The Church maintained that this copy was a replacement copy authorized by 17 U.S.C. § 108, which provides in part that

(a) Notwithstanding the provisions of [17 U.S.C.] section 106, it is not an infringement of copyright for a library or archives . . . to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord . . . .

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.
After concluding that there was sufficient evidence for the 1995 claim, the court concluded that the Hotalings' other claims did not present sufficient evidence showing that unauthorized copies were available to the public at any of the branch libraries. According to the unrebutted affidavit in the record, the paper copy found by Donna Hotaling in the Rhode Island branch library was made and left behind by a library patron. The court stated that there was no evidence to show that the library made the paper copy a part of its collection or listed the copy in its catalog file. Moreover, the court ruled that there was insufficient evidence to conclude that the six copies returned to the main library and destroyed in 1993 were distributed to the public.

Finally, the court addressed the Church's assertion that even if an unlawful copy of the work was held during the limitations period, the claim was barred because it accrued outside the limitations period. Finding the Church's argument unpersuasive, the court reasoned that because each infringing act gives rise to an independent claim for relief, the limitations period did not bar relief. Here, the court concluded that the Church distributed the work in 1995, within the three-year limitations period, regardless of whether past infringements occurred outside the period.

4. Analysis.—

a. Infringing Act.—In Hotaling, the majority appropriately expanded the definition of "distribution" as an infringing act by holding that an unlawful work is distributed when a library places the work in its collection, lists the work in its index, and makes the work available to the borrowing or browsing public. Specifically, the court

17 U.S.C. § 108(a), (c) (1994). Because the district court did not address this issue, the Fourth Circuit declined to address it on appeal. Hotaling, 118 F.3d at 204. On remand, the Fourth Circuit instructed the district court to dismiss the action if the court found that the Church complied with section 108, and to conduct further proceedings on outstanding claims if the Church did not comply with section 108. Id. at 205.
139. Hotaling, 118 F.3d at 204.
140. Id.
141. Id.
142. Id.
143. Id. The Church pointed to Donna Hotaling's deposition testimony for its assertion that the claim accrued outside the limitations period. Id. Her deposition testimony indicated that she knew the libraries were adding unlawful copies to their collections in 1991. Id.
144. Id.
145. Id.
146. Id. at 203.
determined that the library did not have to engage actively in distributing unauthorized copies of a copyrighted work to be liable for copyright infringement. Rather, the court ruled that the mere act of making the unauthorized copy available for distribution constituted a violation of the Copyright Act.\textsuperscript{147}

The Copyright Act seems to require proof of a more "active" dissemination.\textsuperscript{148} Nonetheless, the library’s passive dissemination still qualifies because of the unique context of a library. The Act states that the distribution right is the right to distribute copies of the copyrighted work "to the public."\textsuperscript{149} The plain meaning of "to the public" implies that the distribution right is tied to a physical transfer of possession.\textsuperscript{150} In \textit{Hotaling}, the Church’s public disclosure consisted of placing the copyrighted material in a place where the general public had access.\textsuperscript{151} The act of placing the material in the library’s collection was more passive than what the language of the Act implies. The library context is unique because of the varying nature of the materials found in a library and the use limits placed on the materials. For example, some materials, such as microfiches, are by their nature designed for use only within the library. Although the library does not physically transfer the materials, it makes sense to qualify the passive grant of access to materials "to the public" as a dissemination within the meaning of the Act.

Focusing on a specific type of distribution, the dissent in \textit{Hotaling} correctly pointed out that "lending" was not occurring in the sense of a library patron borrowing the material for use outside of the library.\textsuperscript{152} The term "lending," however, is not limited to the dissent’s use of the word. "Lend" can mean "[t]o part with a thing of value to another for a time fixed or indefinite, yet to have some time in ending, to be used or enjoyed by that other."\textsuperscript{153} The essence of "lending" is a time restriction without referring to a place or location. Hence, a

\textsuperscript{147} Id.

\textsuperscript{148} See LAURA N. GASAWAY & SARAH K. WANT, LIBRARIES AND COPYRIGHT: A GUIDE TO COPYRIGHT LAW IN THE 1990s, at 20 (1994) ("The most common manifestation of the reproduction and distribution rights occurs when an author transfers to a publisher the right to reproduce a novel in book copies and to distribute the copies through sale to bookstores and libraries.").

\textsuperscript{149} 17 U.S.C. § 106(3) (1994).

\textsuperscript{150} See GORMAN & Ginsburg, supra note 70, Supp. at 49 (pointing out the differences between a distribution by physical means and a distribution through electronic transmission).

\textsuperscript{151} \textit{Hotaling}, 118 F.3d at 203.

\textsuperscript{152} Id. at 205 (Hall, J., dissenting).

\textsuperscript{153} \textsc{Black's Law Dictionary} 901 (6th ed. 1990).
library can lend a patron research material that can only be used within the confines of the library.

Understanding "lending" in a more expansive context makes intuitive sense when discussing copyrighted material that is not intended to leave the library.\textsuperscript{154} Following the dissent's reasoning, one could imagine a library escaping copyright infringement liability because its collection consists entirely of non-circulating unauthorized works.

Case law discussing the distribution right requires more of a public dissemination than what the \textit{Hotaling} majority required. For instance, in \textit{National Car Rental}, the Eighth Circuit required an actual dissemination in order for an act to constitute distribution.\textsuperscript{155} Similarly, in \textit{Labus}, the court awarded damages to the copyright owner only where there was proof of actual video rental to resort guests.\textsuperscript{156} Likewise, the court in \textit{Obolensky} required more than the \textit{Hotaling} court, ruling that listing the copyrighted work in an index and offering the work for sale was not a violation of the distribution right.\textsuperscript{157} Similarly, the court in \textit{F.E.L. Publications} ruled that a distribution right infringement occurred when the unauthorized hymnals were actively handed out to members of the congregation.\textsuperscript{158}

These cases, however, are distinguishable from \textit{Hotaling} because they do not reflect the unique nature of non-circulating research material in the library context. In the library context, where the copyrighted materials are designated for use only in the library, proof of public dissemination is difficult if not impossible. This is especially true where the library does not maintain records of public use of these materials. As correctly pointed out by the \textit{Hotaling} majority, a library's lack of public use record keeping should not prejudice the copyright owner.\textsuperscript{159}

Although the issue of whether non-circulating research material constitutes "lending" under the Act had never been addressed by a

\textsuperscript{154} See Ernest A. Seemann, \textit{A Look at the Public Lending Right}, 30 COPYRIGHT L. SYMP. (ASCAP) 71, 71 (1980) (discussing a Public Lending Right that compensates an author for the use of his work by libraries to include the use of the author's books in reading and reference rooms).

\textsuperscript{155} National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 434 (8th Cir. 1993).

\textsuperscript{156} Paramount Pictures Corp. v. Labus, 16 U.S.P.Q.2d (BNA) 1142, 1144 (W.D. Wis. 1990).


\textsuperscript{159} \textit{Hotaling}, 118 F.3d at 203.
court, *Hotaling* comports with rulings in similar contexts. For example, in *Playboy Enterprises, Inc. v. Frena*, the court considered whether placing copyrighted materials on the Internet or a similar on-line service constituted "lending" in violation of the Copyright Act. The *Playboy Enterprises* court held that a computer bulletin board operator engaged in unauthorized distributions of copies by making images available to subscribers. Significantly, the court found the bulletin board operator liable even though it was the subscribers who downloaded the unauthorized images. Similarly, in *Brode v. Tax Management, Inc.*, the court ruled that making unauthorized tax portfolios available to subscribers on LEXIS may constitute an infringing distribution. Non-circulating library materials resemble on-line materials for several reasons. First, the non-circulating library materials are placed in a public location to allow greater access to the public. Similarly, placing materials on-line allows greater access to the public. Second, access to materials in the library or on-line is unrestricted.

b. Statute of Limitations.—The *Hotaling* majority properly applied the Act's three-year statute of limitations to allow recovery only for those infringing acts that occurred within three years of the filing date. In the course of applying the limitations period, the court had to decide when the action accrued. The court stated that an action accrues when one has knowledge of a copyright violation or is chargeable with such knowledge. This is appropriate when the infringing act is a one-time occurrence, but it becomes problematic

161. Id. at 1554.
162. Id. at 1556 ("There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself [sic].").
163. Id. But see *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) ("Only the subscriber should be liable for causing the distribution of [a] plaintiffs' work, as the contributing actions of the BBS provider are automatic and indiscriminate. . . . Netcom does not create or control the content of the information available to its subscribers; it merely provides access to the Internet . . . ."). One commentator suggests that the inconsistency between *Playboy Enterprises* and *Netcom On-Line* is attributable to the level of control the operator has over the content of the bulletin board or website. GORMAN & GINSBURG, supra note 70, Supp. at 50. A library more closely resembles the factual scenario presented in *Playboy Enterprises* because, like the bulletin board operator, the library has complete control over the materials that are accessible to the public.
165. Id. at 1200.
166. *Hotaling*, 118 F.3d at 202.
167. Id.
168. Id.
when the infringing act is more continuous in nature. Instead of ruling that a "continuing wrong" occurred, the court determined that each act of infringement was a separate and distinct harm. The court's application of the limitations period is consistent with "the long established rule that statutes of limitations bar remedies, not the assertion of rights. This principle applies to the Copyright Act." Because an infringing act occurred as recently as 1995, the court correctly allowed the Hotalings to assert their distribution rights and stop the infringing act. A party should always be allowed to assert its rights barring an application of an equitable doctrine such as laches.

In order to determine what claims are recoverable, the Hotaling court followed the above maxim when interpreting and applying the Act's statute of limitations. The court correctly concluded that because the Hotalings filed suit in August 1995, any claims accruing before August 1992 were barred by the statute of limitations. This application follows the rule set forth in Hoey and Roley. The plaintiff in Hoey filed suit on May 5, 1989. The court allowed recovery for only those claims that accrued within three years of the May 5 filing date. Similarly, in Roley, the court allowed recovery for infringing acts that occurred within three years of the February 7, 1991, filing date.

There are two schools of thought on when a copyright infringement claim accrues. The Hotaling court, following the first school of thought articulated by the Roley court, stated that a cause of action accrues when a person knows or has reason to know of a copyright violation. The second school of thought states that a cause of action for copyright infringement accrues when the last infringing act occurs. Applying either of these theories to the Church's original copying and distribution in 1991 would achieve the same result. Applying the Roley reasoning, a cause of action based on the 1991 infringing acts is barred because Donna Hotaling knew the Church was copying and distributing the copyrighted works. Therefore, a suit

169. See supra notes 96-107 and accompanying text.
170. Hotaling, 118 F.3d at 204.
171. Stone v. Williams, 970 F.2d 1043, 1051 (2d Cir. 1992) (citation omitted).
172. Hotaling, 118 F.3d at 202.
173. See supra notes 71-79 and accompanying text.
174. See supra notes 80-89 and accompanying text.
176. Id. at 224.
177. Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994).
178. Hotaling, 118 F.3d at 202.
brought in 1995 was not timely for an action that accrued with her knowledge in 1991. Applying the last infringing act theory also yields the same result. The last act of the original copying and distributing occurred in 1991; thus, the suit brought in 1995 was not timely.

The theories yield differing results when applied to the Hotalings' claim that the Church infringed their distribution right by offering an unauthorized copy to the public in August, 1995. Applying the Roley reasoning, the cause of action should be time barred because there is evidence that Donna Hotaling knew about the unauthorized copy prior to 1992. The cause of action would accrue when she knew about the unauthorized copy, thereby barring a suit brought in 1995. Applying the last infringing act theory, however, the Hotalings have a timely cause of action because the Church distributed the unauthorized copy as late as 1995; therefore, a suit filed in 1995 is timely.

In order for the Roley court and the Hotaling majority to yield the same result as the last infringing act theory, an extra theoretical step was added. The court stated that each act of infringement was a distinct harm giving rise to an independent claim for relief. Therefore, the fact that Donna Hotaling knew the Church was distributing the works before 1992 does not bar a cause of action based on the Church's distributing the works in 1995. In effect, each day the Church offered works to the public, it was committing a separate act of infringement.

5. Conclusion.—In Hotaling, the United States Court of Appeals for the Fourth Circuit held that a library distributes an unlawful copy to the public in violation of the Copyright Act when the library maintains the copy in its collection, lists the copy in its index or card catalog, and makes the copy available to the public. This holding legitimately expands the definition of “lending” to include non-circulating works held by a library. To hold otherwise would allow libraries to place unauthorized copies of copyrighted material on their shelves, treat the copies as non-circulating, and thus never violate the Copyright Act. In addition, the court aptly applied the statute of limitations to allow recovery for only those infringing acts that occurred within the three-year limitations period. In the course of its discussion on limitations, the court adopted the Ninth Circuit’s definition of

180. Hotaling, 118 F.3d at 204.
181. Id. at 201.
182. Id. at 202.
when an infringing act accrues.\textsuperscript{183} Regardless of the accrual theory adopted, the guiding principle to follow is that a statute of limitations bars remedies, but not the assertion of rights.\textsuperscript{184} Adhering to this underlying principle will yield the correct result regardless of which theory of accrual is applied.

JOSEPH F. KEY

B. Confusion in the Fourth Circuit About Federal Jurisdiction Under the Lanham Act

In \textit{Gibraltar, P.R., Inc. v. Otoki Group, Inc.},\textsuperscript{1} the Fourth Circuit Court of Appeals affirmed the dismissal of a petition to compel arbitration of a trademark dispute on the grounds that the district court did not have jurisdiction to compel arbitration because it would not have had jurisdiction over the dispute if it had been litigated rather than arbitrated.\textsuperscript{2} Despite language in the opinion which suggests that the court dismissed the action because, “in essence,” it involved a contract dispute,\textsuperscript{3} the court’s analysis regarding its jurisdiction over the plaintiff’s request for injunctive relief indicates that the Fourth Circuit continues to follow the “face of the complaint” approach for determining federal jurisdiction in suits arising out of contracts licensing or assigning intellectual property. The court’s lack of analysis on the question whether the district court would have had jurisdiction over the declaratory judgment action may indicate that the Fourth Circuit will not apply the \textit{Edelmann} doctrine\textsuperscript{4} to establish jurisdiction over a declaratory judgment action when a party threatened with a suit for trademark infringement seeks an adjudication of its rights. Because the court failed to address the possible applicability of \textit{Edelmann}, however, it is not clear whether the court intended to preclude the application of \textit{Edelmann} in all trademark cases or only those cases arising out of a contract involving a trademark, or whether the court intended to restrict its application at all.

1. The Case.—Gibraltar and Otoki are Puerto Rico based clothing companies.\textsuperscript{5} Gibraltar manufactures commercial and military ap-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{183} Id.; see \textit{Roley v. New World Pictures, Ltd.}, 19 F.3d 479, 481 (9th Cir. 1994); see also \textit{supra} notes 80-89 and accompanying text.
  \item \textsuperscript{184} \textit{Stone v. Williams}, 970 F.2d 1043, 1051 (2d Cir. 1992).
  \item 104 F.3d 616 (4th Cir. 1997).
  \item \textit{Id.} at 619.
  \item \textit{Id.}
  \item \textit{See infra} notes 116-121 and accompanying text.
  \item \textit{Gibraltar}, 104 F.3d at 617.
\end{itemize}
\end{footnotesize}
parel, and Otoki is "a small sportswear design company."\textsuperscript{6} In January 1994, they formed a joint venture named Acorn Partners (Acorn) for the purpose of designing, manufacturing, and selling apparel.\textsuperscript{7} Under the original Joint Venture Agreement, Otoki agreed to assign to Acorn the "right to use" all of Otoki's trademarks.\textsuperscript{8} The agreement was amended ten months later to assign Acorn all of Otoki's "right, title and interest in and to all trademarks and trade names" utilized or possessed by Otoki.\textsuperscript{9} Pursuant to this amendment, Otoki's president executed an assignment of three of Otoki's trademarks to Acorn.\textsuperscript{10}

Otoki later claimed that the amendment and assignment were invalid, while Gibraltar contended that they were properly approved.\textsuperscript{11} The relationship between the parties soured soon after the dispute over the amendment arose.\textsuperscript{12} In accordance with its position that the amendment and assignment were invalid, Otoki wrote to Acorn's attorney and demanded that he not comply with instructions he might receive from Acorn with respect to the assignment and registration of the Otoki trademarks.\textsuperscript{13} Otoki also wrote to Gibraltar and threatened that if Gibraltar attempted or proceeded to transfer any of the subject trademarks, Otoki would sue Gibraltar "in the Federal Court of Puerto Rico for violation of trademark registration rights."\textsuperscript{14} By that time, however, the transfer of the trademarks had already taken place.\textsuperscript{15} In addition, Otoki contacted Acorn's business associates and told them


\textsuperscript{7} Brief of Appellant at 8, Gibraltar, P.R., Inc. v. Otoki Group, Inc., 104 F.3d 616 (4th Cir. 1997) (No. 95-2877).

\textsuperscript{8} Gibraltar, 104 F.3d at 618.

\textsuperscript{9} Id.

\textsuperscript{10} Plaintiff's Amended Petition to Compel Arbitration at 3, Gibraltar, P.R., Inc. v. Otoki Group, Inc., 914 F. Supp. 1203 (D. Md. 1995) (mem.) (No. 95-1303), aff'd, 104 F.3d 616 (4th Cir. 1997). The three trademarks assigned were "Otoki," "Etniko & Design," and "Etniko." Id.

\textsuperscript{11} Gibraltar, 104 F.3d at 618. Otoki alleged that its president signed the assignment documents without written authorization from Otoki's board of directors. Brief of Appellee at 5, Gibraltar, P.R., Inc. v. Otoki Group, Inc., 104 F.3d 616 (4th Cir. 1997) (No. 95-2877).

\textsuperscript{12} Gibraltar, 104 F.3d at 618.

\textsuperscript{13} Plaintiff's Amended Petition to Compel Arbitration at 5, Gibraltar (No. 95-1303).

\textsuperscript{14} Brief of Appellant at 11, Gibraltar (No. 95-2877) (quoting letter from principals of Otoki to principals of Gibraltar (Dec. 10, 1994) (footnote omitted)); accord Plaintiff's Amended Petition to Compel Arbitration at 6, Gibraltar (No. 95-1303); see also Gibraltar, 914 F. Supp. at 1204 (noting that Otoki threatened legal action if the trademarks were used or transferred).

\textsuperscript{15} Brief of Appellant at 11, Gibraltar (No. 95-2877). The assignment was recorded in the United States Patent and Trademark Office on November 2, 1994. Id.
that Acorn did not own Otoki's trademarks. Gibraltar also alleged that during the first week of January 1995, members of Otoki's board of directors "seized and took into their possession records and other items of property belonging to the joint venture" that were necessary to Acorn's use of the trademarks, "includ[ing] patterns and prototypes of products developed by Acorn . . . for sale under the [assigned] trademarks." On January 4, 1995, pursuant to an arbitration clause in the Joint Venture Agreement, Gibraltar filed a Demand for Arbitration with the American Arbitration Association. When Otoki refused to participate in arbitration, Gibraltar filed a petition to compel arbitration in the United States District Court for the District of Maryland. Several weeks after filing its petition, in response to a letter from Otoki's counsel that Gibraltar alleged was a renewed threat of suit for trademark infringement, Gibraltar amended its Demand for Arbitration to include a request for a declaration of Acorn's rights in the trademarks. The Amended Demand for Arbitration contained allegations:

17. Plaintiff's Amended Petition to Compel Arbitration at 6, *Gibraltar* (No. 95-1303).
18. *Id.; see also Gibraltar*, 914 F. Supp. at 1204 (noting that Otoki did not contradict these allegations).
19. Brief of Appellant at 13, *Gibraltar* (No. 95-2877). The Joint Venture Agreement provided:

Any dispute arising out of or concerning this Joint Venture Agreement will be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, any such arbitration to be administered by the American Arbitration Association office in Washington, D.C., with all arbitration hearings to be held in Baltimore, Maryland. Judgment on any award rendered by the arbitrator may be entered by any court having jurisdiction thereof.

*Id.* at 12 (quoting Joint Venture Agreement). Gibraltar claimed that it filed its Demand for Arbitration because "[b]y the time Otoki began to proclaim its right to use the trademarks, and threatened to sue Gibraltar for 'violation of [federal] trademark registration rights,' Gibraltar had already expended, pursuant to the Joint Venture Agreement, substantial monies and effort marketing the trademarks which Otoki had assigned to Acorn Partners." *Id.* (quoting letter from principals of Otoki to principals of Gibraltar (Dec. 10, 1994)). "With so much at risk," Gibraltar claimed it "wanted to resolve the disputes between the parties as soon as possible." *Id.* Gibraltar filed two subsequent amendments to its Demand for Arbitration. Plaintiff's Amended Petition to Compel Arbitration at 8, *Gibraltar* (No. 95-1303).

21. Brief of Appellant at 14-15, *Gibraltar* (No. 95-2877). The letter from Otoki accused Gibraltar of unlawfully stealing Otoki brandnames "by trying to 'assign' or transfer them to third parties or entities" and stated that "if Acorn Partners were to continue to use Otoki trademarks, this would in effect constitute a violation of the laws of Puerto Rico and the United States." *Id.* at 14 (quoting letter from Otoki's counsel to Gibraltar's principals (Mar. 9, 1994)). Gibraltar had amended its Demand for Arbitration twice prior to filing its Petition to Compel Arbitration. Plaintiff's Amended Petition to Compel Arbitration at 8, *Gibraltar* (No. 95-1303).
tions that Otoki had "threaten[ed] Gibraltar with a suit for infringement of Otoki's alleged federal trademark rights," had "in-terfer[ed] with the use of the said trademarks by the unauthorized and unlawful taking of certain records and other written materials necessary to the use of the said trademarks," and had "wrongfully as-sert[ed] that Otoki [was] the owner of the said trademarks." The final amendment to the Demand for Arbitration specifically requested a declaration as to Acorn's rights in the trademarks. Because Otoki was continuing to claim that it owned and had the right to use the trademarks, and was in possession of the materials necessary to use the trademarks, Gibraltar also requested an injunction against Otoki's use of the trademarks. After amending its Demand for Arbitration, Gibraltar filed an Amended Petition to Compel Arbitration in the district court.

The district court dismissed Gibraltar's Amended Petition on the grounds that it failed to allege a violation of federal law, and that the court, therefore, lacked subject-matter jurisdiction over the action. In an unpublished memorandum opinion, the district court denied Gibraltar's motion for reconsideration. Gibraltar appealed the district court's ruling to the Fourth Circuit Court of Appeals.

2. Legal Background.—

a. The Federal Arbitration Act.—Section 4 of the Federal Arbitration Act (FAA) provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an or-

22. Plaintiff's Amended Petition to Compel Arbitration at 9, Gibraltar (No. 95-1303) (quoting amendment to Demand for Arbitration filed with the American Arbitration Association (Mar. 29, 1995)).

23. Brief of Appellant at 15, Gibraltar (No. 95-2877).

24. Id. at 17-18.

25. Gibraltar, 914 F. Supp. at 1206. Neither Gibraltar's Demand for Arbitration nor its Amended Petition contained allegations that Otoki was actually using or infringing the trademarks in dispute. Id. at 1205.


27. Gibraltar, 104 F.3d at 618.

der directing that such arbitration proceed in the manner provided for in such agreement.\textsuperscript{29}

The Supreme Court has stated that despite the FAA's status as a body of federal substantive law "establishing and regulating the duty to honor an agreement to arbitrate," the FAA does not create any independent federal-question jurisdiction.\textsuperscript{30} Rather, section 4 of the FAA provides for an order compelling arbitration "only when the federal district court would have jurisdiction over a suit on the underlying dispute."\textsuperscript{31} Thus, there must be diversity of citizenship or some other independent basis for federal jurisdiction before an order compelling arbitration can issue.\textsuperscript{32}

\textit{b. Federal-Question Jurisdiction Under 28 U.S.C. § 1338.}—In cases involving contractual arrangements for the exploitation of intellectual property, there is often a question whether an action arising out of the contract should be considered a state law contract claim or a federal claim within the jurisdiction of a federal court.\textsuperscript{33} Two lines of authority have developed for determining whether an action involving a dispute over a trademark or copyright license or assignment

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\textsuperscript{29} Id.

\textsuperscript{30} Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). In Moses H. Cone, the Supreme Court stated that "[t]he Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." Id. (citation omitted).

\textsuperscript{31} Id. The court must analyze the underlying issues in the dispute and determine if it would have had jurisdiction had the issues been litigated rather than arbitrated. See TM Marketing, Inc. v. Art & Antiques Assocs., L.P., 803 F. Supp. 994, 1000 (D.N.J. 1992) (determining that the federal court lacked subject-matter jurisdiction to confirm an arbitration award pursuant to section 9 of the FAA because, had the dispute been litigated rather than arbitrated, it would have been grounded upon contract rights protected by state law). In addition to establishing federal subject-matter jurisdiction, the plaintiff must state a claim to compel arbitration under the FAA. To state a claim to compel arbitration under the FAA, the plaintiff must allege:

(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.


\textsuperscript{32} See Moses H. Cone, 460 U.S. at 25 n.32.

"arises under" 28 U.S.C. § 1338 and is thus properly brought before a federal court. In making the jurisdictional determination, some courts look at the "face" of the complaint and determine jurisdiction on the basis of the well-pleaded complaint rule, while others look behind the complaint in an attempt to discern the "essence" of the plaintiff's claim.

*T.B. Harms Co. v. Eliscu* is the leading case on when a claim arises under the Copyright Act. *Harms* involved a dispute over the rights to certain renewal copyrights. The controversy in *Harms* concerned whether the defendant had executed an assignment granting the plaintiff rights in the defendant's renewal copyrights to four

34. This section provides that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks." 28 U.S.C. § 1338(a) (1994) (emphasis added).

35. See Amy B. Cohen, "Arising Under" Jurisdiction and the Copyright Laws, 44 Hastings L.J. 337, 362 (1993). The cases have primarily dealt with jurisdiction under the Copyright Act, but the analysis has been found to be equally applicable in determining jurisdiction under the Lanham Act. See Jay S. Fleischman, Comment, Swimming the Murky Waters: The Second Circuit and Subject-Matter Jurisdiction in Copyright Infringement Cases, 42 Buffalo L. Rev. 119, 120 n.5 (1994) ("It has been widely recognized that actions in copyright, patent and trademark law closely resemble one another and are guided largely by the same principles." (citing Foxrun Workshop, 686 F. Supp. at 86; Tollinger v. Ithaca Gun Co., No. 86-1351, 1988 U.S. Dist. LEXIS 3230, at *1 (N.D.N.Y. Mar. 12, 1988); Bear Creek Prods. v. Saleh, 643 F. Supp. 489 (S.D.N.Y. 1986)); see also Gibraltar, 914 F. Supp. at 1205 (noting that the analytical similarity between actions involving copyrights and those involving trademarks makes cases concerning federal jurisdiction over copyright claims "particularly apposite" in analyzing a court's jurisdiction over a trademark dispute).

36. Under the well-pleaded complaint rule, federal jurisdiction exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (citing Gully v. First Nat'l Bank, 299 U.S. 109, 112-13 (1936)). Thus, the court determines whether a case arises under federal law by "what necessarily appears in the plaintiff's statement of his own claim." Arthur Young & Co. v. City of Richmond, 895 F.2d 967, 969 (4th Cir. 1990) (quoting Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 10 (1983) (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914))).

37. See James M. McCarthy, Comment, Federal Subject Matter Jurisdiction: When Does a Case Involving the Breach of a Copyright License Contract "Arise Under" the Copyright Act, 19 U. Dayton L. Rev. 165, 166-67 (1993) (noting the dispute among courts in making the jurisdictional determination for "cases involving the breach of a licensing contract and an infringement claim"). Under the essence of the complaint approach, courts look behind the complaint to "evaluate the true nature of the dispute before them" and make a jurisdictional determination on that basis. Cohen, supra note 35, at 368-69.

38. 339 F.2d 823 (2d Cir. 1964).

39. See McCarthy, supra note 37, at 169; see also Arthur Young & Co., 895 F.2d at 969-70 (noting that *Harms* "set out what has remained the definitive jurisdictional test for copyright cases"). See generally supra note 35 (noting that the jurisdictional analysis in copyright suits can apply to cases brought under the Lanham Act).

40. *Harms*, 339 F.2d at 824.
The plaintiff alleged that the defendant, after filing renewal applications, assigned his rights in the renewal copyrights to a third party instead of to the plaintiff as required by the alleged assignment. The plaintiff filed a complaint in federal court setting forth a single claim and containing allegations that the action was one arising under the Copyright Act. The district court dismissed the action for lack of subject-matter jurisdiction after determining that the complaint did not contain any allegations of copyright infringement and, therefore, was nothing more than a suit to establish title to the renewal copyrights that should be resolved in state court.

The Second Circuit affirmed the lower court’s dismissal, holding that the case did not “arise under” the copyright laws. In reaching this decision, Judge Friendly formulated and applied a test for determining when a case arises under the Copyright Act:

[A]n action “arises under” the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act... or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. The general interest that copyrights, like all other forms of property, should be enjoyed by their true owner is not enough to meet this last test.

The court found that the complaint did not meet any of the criteria outlined, and therefore, did not arise under the Act.
The *Harms* court did not intend to preclude the exercise of federal jurisdiction over actions arising out of contracts licensing or assigning copyrights. In fact, Judge Friendly made a point of noting that when one who is licensed to use intellectual property is alleged to have forfeited the right of such use, the plaintiff controls the question of federal jurisdiction by either directing his pleadings against the offending use, i.e., a suit for infringement, or by bringing a state law contract action to set the license aside.

Since *Harms*, federal courts, particularly the district courts of New York, have been unable to agree on the proper application of Judge Friendly's test. The confusion centers around whether courts are constrained to determine jurisdiction based on the face of the plaintiff's well-pleaded complaint or whether a court can look behind the allegations of the complaint to determine its "essence" and dismiss the cause of action where it finds that the dispute between the parties is really nothing more than a contract dispute.

Some courts seized upon the following language from the district court opinion in *Harms* as a basis for adopting the "essence" test: "In considering the plea of lack of jurisdiction, the formal allegations [of the complaint] must yield to the substance of the claim."

This one
statement appears to be responsible for the promulgation of the "essence" test.\textsuperscript{54}

The "essence of the complaint" test finds its origins in \textit{Elan Associates, Ltd. v. Quackenbush Music, Ltd.}\textsuperscript{55} \textit{Elan} involved an agreement between the plaintiff and defendant that gave the plaintiff the exclusive right to publish and obtain copyrights to songs written by Carly Simon.\textsuperscript{56} During the three years following the initial agreement, the defendant, a corporation partly owned by Simon that had been formed to publish and hold copyrights in the songs Simon composed, obtained copyrights in seven songs written by Simon on the belief that the agreement with the plaintiff pertained only to one particular song.\textsuperscript{57} After realizing that the agreement did in fact give rights to the

\begin{quote}
violate the copyright itself, is not one arising under the laws of the United States." \textit{Id.} at 340. Thus, Judge Weinfeld's statement that "the formal allegations [of the complaint] must yield to the substance of the claim," \textit{id.} at 338, may only mean that if the alleged acts of infringing use do not in fact constitute infringing use under the Act, and therefore do not state a claim under the Copyright Act, then the "formal allegation" that the suit arises under the Copyright Act will not confer jurisdiction.

\textit{54. See Berger v. Simon & Schuster, 631 F. Supp. 915, 917 (S.D.N.Y. 1986)} (denying jurisdiction because the plaintiff's complaint was "in substance, albeit not in form" seeking to settle the contractual rights and duties of the parties, although the complaint was "framed entirely in terms of infringement"); Fleischman, \textit{supra} note 35, at 125 (stating that the "essence of the claim" approach "makes use of only one part of the district court ruling" in \textit{Harms}); McCarthy, \textit{supra} note 37, at 180 (noting that the "line of cases [adopting the 'essence' test] follows the proposition from the \textit{Harms} district court opinion that the complaint's formal allegations must yield to the substance of the claim"); see also Felix Cinematografica, S.R.L. v. Penthouse Int'l, Ltd., 671 F. Supp. 313, 315 (S.D.N.Y. 1987) (citing \textit{Berger} in support of its dismissal of an action "framed entirely in terms of infringement" on the grounds that the defendant's claim was "in essence" a contract dispute).

There may be an argument that one case, decided by Judge Weinfeld after \textit{Harms}, and often cited as supporting the "essence" rule, refutes the interpretation this Note ascribes to Judge Weinfeld's statement in \textit{Harms} that "the formal allegations [of the complaint] must yield to the substance of the claim." See \textit{supra} note 53. In \textit{Stepdesign, Inc. v. Research Media, Inc.}, 442 F. Supp. 32 (S.D.N.Y. 1977), Judge Weinfeld dismissed a complaint that purported to contain a claim for copyright infringement on the grounds that the "primary and controlling purpose of the complaint" was to reestablish the plaintiff as the rightful owner of the subject copyrights. \textit{Id.} at 34. However, Judge Weinfeld dismissed the claim on this basis only after finding that the plaintiff had not stated a claim for copyright infringement, and therefore, had not directed his pleadings "against the offending use," as required by the Second Circuit opinion in \textit{Harms} for federal jurisdiction to exist in a case where a party licensed to use a copyright is alleged to have forfeited the grant. \textit{Id.; see Fleischman, \textit{supra} note 35, at 127 (supporting this interpretation of the \textit{Stepdesign} opinion). \textit{Stepdesign}, therefore, is similar to the \textit{Harms} district court opinion, in which Judge Weinfeld strongly indicated that had the plaintiff's complaint stated a claim for infringement, he would have found that the court had jurisdiction to hear the dispute. Compare \textit{Harms}, 226 F. Supp. at 341 with \textit{Stepdesign}, 442 F. Supp. at 34.

\textit{55. 399 F. Supp. 461 (S.D.N.Y. 1972); see Cohen, \textit{supra} note 35, at 363 (noting that the essence test originated with \textit{Elan})}.

\textit{56. \textit{Elan}, 399 F. Supp. at 461.}

\textit{57. \textit{Id.}}
plaintiff in those seven songs, the defendant instituted an action in New York state court to void the agreement on the grounds of fraud.\textsuperscript{58} The plaintiff subsequently secured copyrights in the same seven songs previously copyrighted by the defendant and instituted a federal suit alleging that the defendant was infringing its copyrights.\textsuperscript{59}

The court found that it lacked subject-matter jurisdiction to hear a case "which essentially involve[d] a dispute as to the ownership rights to copyrights."\textsuperscript{60} The court stated that the "principal and controlling issue" in the federal action involved the question of who had title to the songs in dispute, and although the action had been cast in terms of infringement, the court did not have jurisdiction under the \textit{Harms} test.\textsuperscript{61}

Another line of authority developing after \textit{Harms} holds that federal jurisdiction to hear a claim arising out of the breach of a contract licensing or assigning intellectual property is determined from the face of the plaintiff's well-pleaded complaint.\textsuperscript{62} These cases rely primarily on Judge Friendly's statement in \textit{Harms} that "[f]ederal jurisdiction is held to exist if the plaintiff has directed his pleadings against the offending use, referring to the license only by way of anticipatory replication,"\textsuperscript{63} and on that portion of the \textit{Harms} three-part "arising under" analysis that states that an action arises under the Copyright Act if "the complaint is for a remedy expressly granted by the Act."\textsuperscript{64}

Commentators consider the decision in \textit{Foxrun Workshop, Ltd. v. Klone Manufacturing, Inc.},\textsuperscript{65} to be the "primary authority" on the "face of the complaint" test.\textsuperscript{66} The plaintiff in \textit{Foxrun} alleged that the defendants had forfeited their right to use the plaintiff's federally registered trademark because they failed to perform their obligations

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 461-62.
\item \textsuperscript{60} Id. at 462.
\item \textsuperscript{61} Id. The \textit{Elan} opinion, while purportedly based upon application of the test announced by Judge Friendly in \textit{Harms}, does not appear to have considered the portion of \textit{Harms} that stated that pleadings directed at the "offending use" of a party who has allegedly lost its right to use copyrighted material under the terms of a contract provide a basis for federal jurisdiction, even if the claim is essentially a contract dispute. See T.B. Harms Co. v. Eliscu, 339 F.2d 823, 825 (2d Cir. 1964).
\item \textsuperscript{62} See Fleischman, \textit{supra} note 35, at 130; McCarthy, \textit{supra} note 37, at 175.
\item \textsuperscript{63} Fleischman, \textit{supra} note 35, at 130 (quoting \textit{Harms}, 339 F.2d at 825); McCarthy, \textit{supra} note 37, at 175.
\item \textsuperscript{64} McCarthy, \textit{supra} note 37, at 175 (quoting \textit{Harms}, 339 F.2d at 828).
\item \textsuperscript{65} 686 F. Supp. 86 (S.D.N.Y. 1988).
\item \textsuperscript{66} McCarthy, \textit{supra} note 37, at 175; see also Daniel Wilson Prods., Inc. v. Time-Life Films, Inc., 736 F. Supp. 40, 43 (S.D.N.Y. 1990) (rejecting the "essence of the claim" test and holding that the court had subject-matter jurisdiction because the complaint alleged copyright infringement and requested remedies provided by the Copyright Act).
\end{enumerate}
\end{footnotesize}
under a licensing agreement giving them the right to use the trademark. The plaintiff asserted that the defendants were infringing upon its federal trademark rights by continuing to use the trademark even after their right of use under the license had terminated. Because the plaintiff "pleaded that the defendants had infringed his trademarks and had not asserted a claim for breach of contract," the plaintiff had "directed his pleading against the offending use," and thus, federal jurisdiction was present. The court explicitly rejected the defendants' argument that the court should "look behind the complaint to assess whether the action turns primarily on claims of breach of contract" and cited several reasons that the "face of the complaint" test is the better rule.

The Fourth Circuit adopted the "face of the complaint" approach in Arthur Young & Co. v. City of Richmond. In Arthur Young, the City of Richmond had contracted with Arthur Young & Co. (Arthur Young) for the design of a computer information system. When disputes arose concerning payments and performance, the City locked Arthur Young out of the workplace, but continued using the system that Arthur Young had installed. Arthur Young subsequently registered a copyright of the system and brought suit in federal court alleging copyright infringement as well as several state law contract claims. The district court dismissed the action for lack of subject-matter jurisdiction after finding that copyright infringement was not the "principal and controlling issue" in the case, but rather, that the action was in essence a contract dispute governed by state law.

The Fourth Circuit, after noting that Judge Friendly set out the "definitive jurisdictional test for copyright cases" in Harms, ex-

68. Id.
69. Id. at 90 (quoting Harms, 339 F.2d at 825). The court announced that its decision rested upon a consideration of the "factors enunciated in" Harms. Id.
70. Id.
71. See id. (stating that the "face of the complaint" test is the better approach because "[i]t is important to the parties to know from the outset whether the court has subject matter jurisdiction over the case" and noting that the "essence" approach "admits a possibility of dismissal at the time of, or even after trial, upon the court's conclusion that the action primarily sought enforcement of contract rights"); see also Mother Waddles Perpetual Mission, Inc. v. Frazier, 904 F. Supp. 603, 608-09 (E.D. Mich. 1995) (discussing competing policy considerations behind the two rules).
72. 895 F.2d 967 (4th Cir. 1990).
73. Id. at 968.
74. Id.
75. Id.
76. Id. at 969.
77. Id. at 969-70.
amined the Harms decision and concluded that Judge Friendly had dismissed the plaintiff's claims in that case "not because they raised state law issues of ownership, but because there was no allegation of copyright infringement."78 The court held, therefore, that under Harms, when a complaint contains proper allegations of copyright infringement on its face, a federal court has jurisdiction over the action regardless of the difficulty or centrality of state law contract issues regarding ownership.79 The Fourth Circuit reversed the district court after finding that the complaint contained proper allegations of copyright infringement under the Harms test, as interpreted by the Fourth Circuit, and therefore, the action arose under the Copyright Act.80

Recognizing that the question whether a breach of a contract licensing or assigning intellectual property gives rise to a federal cause of action "is a complex issue in a 'murky' area,"82 the Second Circuit, in Schoenberg v. Shapolsky Publishers, Inc.,83 recently adopted a three-part "hybrid" analysis for determining whether a claim arises under the Copyright Act.84 The analysis adopted by Schoenberg resolved the

78. Id. at 970.
79. Id. at 970-71 ("The fact that a complaint containing proper allegations of copyright infringement might not present difficult issues of federal law has no bearing on the fundamental question of whether the suit arises under the Copyright Act. As Judge Friendly noted, 'many infringement suits . . . depend only on some point of fact and require no construction of federal law . . . .'") (quoting T.B. Harms v. Eliscu, 339 F.2d 823, 826 (2d Cir. 1964) (ellipses in original)).
80. Id. at 971.
81. Id.; see also Vestron, Inc. v. Home Box Office, Inc., 839 F.2d 1380, 1381 (9th Cir. 1988) (applying the "face of the complaint" approach in making the jurisdictional determination); Daniel Wilson Prods., Inc. v. Time-Life Films, Inc., 736 F. Supp. 40, 41-42 (S.D.N.Y. 1990) (same); Powell v. Green Hill Publishers, Inc., 719 F. Supp. 743, 745 (N.D. Ill. 1989) (same). In coming to its conclusion regarding the proper jurisdictional analysis, the Fourth Circuit acknowledged that "[t]he line between cases that 'arise under' patent and copyright laws, as contemplated by 28 U.S.C. § 1338(a), and those that present only state law contract issues, is 'a very subtle one,' and . . . leads down 'one of the darkest corridors of the law of federal courts and federal jurisdiction.'" Arthur Young, 895 F.2d at 969 n.2 (quoting 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3582, at 307 & n.11 (2d ed. 1983) (quoting Donald Shelby Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 WASH. L. REV. 633 (1971))).
83. 971 F.2d 926 (2d Cir. 1992).
84. The Schoenberg court adopted the following analysis for determining when a case involving the alleged breach of a copyright license or assignment arises under the Copyright Act:

A district court must first ascertain whether the plaintiff's infringement claim is only "incidental" to the plaintiff's claim seeking a determination of ownership or contractual rights under the copyright. If it is determined that the claim is not
conflict that had developed among the judges of the Southern District of New York who were divided over the question of federal jurisdiction in cases arising out of contracts licensing or assigning intellectual property.85

c. Declaratory Relief Under the Lanham Act.—The Declaratory Judgment Act (DJA) provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.86

The DJA "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so."87 One purpose behind providing this type of relief is to permit those threatened with liability to obtain an early adjudication of their rights without having to wait and accrue damages until their adversary sees fit to bring suit.88 This procedural device has proven particularly useful in patent litigation where declaratory judgment liti-

merely incidental, then a district court must next determine whether the complaint alleges a breach of a condition to, or a covenant of, the contract licensing or assigning the copyright . . . . [I]f a breach of a condition is alleged, then the district court has subject matter jurisdiction. But if the complaint merely alleges a breach of a contractual covenant in the agreement that licenses or assigns the copyright, then the court must undertake a third step and analyze whether the breach is so material as to create a right of rescission in the grantor. If the breach would create a right of rescission, then the asserted claim arises under the Copyright Act.

Id. at 932-33 (citations omitted). For a detailed analysis of the Schoenberg test, see Fleischman, supra note 35, at 133-39.

85. See Schoenberg, 971 F.2d at 931 (comparing cases from the Southern District of New York that were split on the use of the "essence" test and the "face of the complaint" test).

86. 28 U.S.C. § 2201(a) (1994). With respect to the question of how this section operates in the context of a trademark dispute, one commentator has stated that "where a trademark user is threatened with a trademark infringement action, he may bring an action in the federal court under the federal Declaratory Judgment Act for an adjudication of noninfringement, provided that an 'actual controversy' exists and federal jurisdiction is established." 3 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 8.03[2], at 8-31 (1997) (emphasis added).

87. 10A WRITING ET AL., supra note 81, § 2751, at 569.

88. Id. (citing E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852, 854 (7th Cir. 1937)).
gation is common, and it has been equally useful in trademark disputes.

The operation of the DJA is procedural only. It does not alter the jurisdiction of the federal courts. Thus, requests for declaratory judgments may be heard only in cases that are otherwise within the subject-matter jurisdiction of the court. The DJA also requires that there be an "actual controversy" between the parties before the court will grant declaratory relief.

(1) Actual Controversy.—In trademark cases, the existence of an "actual controversy" is determined by the application of a two-prong test. First, the declaratory plaintiff must have "a real and reasonable apprehension of litigation." Second, the declaratory plaintiff must have "engaged in a course of conduct which brought it into adversarial conflict with the declaratory defendant." More fundamentally, the courts use this test to determine "whether the plaintiff seeks merely advice or whether a real question of conflicting legal interests is presented for judicial determination." Congress designed the DJA to prevent alleged infringers from having to choose between

89. See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:50, at 32-65 (4th ed. 1997) (discussing how the availability of declaratory relief destroyed the "racket" of patentees who gained unfair advantage over competitors by threatening infringement lawsuits that might never be brought and left the alleged infringer without a chance to contest the validity of the patentee's claims).

90. See Starter Corp. v. Converse, Inc., 84 F.3d 592, 596 (2d Cir. 1996) ("Declaratory judgment actions are particularly useful in resolving trademark disputes, in order to promptly resolve controversies where the alleged owner of a trademark right threatens to sue for infringement."); see also Windsurfing Int'l, Inc. v. AMF Inc., 828 F.2d 755, 757 (Fed. Cir. 1987) (noting that declaratory judgment actions involving trademarks are analogous to those involving patents); 4 McCarthy, supra note 89, § 32:50, at 32-65 (noting that "[t]he purpose of federal declaratory judgment in trademark cases is almost identical to that in patent cases").


92. Id. at 671-72.

93. See 10A Wright et al., supra note 81, § 2751, at 569; infra notes 112-127 and accompanying text (discussing federal-question jurisdiction and the DJA).

94. See 10A Wright et al., supra note 81, § 2751, at 569.


96. Windsurfing, 828 F.2d at 757 (citing Topp-Cola Co. v. Coca-Cola Co., 314 F.2d 124, 125-26 (2d Cir. 1963)).

97. Id. (citing Polaroid Corp. v. Berkey Photo, Inc., 425 F. Supp. 605, 608 (D. Del. 1976)).

98. Simmonds Aerocessories v. Elastic Stop Nut Corp., 257 F.2d 485, 489 (3d Cir. 1958); see also Windsurfing, 828 F.2d at 758 (holding that the declaratory plaintiff did not satisfy second prong of the test because it had demonstrated only a "desire" to use the trademark and sought nothing more than an advisory opinion from the court—"something a federal court may not give").
(1) risking the accrual of damages while the party threatening litigation waited to bring suit, and (2) ceasing the allegedly infringing activity without being able to secure an adjudication of their rights. To further that congressional intent, courts liberally construe the DJA when determining the existence of an actual controversy in trademark disputes.  

In determining whether there is a real and reasonable apprehension of an infringement action, courts attempt to discern the "real and reasonable perceptions of the [declaratory] plaintiff." It is not necessary that there be a direct threat of litigation in order to invoke the DJA. "It is sufficient if such a threat is implicit in the attitude of the defendant as expressed in circumspect language contained in a letter." For example, in Jeffrey Banks, Ltd. v. Jos. A. Bank Clothiers, Inc., the court found that there was a real and reasonable apprehension of litigation where the plaintiff received a letter claiming that its use of a trademark constituted a "false representation of affiliation or association" and was a violation of the defendant's rights under the Lanham Act.

In order to satisfy the second prong of the test for determining the existence of an actual controversy, a plaintiff must engage in a course of conduct that brings it into adversarial conflict with the defendant. Thus, the plaintiff's mere desire to engage in conduct that a declaratory defendant claims will infringe its trademark is not

100. Manufacturers Hanover, 225 U.S.P.Q. (BNA) at 526 (citing Chesebrough-Pond's, Inc. v. Faberge, Inc., 666 F.2d 393, 396-97 (9th Cir. 1982)).
101. Simmonds, 257 F.2d at 489-90; see also 4 McCarthy, supra note 89, § 32:51, at 32-68 (noting that an "actual controversy" can be found even in the absence of direct charges of infringement against the plaintiff by the defendant).
102. Simmonds, 257 F.2d at 490.
104. Id. at 1002. The letter made no direct threat of litigation. Id. The defendant in Jeffrey Banks had also filed an opposition to the plaintiff's trademark registration application. Id. at 1000; see also Chesebrough-Pond's, 666 F.2d at 396-97 (holding that it was reasonable for the plaintiff to infer a threat of an infringement action from the defendant's letter stating that the plaintiff's trademark was "likely to cause confusion" with the defendant's and notifying the plaintiff of an intent to file an opposition to the plaintiff's trademark registration application); Manufacturers Hanover, 225 U.S.P.Q. (BNA) at 527 (holding that a letter to the plaintiff stating that the plaintiff's use of a trademark might create a "likelihood of confusion," coupled with the defendant's filing of opposition to the plaintiff's trademark registration application, created a reasonable apprehension of an infringement action).
105. See supra notes 95 & 97 and accompanying text.
Recognizing, however, that requiring a declaratory plaintiff to incur substantial expense in manufacturing and marketing and to expose itself to liability under the Lanham Act before it can have its rights adjudicated would run counter to the policies of the DJA, the Second Circuit has stated that the second prong is satisfied upon demonstrating an “actual intent and ability to imminently engage in the allegedly infringing conduct” and a showing of “more than a vague or general desire” to use the trademarks.

In Starter Corp. v. Converse, Inc., the Second Circuit found that the second prong was satisfied when the declaratory plaintiff was prepared to begin the manufacture and sale of the allegedly infringing product, but had not begun selling goods under the allegedly infringing trademark because of the threat of a trademark infringement suit. The declaratory plaintiff in Starter alleged that it had invested significant time and money into the project, designed styles and prepared prototypes of the product, made marketing decisions, and attempted to find a manufacturing partner.

(2) Federal Jurisdiction.—“The federal Declaratory Judgment Act is not a grant of jurisdiction.” It merely adds to the remedies available when federal subject-matter jurisdiction otherwise exists. Therefore, in order for a court to have jurisdiction over a declaratory judgment action, there must be an independent basis of federal jurisdiction. When an action for declaratory relief in essence seeks to assert a defense to threatened litigation, one can ascertain whether a declaratory judgment action arises under federal law by “looking to

106. See Windsurfing Int'l, Inc. v. AMF Inc., 828 F.2d 755, 758 (Fed. Cir. 1987) (holding that the second prong was not met where the declaratory plaintiff had alleged it was merely “interested in using the mark . . . in connection with its products”); see also Baltimore Luggage Co. v. Samsonite Corp., 727 F. Supp. 202, 210 (D. Md. 1989) (holding that the second prong was not satisfied where the declaratory plaintiff had at one point “engaged in conduct which brought it into conflict” with the declaratory defendant, but had since “ceased that course of conduct” and simply feared that the declaratory defendant would “again assert its trademark rights” if the declaratory plaintiff resumed that conduct in the future); Polaroid Corp. v. Berkey Photo, Inc., 425 F. Supp. 605, 608-09 (D. Del. 1976) (holding that averments by the declaratory plaintiff that it contemplates using and needs to use the defendant’s allegedly invalid trademark “fall far short of allegations of a substantial dispute between the parties”).

107. See supra note 88 and accompanying text (noting the purpose behind providing declaratory relief to a party threatened with an infringement suit).


109. Id. at 596.

110. Id.

111. Id.

112. 4 McCarthy, supra note 89, § 32:56, at 32-76.

113. Id.
the nature of the action threatened by the declaratory defendant.”

Thus, if the threatened suit would arise under federal law, then a declaratory judgment action seeking to assert a defense to such a suit also arises under federal law.

It has long been settled that an action arises under the patent laws, and is thus properly brought in federal court, when a declaratory plaintiff, who is threatened with a suit for infringement of a declaratory defendant's patent, institutes a declaratory judgment action for a declaration of noninfringement and the invalidity of the defendant's patent. In *E. Edelmann & Co. v. Triple-A Specialty Co.*, the plaintiff, in response to the threat of suit for patent infringement, sought a declaratory judgment respecting the validity of the defendant's patent, and if the patent was found valid, whether the plaintiff had infringed it. The Seventh Circuit, citing the DJA's policy of preventing the accrual of avoidable damages to one not certain of his rights, found that it had jurisdiction to hear the case. The court reasoned that the plaintiff's filing of the action for a declaration of its rights prior to the defendant's instituting infringement litigation did not change the nature of the suit and held that such a suit, whether brought by the patentee or alleged infringer, was “in either instance one arising under the patent laws of the United States.” The court continued: “It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner.”

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114. *Id.* (citing Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952)).

115. See *id.*; see also Colonial Penn Group, Inc. v. Colonial Deposit Co., 654 F. Supp. 1247, 1251 (D.R.I. 1987) (“[W]here the defendant in the coercive suit brings the declaratory judgment action ... one examines the nature of the plaintiff's claim in the coercive suit in order to determine if federal question jurisdiction is present in the declaratory judgment action.” (citing Public Serv. Comm'n, 344 U.S. at 242)).

116. See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 n.19 (1983) (citing E. Edelmann & Co. v. Triple-A Specialty Co., 88 F.2d 852 (7th Cir. 1937)); see also Edwin Borchard, *Declaratory Judgments* 808-10 (2d ed. 1941) (“Where the issue is the validity of the patent or its infringement, whether patentee or alleged infringer initiate the action ... it seems clear that the case arises 'under the patent ... laws,' thus conferring jurisdiction on the federal courts.” (second ellipsis in original) (citing Edelmann as the “most exhaustive refutation of the contrary view”)).

117. 88 F.2d 852 (7th Cir. 1937).

118. *Id.* at 853.

119. *Id.* at 854.

120. *Id.*

121. *Id.* Such a suit is merely an infringement suit with reversed parties. See Borchard, *supra* note 116, at 810.
the jurisdictional analysis of Edelmann in United States Galvanizing & Plating Equipment Corp. v. Hanson-Van Winkle-Munning Co.\textsuperscript{122}

In Eastman Kodak Co. v. Velveray Corp.,\textsuperscript{123} the Southern District of New York found that the reasoning of Edelmann applied equally to trademark cases, and the court held that it had jurisdiction over a declaratory judgment action brought by a party seeking a declaration that it had not infringed the declaratory defendant's trademark.\textsuperscript{124} Similarly, in Apex Beauty Products Manufacturing Corp. v. Brown Shoe Co.,\textsuperscript{125} the Southern District of New York again applied the reasoning of Edelmann and held that where a party was threatened with a suit for trademark infringement, the federal court had jurisdiction over a declaratory judgment action brought by the accused party.\textsuperscript{126} In so holding, the court stated: "Certainly if [the declaratory] defendant wished to take the initiative in bringing suit alleging infringement of its trademark there would be no question as to the federal court's jurisdiction. Now the converse of that situation is before the court in an action for declaratory judgment and the same basis for jurisdiction is applicable."\textsuperscript{127}

\textsuperscript{122} 104 F.2d 856 (4th Cir. 1939). The court quoted extensively from the Edelmann opinion:

"It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued. But the controversy is the same as previously. Heretofore the owner of the patent might sue to enjoin infringement; now the alleged infringer may sue. But the controversy between the parties as to whether a patent is valid, and whether infringement exists is in either instance essentially one arising under the patent laws of the United States. It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner."

\textit{Id.} at 861 (quoting Edelmann, 88 F.2d at 854). Importantly, the parties in Hanson were of diverse citizenship. Hanson-Van Winkle-Munning Co. v. United States Galvanizing & Plating Equip. Corp., 24 F. Supp. 249, 250 (N.D. W. Va. 1938), modified, 104 F.2d 856 (4th Cir. 1939). The court's citation to Edelmann was in the context of analyzing the justiciability of the controversy. Hanson, 104 F.2d at 861. Thus, while the quoted language from Edelmann states that a declaratory judgment action by the alleged infringer of a patent challenging the validity of the patent, and seeking a declaration of noninfringement, arises under the patent laws, the court's subject matter-jurisdiction was not based on application of Edelmann. Therefore, at most, Hanson stands for the proposition that the Fourth Circuit has cited with approval the jurisdictional analysis of Edelmann.

\textsuperscript{123} 175 F. Supp. 646 (S.D.N.Y. 1959).

\textsuperscript{124} \textit{Id.} at 647; \textit{see also} King Kup Candies, Inc. v. H.B. Reese Candy Co., 140 F. Supp. 115, 117 (M.D. Pa. 1956) (holding that federal jurisdiction exists where a declaratory plaintiff is seeking to adjudicate a claim of infringement made by the declaratory defendant).

\textsuperscript{125} 209 F. Supp. 73 (S.D.N.Y. 1962).

\textsuperscript{126} \textit{Id.} at 74.

\textsuperscript{127} \textit{Id.} (citing Velveray, 175 F. Supp. at 648; King Kup Candies, Inc. v. H.B. Reese Candy Co., 134 F. Supp. 463, 466 (M.D. Pa. 1955)); \textit{see also} Jeffrey Banks, Ltd. v. Jos. A. Bank
3. The Court's Reasoning.—In Gibraltar, P.R., Inc. v. Otoki Group, Inc., the Fourth Circuit upheld the dismissal of a petition to compel arbitration on the grounds that the district court lacked jurisdiction to compel arbitration because it would not have had subject-matter jurisdiction over the underlying suit if it were litigated rather than arbitrated. Specifically, the Fourth Circuit held that the district court did not have jurisdiction to grant an injunction against future use of a trademark when no infringing activity had been alleged. The court further held that it did not have jurisdiction to issue a declaratory judgment when a party seeking a declaration of its rights in a trademark in response to the threat of an infringement suit did not allege a violation of the Lanham Act by the party threatening suit.

In response to the plaintiff's request for an injunction, the court stated that "[a] dispute does not invoke federal jurisdiction simply because the plaintiff seeks a remedy [i.e., an injunction] that happens to be available in a federal statute." Rather, the court said, "[a] violation of federal law is a necessary predicate for claiming the remedies of the Lanham Act." The Lanham Act protects a trademark owner only against use of its trademark "in commerce" in a manner that "is likely to cause confusion." Because Gibraltar's petition to compel arbitration did not allege that Otoki was "using" the trademarks in dispute, the petition did not contain proper allegations of infringement and, therefore, did not seek a "remedy granted by" the Lanham Act. Thus, the petition failed to meet the "arising under" test adopted by the Fourth Circuit from Harms for establishing federal jurisdiction over a trademark dispute, which requires the face of the

Clothiers, Inc., 619 F. Supp. 998, 1002 (D. Md. 1985) (recognizing that federal-question jurisdiction under the Lanham Act is present when a party threatened with an infringement suit by the holder of a federally registered trademark sought a declaration of rights under the DJA).

128. Gibraltar, 104 F.3d at 619.
129. Id.
130. Id.
131. Id. at 618.
132. Id.
133. Id. at 619 (citing Lone Star Steakhouse & Saloon v. Alpha of Va., Inc., 43 F.3d 922, 930 (4th Cir. 1995)).
134. In other words, the court cannot enjoin future use under the Lanham Act where there has been no use in commerce that is likely to cause confusion. See infra note 146 and accompanying text.
135. See supra notes 72-81 and accompanying text (discussing the Fourth Circuit's opinion in Arthur Young, which adopted the "face of the complaint" test for making the jurisdictional determination in suits arising out of contract disputes involving intellectual property).
The plaintiff's complaint to contain proper allegations of trademark infringement.\textsuperscript{136}

The Fourth Circuit addressed the declaratory judgment issue by first noting that the DJA, like the FAA, does not provide an independent basis of federal jurisdiction.\textsuperscript{137} Therefore, the court stated, Gibraltar's declaratory judgment claim must "fall back on the Lanham Act for subject matter jurisdiction."\textsuperscript{138} The court then summarily concluded that there was no subject-matter jurisdiction over the action because Gibraltar alleged no violation of the Lanham Act by Otoki.\textsuperscript{139}

The court made a point of noting that the Lanham Act does not confer jurisdiction simply because the subject of the dispute is a trademark.\textsuperscript{140} After finding that there was no basis of jurisdiction under the Lanham Act, the court held that the case was "in essence" a dispute over the ownership of the trademarks.\textsuperscript{141} Consequently, the court did not have jurisdiction because "[a] dispute over property ownership does not properly fall under federal law just because the property is a federally-created interest like a trademark."\textsuperscript{142} The court concluded its opinion by stating that "[v]iewed from any perspective, this is not a Lanham Act case; it is a simple contract dispute. It poses not a question of infringement, but a question of ownership."\textsuperscript{143}

4. Analysis.—

a. Request for Injunction.—The Fourth Circuit determined that the dispute between Gibraltar and Otoki was "in essence" a dispute about the ownership of trademarks.\textsuperscript{144} The court, however, did not deny jurisdiction on that basis.\textsuperscript{145} The dismissal for lack of federal subject-matter jurisdiction following the court's characterization of Gi-

\textsuperscript{136} See Gibraltar, 104 F.3d at 619 ("None of Gibraltar's allegations address the type of infringing use covered by the Lanham Act."); Gibraltar, 914 F. Supp. at 1205 ("Neither Gibraltar's original petition to arbitrate nor its amended petition . . . alleges that Otoki has infringed upon Acorn Partners's trademarks."); Gibraltar, Civil No. L-95-606, slip op. at 8 ("T.B. Harms' holding that a federal court has jurisdiction if the complaint asks for a federally-created remedy does not mean that a plaintiff may bring a suit in federal court merely by asking for an injunction. . . . Rather . . . the requested federal remedy must follow from the deprivation of a federal right, as in a suit for infringement.").

\textsuperscript{137} Gibraltar, 104 F.3d at 619.

\textsuperscript{138} Id.

\textsuperscript{139} Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} Id. (citing Speedco, Inc. v. Estes, 853 F.2d 909, 912-13 (Fed. Cir. 1988)).

\textsuperscript{143} Id.

\textsuperscript{144} Id.

\textsuperscript{145} See supra notes 134-136 and accompanying text.
braltar’s claim as essentially a contract dispute should not be read as a departure from the Fourth Circuit’s “face of the complaint” approach to the jurisdictional determination under 28 U.S.C. § 1338. To the contrary, Gibraltar should be seen as an extension of the “face of the complaint” approach to determining jurisdiction over disputes arising out of contracts licensing or assigning trademarks.

The court’s jurisdictional determination with respect to the request for an injunction rested upon the conclusion that the Lanham Act does not provide for the remedy of an injunction to prevent the future infringement of a trademark by the defendant. It was only after the court determined that the plaintiff had not stated a claim for the remedy of an injunction under the Lanham Act, i.e., had not made proper allegations of trademark infringement, that it dismissed the claim for lack of subject-matter jurisdiction. Despite the seeming clarity of the basis upon which the court declined to exercise jurisdiction, the court’s holding that the plaintiff’s case did not “arise under” the Lanham Act even though the plaintiff had requested a remedy available under the Lanham Act, coupled with the court’s remarks that Gibraltar’s claim was “in essence” a contractual dispute about the ownership of property, makes Gibraltar similar to the Harms case. Gibraltar is thus subject to the same risk of misapplication that spawned the divergent lines of authority for determining jurisdiction under the Copyright Act.

Gibraltar and Harms are similar in that the plaintiffs purported to be seeking remedies granted by the Lanham Act and Copyright Act respectively. In Harms, although the plaintiff alleged that its suit arose under the Copyright Act and contained allegations of infringement, which under the test set out by Judge Friendly in Harms would be

146. This holding seemingly runs contrary to the “well established [principle] that injunctive relief quia timet may be granted where trademark infringement ... is threatened or imminent.” 3 Gilson, supra note 86, § 8.07[2], at 8-155. However, Professor McCarthy has noted that if the threatened infringement is “merely a possibility,” no injunction will be granted and that “[s]ome courts require that the plaintiff allege that defendant has already taken steps to begin marketing its infringing product” before an injunction can issue. 4 McCarthy, supra note 89, § 30:10, at 30-19 (quoting NTN Communications, Inc. v. Interactive Network, Inc., 37 U.S.P.Q.2d (BNA) 1475 (N.D. Cal. 1995)).

147. See Gibraltar, 104 F.3d at 618-19 (discussing when a case arises under the Lanham Act, and concluding that Gibraltar’s claim did not because it did not allege a violation of the Lanham Act).

148. See supra note 53 (arguing that, carefully read, the district court opinion in Harms does not provide a basis for the “essence of the claim” test of federal jurisdiction over actions arising out of contracts licensing or assigning intellectual property).

149. See supra notes 51-85 and accompanying text (discussing the split of authority that developed from the two Harms opinions).
sufficient to confer subject-matter jurisdiction, the court denied jurisdiction on the grounds that the plaintiff had not alleged any acts of copyright infringement and, therefore, was not entitled to relief under the Copyright Act. The rationale for the denial of jurisdiction was that the complaint did not really seek a remedy "expressly granted by the Act," although it purported to do so, because the Copyright Act did not provide relief for the acts that had been alleged by the plaintiff. Similarly, in Gibraltar, the relief requested by the plaintiff, while available under the Lanham Act when a trademark has been infringed, is not available upon allegations of a mere threat of infringement.

It would be easy to read Gibraltar and assert that the Fourth Circuit has adopted the "essence of the complaint" test for determining jurisdiction under the Lanham Act in cases arising out of contracts licensing or assigning trademarks, just as many courts did with the Harms opinion. The basis for such an argument would be that although the plaintiff in Gibraltar sought a remedy granted by the Lanham Act, just as the Harms test dictates, the court denied jurisdiction and cited the nature of the plaintiff's complaint as essentially being one in contract. However, Gibraltar's claim was in "essence" only a contract dispute because it did not state a claim under the Lanham Act. Had Gibraltar alleged that Otoki was using and, therefore, infringing the trademarks, the court would have assumed jurisdiction.

150. Under the Harms test, a case arises under the Copyright Act if "the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement..." T.B. Harms Co. v. Eliscu, 339 F.2d 823, 828 (2d Cir. 1964).
152. Id.
153. See supra note 146 and accompanying text (discussing availability of an injunction under the Lanham Act for threatened infringement).
154. See supra notes 53-61 and accompanying text (discussing the origins of the essence of the complaint approach and suggesting that the adoption of that approach was based on an incorrect interpretation of the Harms opinions).
155. See Gibraltar, 104 F.3d at 619 ("In essence, this is a contract dispute between the two companies over the ownership of property.").
156. The court in Gibraltar did conduct an inquiry, however brief, into whether the plaintiff had stated a claim under the Lanham Act before concluding that the district court did not have jurisdiction to issue an injunction. Id. at 618-19. After the district court dismissed Gibraltar's petition to compel arbitration, Gibraltar refiled its petition. Brief of Appellee at 6, Gibraltar (No. 95-2877). In its new petition, Gibraltar alleged that Otoki was using and, therefore, infringing the disputed trademarks. Id. Otoki moved to dismiss this subsequent petition, but the district court denied its motion. Id. A jury trial was held on the question whether there was an enforceable agreement to arbitrate, and the district court compelled Otoki to submit to arbitration. Id. at 6-7.
Parties may be tempted to seize upon the language in *Gibraltar* stating that "[i]n essence, this case is a contract dispute between the two companies over the ownership of property,"¹⁵⁷ to cite the court's denial of jurisdiction, and then claim that the Fourth Circuit now follows the "essence of the complaint" test. It was that type of cut and paste analysis that led to the split of authority among courts following the *Harms* decision. It should not happen in the Fourth Circuit.

*b. Request for Declaratory Relief.* In the *Gibraltar* opinion, the Fourth Circuit determined that there was no jurisdiction under the DJA because "*Gibraltar* . . . failed to allege a violation of the Lanham Act."¹⁵⁸ While this may have been the proper inquiry for a determination of the court's jurisdiction to issue an injunction, the court did not explore the possibility that application of the *Edelmann* doctrine,¹⁵⁹ which has been applied in the trademark context by several courts, may have provided a basis of jurisdiction.¹⁶⁰

In accordance with its position that the assignment of its rights in the disputed trademarks was invalid, Otoki threatened legal action against Acorn Partners/Gibraltar if it used or attempted to transfer the trademarks.¹⁶¹ Specifically, Otoki threatened to "sue Gibraltar in the United States District Court for the District of Puerto Rico for violation of Otoki's 'trademark registration rights,'"¹⁶² and warned Gibraltar that "if Acorn Partners were to continue to use Otoki trademarks, this would in effect constitute a violation of the laws of Puerto Rico and the United States."¹⁶³ It was in response to these letters that

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¹⁵⁷. *Gibraltar*, 104 F.3d at 619.
¹⁵⁸. Id.
¹⁵⁹. See *supra* notes 116-121 and accompanying text.
¹⁶⁰. See *supra* notes 123-127 and accompanying text (discussing cases that have applied the *Edelmann* doctrine in trademark disputes).
¹⁶². Plaintiff's Amended Petition to Compel Arbitration at 8, *Gibraltar* (No. 95-1303); see also *Gibraltar*, 914 F. Supp. at 1204 (noting that, at the time of its opinion, Otoki had commenced suits against Gibraltar in federal court in Puerto Rico for trademark infringement); Brief of Appellant at 11, *Gibraltar* (No. 95-2877) (quoting the letter from Otoki to Gibraltar which stated that Otoki would bring an action against Gibraltar "in the Federal Court of Puerto Rico for violation of trademark registration rights" (Dec. 10, 1994)).
¹⁶³. Brief of Appellant at 14, *Gibraltar* (No. 95-2877) (quoting letter from Otoki to Gibraltar (Mar. 3, 1995)). The letter, in addition to stating that Gibraltar's continued use of the trademarks would violate federal law, stated that the transfer and use of the trademarks by Gibraltar had caused Otoki "losses . . . estimated to be a sum not less than two million dollars." Id.
Gibraltar amended its Demand for Arbitration to request a declaration of its rights in the disputed trademarks. 164

As discussed above, to obtain relief under the DJA a declaratory plaintiff must establish that there is an “actual controversy” between the parties and also an independent basis of federal jurisdiction. 165 With respect to the “actual controversy” determination, Gibraltar alleged that it received a letter from Otoki that threatened a suit for violation of Otoki’s federal trademark registration rights. 166 The first letter did not contain any “circumspect language” that would leave doubt as to whether Gibraltar’s apprehension of a suit was reasonable; rather, the letter plainly stated that if Gibraltar attempted to transfer the trademarks, it would be sued in federal court for a violation of Otoki’s federal trademark rights. 167 Even the second letter, which, without directly threatening suit, stated that Gibraltar’s use of the trademarks was causing Otoki to suffer damages and that Acorn Partners’ continued use of the trademarks would be a “violation of the laws of . . . the United States,” would itself be sufficient to create a reasonable apprehension of litigation. 168

Gibraltar had also engaged in a course of conduct that brought it into adversarial conflict with Otoki, and thus it satisfied the second prong of the “actual controversy” requirement. 169 At the time that Gibraltar had received the letters from Otoki threatening the federal suit, Gibraltar had already recorded the assignment of trademarks in the United States Patent and Trademark Office. 170 Gibraltar also alleged that it had “expended . . . substantial monies and effort marketing the trademarks which Otoki had assigned.” 171 Thus, Gibraltar was .

164. Id. at 15 (“Following its receipt of the March 3, 1995 letter, Gibraltar amended its Demand for Arbitration pending before the AAA once again, this time to specifically request a declaration from the arbitrator as to Acorn Partners’ rights in the trademarks.”).

165. See supra notes 91-94 and accompanying text.

166. See supra note 162 and accompanying text.

167. See supra notes 101-104 and accompanying text (discussing cases in which the “reasonable apprehension of litigation” prong of the “actual controversy” requirement was satisfied even though no direct threat of litigation existed).

168. See supra notes 103-104 and accompanying text (discussing cases where this type of “circumspect language” was held sufficient for the creation of a reasonable apprehension of litigation).

169. See supra notes 95, 97 and accompanying text.

170. Brief of Appellant at 11, Gibraltar (No. 95-2877) (“By December 10, 1994, when Otoki sent this letter to Gibraltar, the ‘transfer’ of the trademarks from Otoki to Acorn Partners had already taken place pursuant to the Joint Venture Agreement; the assignment was recorded in the U.S. Office of Patents and Trademarks on November 2, 1994.”).

171. Id. at 12; accord Plaintiff’s Amended Petition to Compel Arbitration at 4, Gibraltar (No. 95-1303) (“Gibraltar has expended substantial monies and effort marketing the . . . trademarks.”).
not merely seeking an advisory opinion from the court on the basis that it "desired" to engage in conduct that might subject it to suit; rather, it had engaged in the precise conduct for which Otoki had threatened to sue it.\textsuperscript{172}

The court did not address the issue of justiciability, i.e., the "actual controversy" requirement, in \textit{Gibraltar} because it was unnecessary to answer that question once the court determined there was no independent basis of jurisdiction to hear the controversy.\textsuperscript{173} The court, noting that the DJA does not provide an independent basis of jurisdiction, and therefore, that Gibraltar's claim for declaratory relief must fall back on the Lanham Act for subject-matter jurisdiction, concluded there was no jurisdiction because Gibraltar had not alleged that Otoki was violating the Lanham Act.\textsuperscript{174} The court erred, however, in looking only to the nature of the declaratory plaintiff's claim in making the jurisdictional determination.

In essence, Gibraltar’s declaratory judgment action sought to assert a defense to Otoki's threatened claims.\textsuperscript{175} Thus, the determination of whether there is federal subject-matter jurisdiction over the suit should be decided by looking at the nature of the suit threatened by the declaratory defendant.\textsuperscript{176} The coercive suit in this case was the one threatened by Otoki against Gibraltar for the transfer of the trademarks in violation of Otoki's "trademark registration rights" and

\textsuperscript{172} See supra note 106 and accompanying text (discussing cases in which courts found that the "actual controversy" requirement was not met when the declaratory plaintiff merely expressed a "desire" to engage in conduct for which the declaratory defendant was threatening suit). It should be noted that the Fourth Circuit has not addressed the question of the justiciability of declaratory judgment actions involving trademarks. The District Court of Maryland, however, has applied the \textit{Windsurfing} approach to the justiciability determination in the trademark context. Baltimore Luggage Co. v. Samsonite Corp., 727 F. Supp. 202, 210 (D. Md. 1989); see supra notes 95-97 and accompanying text (discussing the two-prong test adopted by the Federal Circuit in \textit{Windsurfing Int'l v. AMF Inc.}, 828 F.2d 755, 757 (Fed. Cir. 1987), for determining justiciability of a declaratory judgment action involving a trademark dispute).

\textsuperscript{173} See supra note 93 and accompanying text (noting that actions under DJA must have an independent basis of jurisdiction).

\textsuperscript{174} \textit{Gibraltar}, 104 F.3d at 619.

\textsuperscript{175} Gibraltar’s request for a declaration of its rights in the trademarks was added to its Demand for Arbitration in response to Otoki’s letters stating that Gibraltar would be sued in federal court for violation of Otoki’s federal trademark registration rights and that Gibraltar's use of the trademarks was causing monetary damage to Otoki and violated federal law. That is, the declaratory judgment action sought to assert a defense to Otoki’s claims that Gibraltar was violating federal trademark laws by transferring and using the trademarks. See supra notes 21, 163 and accompanying text.

\textsuperscript{176} See supra notes 114-115 and accompanying text (discussing the basis for the jurisdictional determination where the action brought by the declaratory plaintiff is essentially asserting a defense to a suit threatened by the declaratory defendant).
for use of the trademarks in "violation of the laws of . . . the United States." Therefore, the court must make the jurisdictional determination on the basis of whether Otoki's threatened claims would arise under federal law if it were to bring suit against Gibraltar.

In its letters to Gibraltar, Otoki asserted that it would sue Gibraltar in federal court for violation of Otoki's federal trademark registration rights if Gibraltar attempted to transfer the trademarks to Acorn Partners. Otoki also asserted in its letters that it had suffered over two million dollars in damages as a result of Gibraltar's use of the trademarks and warned that continued use of the trademarks would constitute a violation of the laws of the United States. There can be no doubt that a claim brought by Otoki alleging that Gibraltar was using Otoki's trademarks in violation of the laws of the United States would arise under the Lanham Act because this would essentially be a suit for trademark infringement. The Fourth Circuit, therefore, had it applied Edelmann, would have found that it had jurisdiction to issue a declaratory judgment and compel arbitration.

The court's failure to apply Edelmann, despite Gibraltar's urging of its application, seems to indicate that the Fourth Circuit will not apply Edelmann to establish subject-matter jurisdiction when a party brings a declaratory judgment action in response to the threat of a suit for trademark infringement. It may have been the court's intention, however, to limit its refusal to apply Edelmann to the facts of this case, i.e., where the action involves a trademark assignment or li-

177. See supra notes 161-163 and accompanying text (discussing the letters sent by Otoki to Gibraltar respecting Gibraltar's transfer and use of the disputed trademarks).
178. See supra note 162 and accompanying text.
179. See supra note 163 and accompanying text.
180. See 15 U.S.C. § 1114(1)(a) (1994) (stating that defendants are liable to the trademark registrant for the remedies provided in the Lanham Act if they "use in commerce" a trademark in a manner "likely to cause confusion, or to cause mistake, or to deceive" (emphasis added)). In this case, because Otoki's claim of infringement would have arisen out of a contract assigning the trademark, the assertion that a federal court would have had jurisdiction over Otoki's coercive suit is based on the Fourth Circuit's having adopted the "face of the complaint" test for determining when a case "arises under" the Lanham Act. See supra notes 72-81 and accompanying text (discussing the Arthur Young case). If the Fourth Circuit followed the "essence" rule, it would not have had jurisdiction over a suit brought by Otoki alleging infringement of Otoki's trademark rights. See supra notes 51-85 and accompanying text (discussing the split among courts for determination of federal jurisdiction in cases arising out of contracts licensing or assigning intellectual property).
181. See supra note 122 and accompanying text (discussing the Fourth Circuit's approval of Edelmann, which would permit a party threatened with an infringement suit by a patentee to bring a declaratory judgment action in federal court seeking a declaration as to the validity of the patent and as to noninfringement).
182. See Brief of Appellant at 26-34, Gibraltar (No. 95-2877) (arguing that Edelmann provided a basis for establishing federal jurisdiction in this case).
The fact that Otoki's threats of an infringement suit arose out of disputes concerning a contract of assignment, which could serve as the basis for a state court action to establish title in the trademarks, may provide an argument against the applicability of Edelmann.

When a declaratory plaintiff is threatened with a suit for infringement, the availability of a declaratory judgment action prevents the threatened party from having its "commercial hands" tied. The declaratory judgment action permits the threatened party to test the validity of the patentee's claims, thus obtaining an adjudication of its rights with respect to the allegedly infringing activity and avoiding the unnecessary accrual of damages or cessation of activity that was not infringing. Perhaps the Fourth Circuit did not apply Edelmann because Gibraltar did not have its hands tied by Otoki's threats. A federal declaratory judgment action was not the only way that Gibraltar could have obtained an adjudication of its rights, and therefore, application of Edelmann as a basis for jurisdiction may have been unnecessary to prevent Gibraltar from having to choose between accruing damages in a suit that Otoki might bring in the future or ceasing its allegedly infringing activity.

183. See supra notes 88-90 and accompanying text (discussing the purpose of providing declaratory relief to a party threatened with infringement litigation).

184. Professor McCarthy has described the "racket" of patentees who sought to gain unfair advantage in the marketplace by threatening alleged infringers with lawsuits that might never be filed. 4 McCarthy, supra note 89, § 32:50, at 32-65. If the threatened party were to continue the allegedly infringing activity, it was potentially accruing damages for a suit that might one day be filed by the patentee. The other option for the party threatened with suit was to cease the allegedly infringing activity. This "racket" described by Professor McCarthy would often have the effect of permitting an invalid patent to remain as a "scarecrow" in the marketplace with only the patentee having the power to obtain an adjudication of its rights in the patent. Id. Before the availability of a declaratory judgment action:

[u]nless the patentee so grossly abused his privileges as to enable the alleged infringer to demonstrate a malicious or bad faith attempt to destroy his business or property, so that an injunction against unfair competition might be granted, the infringer was unable to obtain relief. He was forced by the law to await the pleasure of the patentee in bringing the validity of his patent and the charge of infringement to judicial test.

Borchard, supra note 116, at 803. Even if the alleged infringer were to bring a suit for unfair competition, such a suit "might enjoin the continuance of the charges of infringement and threats of suit, but [it] could not determine the issue of infringement." Id. at 803 n.10 (citations omitted).

185. See 4 McCarthy, supra note 89, § 32:50, at 32-65.

186. Because this dispute arose out of a contract of assignment, Gibraltar could have brought a state law action to establish its rights in the trademarks. See, e.g., Northern Assurance Co. of Am. v. EDP Floors, Inc., 311 Md. 217, 223, 533 A.2d 682, 685 (1987) (noting that a state court of general jurisdiction has the power "to construe a written contract and declare the rights of the parties under it" (citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-402, 3-406 (1984))).
At least one court has declared, however, that this would not be an adequate basis for denying federal jurisdiction over a declaratory judgment action that otherwise fits under the *Edelmann* pattern. In *Grip Nut Co. v. Sharp*, the Seventh Circuit, which also decided *Edelmann*, held that the existence of a license between the patentee and alleged infringer, and the availability of state court proceedings to determine title to the patents, were not sufficient bases for denying federal jurisdiction over the alleged infringer’s declaratory judgment action. The plaintiff in *Grip Nut* sought a declaration of rights in response to charges by the defendant that the plaintiff’s sale and manufacture of certain goods was an infringement of certain patents of the defendant. Aside from denying infringement of defendant’s patents, the plaintiff’s complaint affirmatively stated that the defendant had no cause of action because the plaintiff had a license to manufacture and sell the goods and had an “equitable title to the patents.” “The sole question” for the court was whether the complaint presented a controversy “arising under” the patent laws.

In holding that the case did arise under the patent laws, the Seventh Circuit stated:

In this case, the plaintiff alleges that the defendant has charged plaintiff with infringement of patents and that plaintiff denies it. The plaintiff is entitled to have a declaration as to whether that charge is true.

The right to have the question of infringement settled once and for all is not lost to the plaintiff by its further plea that it was a licensee and the equitable owner of the patents. In the ordinary suit for infringement such a plea must be set up in the answer, and we believe that the new right of the alleged infringer to bring a suit for a Declaratory Judgment has not removed this onus since the Declaratory Judgment

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187. 124 F.2d 814 (7th Cir. 1941).
188. *Id.* at 815. The district court in *Grip Nut* held that an action for a declaratory judgment in response to threats by the declaratory defendant to sue for patent infringement could not be maintained by the declaratory plaintiff where a license governs the relations of the parties with respect to the patent because “the state courts are open to [the] plaintiff . . . [to] have the title to the patent adjudicated.” *Grip Nut Co. v. Sharp*, 40 F. Supp. 80, 82 (N.D. Ill.), *rev'd*, 124 F.2d 814 (7th Cir. 1941). The district court explicitly rejected the plaintiff’s argument that “where one of the parties to a controversy may maintain an action against the other in a federal court, the other must have the right to go into the same court and maintain there a suit for a declaratory judgment.” *Id.*
189. *Grip Nut*, 124 F.2d at 815.
190. *Id.*
191. *Id.*
suit, once brought, is really no different than the suit by the patentee for infringement.

... The defendant has seen fit to charge plaintiff with infringement and those charges give the plaintiff a right to a declaration as to its merits. It would be most unreasonable to hold that plaintiff must try the issue of license and title in the state court. To require that would be to deny the plaintiff a defense in its suit for declaration of no infringement which it would have had if this were an infringement suit by the patentee. Such a result would violate the purpose of the Declaratory Judgments Act and impair unwisely the efficient administration of justice.192

Of course, because the Fourth Circuit did not even discuss the possibility of Edelmann's applicability to this case, there is no way to know whether the court was attempting to craft some exception to the applicability of Edelmann in cases where the charge of infringement arises out of a contract licensing or assigning the intellectual property,193 or whether the court will simply not apply Edelmann in the trademark context.194

5. Conclusion.—A careful reading of Gibraltar reveals that the basis upon which the Fourth Circuit determined that the district court did not have jurisdiction to compel arbitration of the action for injunction supports the view that the Fourth Circuit follows the "face of the complaint approach" for determining jurisdiction in cases arising out of contracts licensing or assigning intellectual property. Unfortunately, the court used language at several points in its opinion that could be seized upon and used as a basis for arguing that the Fourth Circuit now follows the "essence of the complaint" approach. The courts of the Fourth Circuit, however, should not fall victim to the type of "cut and paste" analysis that the New York district courts exercised following Harms and should continue to follow the "face of the complaint" approach.

The Fourth Circuit's failure to consider whether application of the Edelmann doctrine would have supplied a basis of jurisdiction to issue a declaratory judgment when a declaratory plaintiff is threatened with a suit for trademark infringement raises questions about the

192. Id. (citations omitted).
193. This exception was rejected by the Seventh Circuit in Grip Nut, which also decided Edelmann. See supra notes 187-192 and accompanying text.
194. The court must have been aware that the application of Edelmann would have provided a basis of jurisdiction in this case, because that point was argued extensively by the Appellant in its brief. Brief of Appellant at 26-34, Gibraltar (No. 95-2877).
Fourth Circuit's willingness to apply *Edelmann* in the trademark context. The court's failure to apply the doctrine in this case, however, may be a result of the fact that the threat of the infringement suit arose out of a contract of assignment, which perhaps negates some of the policy considerations that ordinarily favor application of *Edelmann*. Nevertheless, in light of the Seventh Circuit's rejection of that reasoning, the Fourth Circuit's failure to provide a reason for not applying *Edelmann* leaves the law in the Fourth Circuit in a state of uncertainty.

RYAN M. WALSH
IV. Criminal Law

A. Creating an Unnecessary Bright-Line Rule Allowing Searches of Cars with Tinted Windows

The United States Supreme Court recently denied certiorari in the case of United States v. Stanfield,\(^1\) in which the United States Court of Appeals for the Fourth Circuit created a bright-line rule allowing police officers, during lawful traffic stops, to open the doors of cars with heavily tinted windows whenever "it appears in their experienced judgment prudent to do so" in order to visually inspect the interior of the car to determine whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who may pose a threat to the officers.\(^2\) The Fourth Circuit justified its holding, in part, by using three prior Supreme Court cases—Terry v. Ohio,\(^3\) Michigan v. Long,\(^4\) and Maryland v. Buie\(^5\)—collectively allowing police officers in stop and frisk situations\(^6\) to conduct a limited search of a suspect's person, and the area around him, for weapons and possible third parties when the officer has a reasonable articulable suspicion of danger. This Note will argue that the facts available to the arresting officer in Stanfield were insufficient to create a reasonable articulable suspicion of danger,\(^7\) and therefore, the officer's actions were not justified under existing search and seizure principles. Moreover, the bright-line rule announced in Stanfield eliminated the objective standard of the reasonable articulable suspicion rule by suggesting that an officer's actions be judged subjectively, according to what the officer felt was prudent at the time. This new rule is an

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2. Id. at 981.
3. 392 U.S. 1, 27 (1968) (holding that a police officer has the authority to conduct a patdown of a suspect's outer clothing for weapons when the officer has reason to believe that he is dealing with an armed and dangerous individual).
4. 463 U.S. 1032, 1051 (1983) (holding that, during a lawful stop, the police may conduct an area search of the passenger compartment of a car to uncover weapons "as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous").
5. 494 U.S. 325, 334 (1990) (holding that a police officer can, incident to an arrest, look in the areas immediately adjoining the place of arrest from which an attack could be immediately launched, when the officer has "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene").
6. The "stop and frisk" rule refers to the Court's rule in Terry that the police may "stop" a person and detain him briefly for questioning if they reasonably suspect him of criminal activity, and may "frisk" the individual for weapons upon further reasonable suspicion that he is armed. Terry, 392 U.S. at 22, 27.
7. See infra notes 90-173 and accompanying text.
illustration of the trend toward expanding police power at the expense of individual privacy rights in automobile search and seizure cases. The decision in *Stanfield* creates a greater potential for police abuse of discretion and discrimination.

1. **The Case.**—At approximately 9:00 a.m. on April 29, 1994, Officers Mackel, Buie, and Hamel of the Baltimore City Police Department were patrolling a high-crime area in West Baltimore when they saw a black Nissan Pathfinder with heavily tinted windows illegally parked in the street, blocking traffic. After circling the block once, the officers, who were armed and wearing bullet-proof vests over their uniforms, parked in front of the Pathfinder and exited their unmarked vehicle. At that time, the driver of the Pathfinder, Billy Howard Stanfield, was talking to a man whom the officers recognized as a "known drug dealer." The officers approached Stanfield’s Pathfinder and noticed that the front driver’s side window was down, but that the front passenger’s side window was raised. The tinting on the Pathfinder’s windows was so dark that Officer Mackel, who approached the passenger’s side, could not see into the vehicle, so, without notice to Stanfield, he opened the passenger’s side door to determine "whether Stanfield was armed or had access to weapons and whether he was alone in the Pathfinder." When Officer Mackel opened the passenger’s side door, he saw in plain view, from outside the vehicle, a plastic bag of cocaine protruding from the mouth of a brown paper bag on the back seat of the Pathfinder. The officers

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8. See infra notes 27-60 and accompanying text.
11. Id.
12. Id. This is one of many facts vigorously disputed at the suppression hearing before the district court. *Id.* at 979 n.1. The officers testified that both the driver’s and passenger’s side windows were down; Stanfield testified that only the driver’s side window was down. *Id.* The district court found that the driver’s side window was down, but the passenger’s side window was up, apparently because it was cloudy and 59 degrees that day, making it unlikely that Stanfield would have both windows down. United States v. Stanfield, 906 F. Supp. 300, 303 n.5 (D. Md. 1995), aff’d, 109 F.3d 976 (4th Cir.), cert. denied, 118 S. Ct. 156 (1997).
14. *Id.* at 979. This was another fact heavily disputed at the suppression hearing. Stanfield testified that Officer Mackel opened the passenger’s side door, climbed inside the vehicle, and searched under the back seat to find the cocaine. *Stanfield*, 906 F. Supp. at 302. However, the district court rejected this testimony, finding that the cocaine was in plain view once Officer Mackel opened the passenger’s side door and that he neither entered the vehicle nor searched under the vehicle’s seat. *Id.* at 303 n.6.
then placed Stanfield under arrest for possession with intent to distribute cocaine and cocaine base.\textsuperscript{15}

The United States District Court for the District of Maryland denied Stanfield's motion to suppress the evidence discovered by Officer Mackel.\textsuperscript{16} The court found the search constitutional under two Supreme Court cases. First, under \textit{Texas v. Brown},\textsuperscript{17} officers may illuminate the interior of a car with the aid of a flashlight without violating Fourth Amendment search and seizure protections.\textsuperscript{18} In \textit{Stanfield}, however, the heavy tinting of the windows precluded Officer Mackel from seeing in; therefore, the district court concluded, Officer Mackel was constitutionally permitted to open the door.\textsuperscript{19} Second, the district court, citing \textit{Michigan v. Long},\textsuperscript{20} found that Officer Mackel had an objectively reasonable, articulable suspicion of danger when he opened the car door.\textsuperscript{21}

On appeal, the United States Court of Appeals for the Fourth Circuit stated the issue to be resolved in terms of a balance between the individual’s right to privacy and the officer’s safety.\textsuperscript{22} It addressed whether the government’s substantial interest in officer safety during a lawful traffic stop outweighs the intrusion on the privacy interests of the vehicle’s occupants which results when, because of heavily tinted windows that prevent the interior compartment from being viewed, an officer opens a door of the vehicle in order to ensure that the vehicle’s driver is unarmed and that there are no other occupants who might threaten his safety during the investigatory stop.\textsuperscript{23}

\section*{2. Legal Background.—}The Fourth Amendment to the United States Constitution provides individuals with the right to be free from

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\item \textsuperscript{15} \textit{Stanfield}, 109 F.3d at 979.
\item \textsuperscript{16} \textit{Stanfield}, 906 F. Supp. at 301.
\item \textsuperscript{17} 460 U.S. 730 (1983) (plurality opinion).
\item \textsuperscript{18} \textit{Stanfield}, 906 F. Supp. at 303-04. The court further reasoned that in looking through the car window, an officer would not be violating any legitimate expectation of privacy. \textit{Id.} at 303 n.9 (citing \textit{Brown}, 460 U.S. at 740).
\item \textsuperscript{19} \textit{Id.} at 304.
\item \textsuperscript{20} 463 U.S. 1032 (1983). In \textit{Long}, the Supreme Court concluded that after a valid stop, police officers may conduct a \textit{Terry} search of the passenger compartment of a vehicle “as long as [the officers] possess an articulable and objectively reasonable belief that the suspect is potentially dangerous.” \textit{Id.} at 1051.
\item \textsuperscript{21} \textit{Stanfield}, 906 F. Supp. at 304 n.11. “[B]ecause Officer Mackel was unable to see through the heavily tinted windows of the Pathfinder, he had an objectively reasonable belief that Stanfield (or a hidden passenger) was potentially dangerous.” \textit{Id.}
\item \textsuperscript{22} See \textit{Stanfield}, 109 F.3d at 978.
\item \textsuperscript{23} \textit{Id.}
"unreasonable searches and seizures." In interpreting the Fourth Amendment, the Supreme Court has repeatedly struggled to strike the proper balance between an individual's right to privacy and the government's interest in conducting searches. Initially, the Court concluded that any search without a warrant is "per se unreasonable," but it soon began to carve out exceptions to this rule. These exceptions embodied a trend toward reading the protections of the Fourth Amendment narrowly, while expanding the powers of police officers to search. This trend is especially apparent in two areas of search and seizure cases: automobile searches and protective searches for weapons. The two areas often overlap.

a. The Car Exception to the Warrant Requirement.—The Supreme Court introduced the car exception to the warrant requirement in Carroll v. United States. In that case, the Court recognized the inherent unreasonableness of searching someone's home without a warrant, but determined that there is a greater government interest in searching cars without first having to obtain a warrant. It reasoned that vehicles, unlike homes, may be moved out of the locality or jurisdiction in which a warrant would be sought; therefore, police officers have an interest in conducting the search before the owner can move the vehicle and possibly destroy the evidence contained therein. Accordingly, the Court held that a warrantless search of an automobile does not violate the Fourth Amendment if the officer has probable cause to believe that the car contains contraband of some sort.

24. U.S. CONST. amend. IV.
25. See Maryland v. Buie, 494 U.S. 325, 331 (1990) (explaining that "in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests").
27. See, e.g., California v. Greenwood, 486 U.S. 35, 40 (1988) (authorizing the warrantless search of property that a person knowingly exposes to the public); Chimel v. California, 395 U.S. 752, 763 (1969) (permitting police officers to conduct a limited warrantless search of the premises around an individual incident to a lawful arrest); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (allowing police officers to search premises without a warrant when there are exigent circumstances).
29. Id. at 153.
30. Id.
31. Id. at 149. The concept of probable cause may be traced to the Fourth Amendment itself, which provides that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Probable cause is generally defined as: "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged." Stacey v.
Since *Carroll*, the Supreme Court has continued to interpret the Fourth Amendment as requiring fewer protections in car searches, claiming that there is a lesser expectation of privacy. For instance, it has determined that automobiles are the subject of pervasive regulation by the states, so drivers of motor vehicles must expect that the state will intrude to some extent upon their privacy.\(^2\) It has also noted that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."\(^3\)

Additionally, the Court has stated that, because the passenger compartment of a car is generally open to public view, car owners should not expect the same degree of privacy as they would in their homes.\(^4\) However, the Court cautioned in *Almeida-Sanchez v. United States*\(^5\) that "the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."\(^6\)

\[b. \text{The Protective Search for Weapons Exception to the Warrant Requirement.} - \text{The Court introduced the second relevant exception to the warrant requirement in *Terry v. Ohio*, setting forth the "stop and frisk" rule. According to this rule, where an officer observes unusual conduct by an individual that leads him to conclude reasonably that criminal activity may be afoot, the officer may stop the individual and}

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32. *See New York v. Class, 475 U.S. 106, 113 (1986) ("[A]utomobiles are justifiably the subject of pervasive regulation by the State."); Cady v. Dombrowski, 413 U.S. 433, 441 (1973) ("Because of the extensive regulation of motor vehicles and traffic, ... the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office.").*


34. *See Texas v. Brown, 460 U.S. 730, 740 (1985) (plurality opinion) (reasoning that because the general public could peer into the defendant's car through the windows, the officer should not be prohibited from doing so); United States v. Chadwick, 433 U.S. 1, 13 (1977) (distinguishing the privacy interests in luggage, which is not open to public view, from automobiles, which are open to public view), abrogated, California v. Acevedo, 500 U.S. 565 (1991); Cardwell, 417 U.S. at 590 (explaining that cars deserve a lesser protection of privacy because they travel through "public thoroughfares" where their occupants and contents "are in plain view"); cf. California v. Carney, 471 U.S. 386, 388, 393 (1985) (concluding that the defendant had a lesser expectation of privacy in his motor home, even though it had shades covering the windows, because it was still a mobile vehicle subject to pervasive regulation by the State).*

35. 413 U.S. 266 (1973).

36. *Id. at 269.*

37. 392 U.S. 1 (1968).*
briefly detain him in order to investigate. If the officer then has a reasonable articulable suspicion that the individual is armed and presently dangerous, he is entitled, for the protection of himself and others in the area, to frisk the suspect for weapons, carefully limiting the search to the suspect’s outer garments. The officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the officer’s] intrusion.”

The Court’s primary goal in applying the “reasonable articulable suspicion” standard has been to strike the appropriate balance between an individual’s privacy interests and the government’s interest in protecting police officers in stop and frisk situations. In applying the rule, the Court has emphasized that “the totality of the circumstances—the whole picture—must be taken into account,” instead of merely identifying particular circumstances that establish a reasonable articulable suspicion of danger.

Since Terry, the Court has applied the “reasonable articulable suspicion” standard to various other situations. In Maryland v. Buie, the Court extended the rule to in-home arrests, holding that a protective sweep of a home did not require probable cause of danger. It determined that once a police officer frisks and arrests a suspect, the officer might still have reason to conduct a protective search of the area in order to make sure there are no additional individuals who pose a danger. The Court held that, as long as the officer “possesse[d] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individ-

38. Id. at 30.
39. Id.
40. Id. at 21. The Court found that such facts existed in Terry. Id. at 28. The officer in that case observed two individuals on a city street who appeared to be “casing” a store. Id. at 5-6. The men would walk past the store, peer in the window, and then confer with each other. Id. at 6. They engaged in this process approximately a dozen times, twice conferring with a third man. Id. Suspecting that the three men were contemplating an armed robbery, the officer approached them and asked for their names. Id. at 6-7. At that point, the men mumbled something in response, and the officer spun one of the men around, frisked him, and found a .38 caliber revolver. Id. at 7.
43. See infra text accompanying notes 90-180 for cases analyzing the sufficiency of various circumstances for a “reasonable articulable suspicion” of danger.
45. Id. at 336-37.
46. Id. at 327.
ual posing a danger to the officer or others," the search was reasonable. The Court remanded the case to the Maryland Court of Appeals, which determined that the officer did, in fact, have a reasonable articulable suspicion of danger when he conducted the protective sweep of the house.

The Supreme Court has also applied the "reasonable articulable suspicion" rule to automobile cases. In *Michigan v. Long*, the Court concluded that police officers are justified in conducting a Terry-type search of the passenger compartment of a motor vehicle during a lawful traffic stop when they reasonably believe it is necessary to protect themselves. Again, officers were required to have an "articulable suspicion that the suspect is potentially dangerous."

The Supreme Court developed an exception to the "reasonable articulable suspicion" standard, however, in *Pennsylvania v. Mimms* and *Maryland v. Wilson*. In those cases, the Court eliminated the

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47. *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted).
48. In *Buie*, the police went to Buie's house to execute an arrest warrant for robbery. *Id.* at 328. One of the officers called down to the basement for all occupants to come upstairs. Although there had been two suspects, only Buie emerged, whereupon the officers handcuffed him. Believing that the second suspect might be in the house, one officer went into the basement to make sure no other individuals were there and found evidence of the crime for which Buie was being arrested. *Id.*
49. *Id.* at 337.
50. *Buie v. State*, 320 Md. 696, 706, 580 A.2d 167, 172 (1990). The Court of Appeals explained that on the day of the offense, the officers secured arrest warrants for both Buie and his accomplice and immediately placed Buie's house under surveillance. *Id.* at 703, 580 A.2d at 170. The officers did not observe either suspect for two days. *Id.* at 703-04, 580 A.2d at 170-71. When they entered Buie's home and only Buie emerged from the basement, the officer who conducted the protective sweep was justified in believing that the other suspect might still be hiding in the basement. *Id.* at 705, 580 A.2d at 171. Moreover, the officer knew that Buie had used a gun in the robbery and it had not yet been recovered. *Id.* Thus, if the accomplice were still in the basement, he might have been armed. *Id.*
52. *Id.* at 1051.
53. *Id.* at 1052 n.16. The court in *Long* held that such suspicion existed. *Id.* at 1035. In that case, two police officers stopped a car after observing it speeding and swerving into a shallow ditch. *Id.* The driver, David Long, exited the car, meeting the officers at the rear of his vehicle. *Id.* After Long failed to respond to the officers' repeated requests for his driver's license and vehicle registration, the officers determined that Long was "under the influence of something." *Id.* at 1036. Long began to walk back toward the car, when the officers saw a hunting knife on the floorboard of the driver's side of the car. *Id.* Upon seeing the knife, the officers subjected Long to a pat-down search and found no weapons. *Id.* One officer then shined his flashlight into the car and saw something protruding from under the front-seat armrest. *Id.* After lifting the armrest, he found a bag of marijuana. *Id.*
need for a reasonable articulable suspicion of danger as a prerequisite for ordering drivers\textsuperscript{56} and passengers\textsuperscript{57} out of vehicles during lawful traffic stops by the police.\textsuperscript{58} In both cases, the Court reasoned that the State's concern for officer safety greatly outweighed the minimal inconvenience occasioned by the driver or passenger in exiting the vehicle.\textsuperscript{59} Although ordering occupants out of a vehicle does not rise to the level of a search,\textsuperscript{60} these cases demonstrate the Supreme Court's trend toward expanding police power at the expense of individual privacy, especially in automobile cases.

3. The Court's Reasoning.—In Stanfield, the Fourth Circuit conducted a reasonableness inquiry to determine whether Officer Mackel was justified in opening the passenger's side door of a vehicle with tinted windows.\textsuperscript{61} Using two different rationales, the court affirmed the district court's denial of Stanfield's motion to suppress the recovered cocaine.

\begin{itemize}
  \item \textsuperscript{56} Mimms, 434 U.S. at 111.
  \item \textsuperscript{57} Wilson, 117 S. Ct. at 886.
  \item \textsuperscript{58} In Mimms, two officers observed the defendant driving a car with an expired license plate. 434 U.S. at 107. While approaching the vehicle, one of the officers asked the driver to step out of the car. \textit{Id}. The State of Pennsylvania, although conceding that the officer had no reason to suspect foul play from the driver at the time of the stop because there was nothing suspicious about his behavior, stated that it was the officer's practice to order all drivers out of their vehicles whenever they had been stopped for a traffic violation. \textit{Id}. at 109-10. The Court concluded that this practice was constitutional because the safety of the officer outweighs the individual's privacy concerns. \textit{Id}. at 111. It explained that being required to exit a vehicle is "at most a mere inconvenience," while the officer has a substantial interest in protecting himself from the dangers of ongoing traffic and potential violence by the driver by asking him to "step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both." \textit{Id}. 434 U.S. at 107.
  \item In Wilson, an officer attempted to pull a car over for speeding. 117 S. Ct. at 884. During his pursuit, he noticed the two passengers repeatedly ducking out of his sight and then reappearing. \textit{Id}. When the car finally pulled over, the officer approached it and noticed that the front-seat passenger "was sweating and . . . appeared extremely nervous." \textit{Id}. The officer instructed the passenger to exit the vehicle. \textit{Id}. When he got out of the car, a quantity of crack cocaine fell to the ground. \textit{Id}. On appeal, the Supreme Court reiterated the view, announced in Mimms, that the danger to an officer from a traffic stop is substantial and is likely to be greater when there are passengers in the vehicle. \textit{Id}. at 886. The Court then held that an officer making a traffic stop may order passengers out of the car as a matter of course. \textit{Id}. at 886.
  \item \textsuperscript{59} See Wilson, 117 S. Ct. at 886; Mimms, 434 U.S. at 111.
  \item \textsuperscript{60} See Wilson, 117 S. Ct. at 886 ("The only change in [a passenger's] circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car."); Mimms, 434 U.S. at 111 ("The driver is being asked to expose to view very little more of his person than is already exposed.").
  \item \textsuperscript{61} Stanfield, 109 F.3d at 979-81.
\end{itemize}
a. Bright-Line Rule.—First, the court determined that the government’s interest in protecting police officers often outweighs an individual’s expectation of privacy in a vehicle, particularly in cases involving tinted windows. This fact, according to the court, justifies a bright-line rule allowing police officers to open at least one door of a vehicle with heavily tinted windows whenever “it appears in their experienced judgment prudent to do so.” It based this determination on an analysis of prior cases involving protective searches by police officers.

The court noted that Fourth Amendment cases have often focused on protecting police officers. It cited Terry and Long as cases allowing officers to conduct pat-down type searches of individuals and their cars “‘as long as they possess [a] reasonable belief that the suspect is potentially dangerous.’” It then noted that, in Mimms and Wilson, the Supreme Court adopted bright-line rules allowing officers to order drivers and passengers from vehicles during routine traffic stops, even without a reasonable fear of danger, in order to ensure the officers’ safety.

The court concluded that, given the Supreme Court’s precedent regarding protective searches, a bright-line rule allowing the searches of cars with tinted windows was in order. It asserted that tinted windows pose a unique danger to police officers: “[W]e can conceive of almost nothing more dangerous to a law enforcement officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer’s view by darkly tinted windows.”

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62. Id. at 980-81.
63. Id. at 981.
65. Id.
66. Id. at 980 (alteration in original) (quoting Long, 463 U.S. at 1051).
67. Id. The court noted that the justification behind the rule announced in Mimms was that “the additional intrusion on personal liberty occasioned by requiring drivers to exit their vehicles and to move off onto the shoulder of the road [is] de minimis,” “at most a mere inconvenience,” because “[t]he driver is being asked to expose to view very little more... than is already exposed’ when the driver is seated in his automobile.” Id. (second alteration in original) (citations omitted) (quoting Mimms, 434 U.S. at 111; Terry, 392 U.S. at 17). It further noted that “the Court in Wilson recently expanded the Mimms per se rule to allow officers to order not only drivers, but all occupants,” out of the car in order to ensure officer safety. Id. at 980-81 (citing Wilson, 117 S. Ct. at 883).
68. See id. at 981 (“Notwithstanding that the Court ‘generally eschew[s] bright-line rules in the Fourth Amendment context,’ we believe that the Court’s decisions in Mimms and Wilson in particular would support [a new rule for cars with tinted windows].” (first alteration in original) (citations omitted) (quoting Wilson, 117 S. Ct. at 885 n.1)).
69. Id.
The court then reasoned that the privacy interest at stake when an officer opens a vehicle's door is minor in comparison to the potential danger to police officers.\textsuperscript{70} Because a driver must expose some of the inside of his car when he lowers the window to interact with the officer, the officer's opening of one of the vehicle's doors "would seem minimal when measured against the enormous danger law enforcement officers face when they approach a vehicle with heavily tinted windows."\textsuperscript{71} The court also noted that this invasion of privacy is no greater than when an occupant must open his door to exit the vehicle under the authority of \textit{Mimms} or \textit{Wilson}.\textsuperscript{72}

The court's final justification for its bright-line rule was that no alternative would infringe less upon the privacy interests of occupants of vehicles with tinted windows while still protecting police officers to the same degree.\textsuperscript{73} Simply ordering the occupants out of the vehicle would subject police officers to the danger of attack, and ordering the occupants to open the vehicle's doors themselves would allow them to move about the vehicle, thus giving them an opportunity to access weapons.\textsuperscript{74} Therefore, the court adopted a bright-line rule that "would at least reduce . . . the enormous danger to which law enforcement authorities are exposed as a consequence of the advent of tinted windows."\textsuperscript{75}

\textbf{b. Existing Law: Reasonable Articulable Suspicion.}—In the second half of its analysis, the court stated that, even absent a bright-line rule, its holding was justified under the principles of \textit{Terry}, \textit{Long}, and \textit{Buie}.\textsuperscript{76} The court found that Officer Mackel had a reasonable articulable suspicion of danger when he opened Stanfield's door.\textsuperscript{77} The court pointed to the following facts as creating this reasonable articulable suspicion:\textsuperscript{78} First, Stanfield committed a traffic violation, justifying the officers' stop of the vehicle.\textsuperscript{79} Second, the stop occurred in

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at 982.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.}; \textit{see supra} notes 54-58 and accompanying text.
\item \textsuperscript{73} \textit{Stanfield}, 109 F.3d at 983 ("There simply do not appear to be any alternatives to the bright-line rule we suggest, which would infringe less on the residual privacy interests that drivers and passengers retain . . . ").
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 984.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} See \textit{infra} text accompanying notes 90-118 for the sufficiency of these considerations.
\item \textsuperscript{79} \textit{Stanfield}, 109 F.3d at 984.
\end{itemize}
the "early morning in a relatively deserted area of town." Third, the area was known to be a high crime area. Fourth, Stanfield's vehicle "is of the class of four wheel drive vehicles favored by drug dealers." Fifth, the tinting on the windows precluded the officers from determining whether Stanfield was alone or had access to weapons. Finally, Stanfield was talking to "a known drug dealer" at the time of the stop.

The court deemed these considerations sufficient to give Officer Mackel a reasonable articulable suspicion that Stanfield could have been armed and dangerous, therefore, the court reasoned, his act of opening the passenger's side door of Stanfield's vehicle was a justifiable protective search of the interior of Stanfield's vehicle. It concluded that even absent a new bright-line rule, the search was constitutional.

4. Analysis.—The Fourth Circuit's new bright-line rule declares that:

Whenever, during a lawful traffic stop, officers are required to approach a vehicle with windows so heavily tinted that they are unable to view the interior of the stopped vehicle, they may, when it appears in their experienced judgment prudent to do so, open at least one of the vehicle's doors and, without crossing the plane of the vehicle, visually inspect its interior in order to ascertain whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who might pose a danger to the officers.

Although the court claimed that this rule is consistent with the principles of Terry, Long, and Buie, a careful analysis of the facts reveals that the circumstances of this case were not sufficient to give Officer Mackel a reasonable suspicion of danger. As a result, the court's new rule becomes an extension of police power and discretion resulting in the further limitation of an individual's right against un-
reasonable searches. Also, because of the subjectivity of the new rule, it is likely to facilitate police abuse of discretion and discrimination because there are no longer any sufficient objective limitations on when officers may search cars with tinted windows.

a. The Court's Holding Is Not Justified Under Existing Principles.—Contrary to the court's assertion, its holding is not in accord with the principles of existing Fourth Amendment law. After considering the facts of this case and comparing them to the facts of other reasonable articulable suspicion cases, it becomes apparent that at the time Officer Mackel opened Stanfield's door, he did not have articulable facts that would warrant a reasonably prudent officer in believing that the Pathfinder harbored an individual posing a danger to the officers or that Stanfield was armed and presently dangerous. A balancing between Stanfield's privacy interests and the government's interest in protecting police officers reveals further that the court's holding is not justified under existing law.

(1) Factual Analysis.—In determining whether the officers in Stanfield had a reasonable articulable suspicion of danger sufficient to justify opening Stanfield's car door, the totality of the circumstances facing the officers must be considered. The court articulated six facts that it claimed were sufficient to justify a reasonable suspicion of danger: Stanfield was double-parked, the stop occurred early in the morning, the area had a high crime rate, Stanfield was in a vehicle "favored by drug dealers," the vehicle had tinted windows, and Stanfield was talking to "a known drug dealer." However, a careful analysis shows that these facts, when considered with the other circumstances of the event, could not have created a reasonable articulable suspicion of danger.

Two of these facts, the type of vehicle Stanfield was driving and his acquaintance's status as a known drug dealer, are not appropriate

90. The court stated:

Even absent a . . . per se rule that officers may, in the circumstances we have described, open a vehicle's door to [determine] the number of occupants within and whether any of those occupants are armed or have access to weapons, . . . Officer Mackel's opening of Stanfield's passenger door was fully authorized under the principles, if not by the direct holdings, of Terry, Long and Buie. Officer Mackel's belief that he was potentially in danger as he approached Stanfield's Pathfinder was imminently reasonable; it would be folly to suggest otherwise.

Stanfield, 109 F.3d at 984.


92. Stanfield, 109 F.3d at 984 (internal quotation marks omitted); see also supra text accompanying notes 79-84.
considerations for the purpose of determining whether reasonable articulable suspicion existed. The court explained that Pathfinders are a type of vehicle "favored by drug dealers." However, the court gave no authority for this generalization. Unless the court could show that Pathfinders are associated with dangerous individuals and that the officers here based their suspicion of danger on this association, the type of car Stanfield was driving should not be considered. Moreover, at least one circuit has explicitly eschewed this consideration in determining the existence of reasonable articulable suspicion.

"[W]e must not accept what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." The court is in danger of doing this when it accepts the stereotype of Pathfinders as indicative of criminal activity and danger. Thus, the type of car Stanfield was driving was an inappropriate consideration in determining the officers' reasonable articulable suspicion of danger.

It was also inappropriate to consider Stanfield's talking to a "known drug dealer" as an articulable fact under the reasonable articulable suspicion test. In Sibron v. New York, a police officer saw a suspect speaking with a group of known drug users and argued later that this gave him reason to fear for his safety. The Supreme Court concluded that "[t]he suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." Thus, the fact that Stanfield's acquaintance was identified by the officers as being a drug dealer could not legally give rise to a reasonable articulable suspicion of danger.

The remaining circumstances of the Stanfield case did not warrant Officer Mackel's opening of Stanfield's door. It is true that Stanfield was engaged in a traffic offense at the time the search occurred, but it

93. Stanfield, 109 F.3d at 984.
94. See United States v. Ornelas-Ledesma, 16 F.3d 714, 716-17 (7th Cir. 1994) (rejecting the officers' contention that their reasonable articulable suspicion was bolstered by the suspect's two-door General Motors vehicle, a "favorite" of drug traffickers), vacated on other grounds sub nom. Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996).
95. United States v. Rodriguez, 976 F.2d 592, 595-96 (9th Cir. 1992), amended by 997 F.2d 1306 (9th Cir. 1993).
96. Stanfield, 109 F.3d at 984.
98. Id. at 62.
99. Id. at 64.
was a concededly minor, non-violent offense.\textsuperscript{100} In some cases, activity appearing innocuous to an average person might appear suspicious when observed by a trained officer.\textsuperscript{101} However, the State produced no evidence indicating that the officers in this case had any reason to believe that double-parking was an indication of dangerousness.\textsuperscript{102}

Similarly, the time of day in this case does not lend any support to a finding of reasonable articulable suspicion. The officers saw Stanfield at 9:00 a.m.,\textsuperscript{103} in broad daylight. The courts on occasion have considered the time of day relevant to the formation of a reasonable suspicion of danger, but generally only when it was in the middle of the night or some time when it would be unusual for people to be out on the streets\textsuperscript{104}. It seems reasonable for people to be on the streets at 9:00 a.m. Thus, this consideration fails to support the officer's claim that he believed he was in danger.

The characteristics of the area in which the officers stopped Stanfield was an appropriate consideration—it is settled that an area's disposition toward criminal activity is an articulable fact that officers may consider.\textsuperscript{105} However, as the Fourth Circuit recognized in United States v. Moore,\textsuperscript{106} an individual's mere presence in a high crime area is

\textsuperscript{100} Stanfield's vehicle was double-parked, blocking the flow of two-way traffic. Stanfield, 109 F.3d at 978; see MD. CODE ANN., TRANSP. II § 21-1003(r) (1992 & Supp. 1996) (prohibiting double-parking); id. § 27-101(b) (making double-parking a misdemeanor punishable with a fine of not more than $500).

\textsuperscript{101} See United States v. Cortez, 449 U.S. 411, 419 (1981) (explaining that "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion").

\textsuperscript{102} Cf. Terry v. Ohio, 392 U.S. 1, 22-23 (1968). In Terry, the officer observed seemingly innocent behavior—two men repeatedly walking past a store window, looking in, and then conferring with each other—but in his trained experience, the officer recognized this behavior as indicative of the planning of an armed robbery. Id. Given the possible crime involved, it was reasonable for the officer to suspect that the individuals might be armed. Id. at 28.

\textsuperscript{103} Stanfield, 109 F.3d at 978.

\textsuperscript{104} See Michigan v. Long, 463 U.S. 1032, 1050 (1983) (considering relevant the fact that "the hour was late"); Adams v. Williams, 407 U.S. 143, 147 (1972) (considering relevant the fact that the stop occurred at 2:15 a.m.); United States v. Bull, 565 F.2d 869, 870 (4th Cir. 1977) (per curiam) (declaring that whether it was "late at night or not" should be considered in determining whether an officer reasonably feared that an individual might be armed); Brian J. O'Connell, Casenote, Search and Seizure: The Erosion of the Fourth Amendment Under the Terry-Standard, Creating Suspicion in High Crime Areas, 16 U. DAYTON L. REV. 717, 730 (1991) (noting that courts sometimes consider the time of day at which a suspect is observed in determining whether reasonable suspicion exists).

\textsuperscript{105} See United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Officers may consider the characteristics of the area in which they encounter a vehicle.").

\textsuperscript{106} 817 F.2d 1105 (4th Cir. 1987).
not, by itself, enough to raise reasonable suspicion. Thus, the officers in Stanfield must have had other reasons for fearing danger.

The officers did have another reason. The most important consideration in the totality of the circumstances of Stanfield was the fact that Stanfield's car windows were heavily tinted. Because the officers could not see inside the Pathfinder, they could not tell whether Stanfield had a weapon or whether other individuals were inside. However, an officer's lack of knowledge regarding whether a dangerous person or weapon is in the vehicle could not rise to the level of an individualized suspicion. An officer must have some particular reason to believe that the tinted windows are hiding a dangerous person or weapon; mere lack of knowledge occasioned by tinted windows is insufficient.

Thus, the court's six articulable facts boil down to three officers approaching a car with tinted windows in a high crime area. There are other facts that the court did not consider that should also be weighed in a totality of the circumstances analysis. The officers were armed and wearing bullet-proof vests and were patrolling their normal beat at the time they encountered Stanfield. They circled the block once before stopping him. They did not see Stanfield engaging in any dangerous crimes. They did not see a weapon. Stanfield was calm and cooperated with the officers. Therefore, the court

107. Id. at 1107; see also United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993) (noting that an area's propensity toward criminal activity, while a valid consideration, is not by itself enough to raise reasonable suspicion); People v. Aldridge, 674 P.2d 240, 242 (Cal. 1984) ("A history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality.").
108. Stanfield, 109 F.3d at 984.
109. Id.
110. See United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996) ("Lack of information cannot provide an articulable basis upon which to justify a protective sweep."); see also United States v. Akrawi, 920 F.2d 418, 420 (6th Cir. 1990) (holding that it was improper for the officers to conduct a protective sweep of an arrestee's home, because they articulated no specific basis for believing that the residence harbored any individual posing a threat to them); United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1298-99 (9th Cir. 1988) (concluding that the officers failed to point to specific and articulable facts supporting their belief that dangerous persons were on the premises when they had no information that any other persons were in the suspect's apartment or that weapons were left in the apartment).
111. Cf. Buie v. State, 320 Md. 696, 580 A.2d 167 (1990) (holding that an officer had reason to believe that a second suspect might be dangerous and hiding in Buie's basement when the officer knew that two men committed an armed robbery, neither man had been seen, the gun had not been found, and Buie emerged from his basement alone).
112. Stanfield, 906 F. Supp. at 301.
113. Id.
114. Id. at 302.
should have concluded that the officers were in control of the situation.

Finally, other factors that the courts have considered relevant in establishing reasonable articulable suspicion were not present in this case. Other than violating a minor traffic law, Stanfield was not engaged in particularly suspicious activity, as the suspects in Terry were. Stanfield did not appear to be intoxicated, and he did not act nervous or attempt to avoid the officers when they approached him. On the contrary, the officers testified that he was "calm and cooperative." Nor did the officers see any bulges in Stanfield's clothing or any weapons through his open driver's side window that would cause them to fear danger. It becomes even more apparent that the totality of the circumstances did not produce a reasonable articulable suspicion when the facts in Stanfield are compared to the facts of other cases establishing the standard.

(2) Comparison to Other Cases.—Despite the court's insistence to the contrary, the facts in Stanfield simply do not rise to a comparable level of urgency as in the other cases interpreting the "reasonable articulable suspicion" standard, especially the principal cases of Terry, Long, and Buie. As the comparison demonstrates, the Fourth Circuit's holding in Stanfield expanded police power.

First, the court noted that, in Terry, the officer observed conduct that was "entirely innocent in itself," but he was still justified in believing that one of the men could be armed. Stanfield, the court explained, was not engaged in innocent behavior—he was actually committing an offense by double-parking. This comparison ignores the Supreme Court's express rationale that the officer in Terry

115. See supra note 40 and accompanying text.
116. Cf. Michigan v. Long, 463 U.S. 1032, 1050 (1983) (considering the suspect's apparent intoxication an appropriate factor); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (noting that, in determining whether reasonable suspicion existed, the driver's obvious attempts to evade officers can be relevant); Adams v. Williams, 407 U.S. 143, 148 (1972) (concluding that the suspect's failure to comply with the officer's order to get out of the car helped to establish the officer's reasonable fear of danger).
118. Cf. Long, 463 U.S. at 1050 (1983) (considering the officers' observation of a hunting knife in the car important in establishing a reasonable suspicion); United States v. Trullo, 809 F.2d 108, 113-14 (1st Cir. 1987) (noting that the bulge in the suspect's pocket created a particularized suspicion).
119. In the second half of its analysis, the court compared the facts of Stanfield and the facts of Terry, Long, and Buie, ultimately concluding that the officers in Stanfield faced an equal or greater danger. Stanfield, 109 F.3d at 985-87.
120. Id. at 986 (citing Terry v. Ohio, 392 U.S. 1, 28 (1968)).
121. Id.
properly interpreted the suspects' actions as preparation for an armed robbery, a crime that generally involves a weapon. Double-parking ordinarily does not involve a weapon, so the same conclusion of reasonableness does not follow.

The court also observed that the stop in Terry did not occur in a high crime area or involve a suspect in a car associated with criminal activity talking with a known drug dealer, as the district court found to be the case in Stanfield. As discussed above, though, the type of car and the criminal status of Stanfield's acquaintance are improper considerations. Further, the characteristics of the area cannot give rise to the requisite individualized suspicion of danger. The officer in Terry had that individualized suspicion because of the suspects' conduct before the stop. The officers in Stanfield did not observe any unusual or dangerous conduct on the part of Stanfield.

Second, the court claimed that "[t]here was more reason for Officer Mackel to believe that his safety might be in danger than there was in Long for Deputies Howell and Lewis to believe that their safety might be in danger." The court reasoned that the officers in Long conducted the search of Long's vehicle after they had already detained and frisked him; thus they knew he was alone and unarmed at the time they searched his vehicle. In Stanfield, however, the officers had just initiated their encounter with Stanfield when Officer Mackel opened his car door, so they did not know whether he was alone or armed. The court's analysis is oversimplified. The Court in Long held the officers' search permissible because it was late at night, Long was speeding and driving recklessly, he got out of his car without a request from the officers, he failed to comply with the officers' orders, and he appeared to be intoxicated. Further, the officers had seen a hunting knife in the car as Long was about to reenter it. These facts show a greater potential for danger than in Stanfield.

122. Terry, 392 U.S. at 28.
123. Stanfield, 109 F.3d at 986.
124. See supra notes 93-99 and accompanying text.
125. See supra notes 105-107 and accompanying text.
126. Stanfield, 109 F.3d at 985.
127. Id. (citing Michigan v. Long, 463 U.S. 1032, 1050 (1983)).
128. Id.
129. Long, 463 U.S. at 1050.
130. Id. In Stanfield, the Fourth Circuit claimed that the Supreme Court did not rely on the observation of the hunting knife in Long's car to justify the officers' reasonable suspicion of danger. 109 F.3d at 985 n.6. However, the Supreme Court did mention the knife as one of the relevant factors in finding the officers' search permissible. See Long, 463 U.S. at 1050.
where it was 9:00 a.m., Stanfield was merely sitting in his car, he was cooperative with the officers and did not appear to be intoxicated, and the officers had not observed any behavior on his part that might indicate that he had weapons in the car. Although the officers could not see the entire interior of his car, the officers did see Stanfield himself through the open driver's side window, and he did not appear to lunge or reach for anything as the officers approached.

Finally, the court compared Stanfield to Buie. It first pointed out that, through his use of tinted windows, Stanfield was able to secure for himself a confined setting into which the officers could not see. Thus, the officers had to confront Stanfield on his own "turf," just as the officers in Buie had to do when confronting a suspect in his home. In Buie, however, the Court emphasized that a person's home is his "turf" because it has a configuration with which an officer is unfamiliar. Although tinted windows on a car make the inside difficult or impossible to see, the interior of a car is not an "unknown configuration" in the same sense as a home. A home has several rooms in which people or things may be hidden. This is not the case with vehicles, which have only limited space. Further, the interiors of various automobiles are relatively uniform, while the insides of homes vary drastically. Although the officers' inability to see into the car is a valid concern, it is not the same type of concern confronting the officers in Buie.

It further explained that in Buie, there were six or seven officers, while in Stanfield there were only three. However, in Buie, the officers had to search an entire house, while in Stanfield, the encounter was a simple traffic stop involving only one vehicle.

The court then asserted that in Buie the officers went to the house specifically to arrest Buie and were thus prepared for "anything that might develop," but in Stanfield the officers came upon Stanfield

131. Stanfield, 109 F.3d at 978.
132. Id.
134. Stanfield, 109 F.3d at 987.
135. Id.
136. The officers made no mention of any such movement.
137. Stanfield, 109 F.3d at 987.
138. Id.
139. Id.
141. See supra notes 108-109 and accompanying text.
142. Stanfield, 109 F.3d at 987.
unexpectedly. The court apparently failed to consider that when the officers saw Stanfield double-parked, they circled the block once before stopping in front of his car. Additionally, they were patrolling their normal beat, were armed, and were wearing bullet-proof vests. These facts show that the officers were prepared for possible danger.

The Stanfield court further commented that in Buie, there appeared to be no specific facts to support an inference that someone might be hiding in the house with Buie. The court then admitted that the officers in Stanfield "likewise had no specific reason to believe that there were other passengers in the Pathfinder." It claimed that the officers' lack of information regarding the number of people in the car justified their fear of danger. But that contradicts the very concept of a reasonable articulable suspicion, which requires that the officers have some specific and articulable facts that reasonably warrant their fear. Lack of information cannot suffice.

Further, the majority in Buie concluded on remand that the officer did, in fact, have specific facts to justify a reasonable suspicion of danger. The officers there secured arrest warrants for two suspects and immediately placed Buie's house under surveillance. They saw neither suspect for two days. When they entered Buie's house, one officer called down to the basement for any occupant to come out. Only Buie emerged. The court held that the officer was entitled to suspect that Buie had been hiding out in his basement since the robbery and that the second suspect could have been with him. Further, the officer knew that Buie had used a gun in the burglary, and it

143. Id.
144. Id. at 978.
145. Id.
146. Id. at 987 (citing Buie v. State, 320 Md. 696, 709-10, 580 A.2d 167, 173-74 (1990) (Adkins, J., dissenting)).
147. Id.
148. Id.
149. See Terry v. Ohio, 392 U.S. 1, 21 (1968).
150. See supra note 110 and accompanying text.
151. See supra notes 93-111.
153. Id. at 703, 580 A.2d at 170.
154. Id.
155. Id. at 704, 580 A.2d at 171.
156. Id.
157. Id.
had not yet been recovered.\textsuperscript{158} The court concluded that the officer therefore had sufficient facts to determine that the second suspect could be hiding, armed, in the basement.\textsuperscript{159}

Prior cases from the Fourth Circuit and from other circuits lend further support to the conclusion that the totality of the circumstances in \textit{Stanfield} did not give rise to a reasonable articulable suspicion of danger. For instance, in \textit{United States v. Bull},\textsuperscript{160} the Fourth Circuit emphasized that, apart from the characteristics of the area, the suspicious conduct of the suspect, such as nervous conduct or an obvious attempt to avoid the officers, is a paramount factor in establishing a reasonable articulable suspicion of danger.\textsuperscript{161} Similarly, in \textit{United States v. Lender},\textsuperscript{162} the court based its decision that the officers had a reasonable articulable suspicion of danger on the suspect's refusal to comply with the officer's commands to stop and the fact that he brought his hands to the front of his waist as though reaching for something in that area.\textsuperscript{163} Again, the officers in \textit{Stanfield} conceded that Stanfield exhibited no such suspicious conduct.\textsuperscript{164}

In \textit{United States v. Moore},\textsuperscript{165} the Fourth Circuit found that because "[t]he hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons," the officer had a reasonable articulable suspicion of danger.\textsuperscript{166} In \textit{Stanfield}, by contrast, the hour was not late, the street was not dark, Officer Mackel was not alone, and the offense that Stanfield committed was not a felony that often involves the use of weapons.\textsuperscript{167}

The factors considered by the other circuits also indicate that more is needed to warrant a reasonable articulable suspicion of danger than was present in \textit{Stanfield}. In \textit{United States v. Rideau},\textsuperscript{168} the Fifth Circuit found a reasonable articulable suspicion of danger where the suspect was standing in the middle of the street in a high crime area at 10:30 p.m., failed to respond to the officer's request for his name.

\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.} at 706, 580 A.2d at 172. Specifically, the court said, "[A] prudent police officer in [this officer's] position could reasonably suspect that the basement harbored an individual who posed a danger to those on the arrest scene, and thus he was justified in conducting a cursory sweep of that area to neutralize the danger." \textit{Id.}
\textsuperscript{160} 565 F.2d 869 (4th Cir. 1977) (per curiam).
\textsuperscript{161} \textit{Id.} at 870-71.
\textsuperscript{162} 985 F.2d 151 (4th Cir. 1993).
\textsuperscript{163} \textit{Id.} at 153.
\textsuperscript{164} \textit{See Stanfield}, 906 F. Supp. at 302.
\textsuperscript{165} 817 F.2d 1105 (4th Cir. 1987).
\textsuperscript{166} \textit{Id.} at 1108.
\textsuperscript{167} \textit{See Stanfield}, 109 F.3d at 978.
\textsuperscript{168} 969 F.2d 1572 (5th Cir. 1992) (en banc).
seemed nervous, and tried to back away.\textsuperscript{169} Similar factors were not present in \textit{Stanfield}.

The Seventh Circuit, in \textit{United States v. Richards},\textsuperscript{170} concluded that the officers had a reasonable articulable suspicion of danger when the suspect they were arresting opened the door of his house with a gun and failed to answer the officers’ question about whether anyone else was in the house.\textsuperscript{171} The same court found a protective sweep of a car constitutional in \textit{United States v. Evans},\textsuperscript{172} concluding that the officers had a reasonable articulable suspicion of danger when they observed a suspect speeding and weaving in and out of traffic and then leaning forward as if to reach under the seat for something upon seeing the officers behind him.\textsuperscript{173}

These cases from the Supreme Court and the Fourth, Fifth, and Seventh Circuits provide guidance as to what constitutes a reasonable articulable suspicion. The circumstances facing the officers in \textit{Stanfield} simply do not compare. Thus, Officer Mackel did not have the proper individualized suspicion necessary to open Stanfield’s car door and look inside.

\textit{(3) Balancing Test.}—Under the circumstances of this case, the government’s interest in protecting the three officers did not outweigh Stanfield’s privacy interest. Stanfield had a substantial interest in the privacy of his vehicle. Many of the rationales for holding that individuals have a lesser expectation of privacy in cars become obsolete when tinted windows are involved. Although drivers should expect some police contact given the extensive codes regulating the condition and manner in which vehicles may be operated,\textsuperscript{174} this regulation generally does not involve the passenger compartment of the vehicle, and any police contact should be with the driver, not the inside of his car. In cars without tinted windows, the privacy interest of the driver is diminished by this regulatory contact because officers, when dealing with the driver, can see through the windows into the inside of the car. However, in cars with tinted windows, the officer’s view is confined to the outside of the car and whatever part of the inside as can be viewed through the open driver’s side window (which, incidentally, are all that an officer needs to see in order to conduct a

\begin{thebibliography}{99}
\bibitem{169} \textit{Id.} at 1574-75.
\bibitem{170} 937 F.2d 1287 (7th Cir. 1991).
\bibitem{171} \textit{Id.} at 1291-92.
\bibitem{172} 994 F.2d 317 (7th Cir. 1993).
\bibitem{173} \textit{Id.} at 321.
\end{thebibliography}
routine traffic stop to be sure that all vehicle regulations are met). The regulations still exist, but they do not lessen the driver’s interest in the privacy of his car’s interior when the car has tinted windows.

Similarly, the justification that the occupants and contents of cars are “open to public view”175 does not apply when a vehicle has tinted windows, because tinting precludes direct observation of the inside of the car. Indeed, the very purpose of tinting is to preserve the privacy of the passenger compartment of the car.

The Supreme Court’s decision in California v. Carney,176 however, seems to indicate that tinted-windowed cars should be accorded no greater expectation of privacy than cars without tinted windows. The defendant in Carney had a motor home with shades covering all the windows.177 The Court concluded that he was not entitled to any greater expectation of privacy than owners of regular cars because “[t]hese reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.”178 However, it did not articulate a reason why pervasive regulation should diminish one’s expectation of privacy when that regulation does not result in an officer’s being able to see into the vehicle. Due to the growing popularity of tinted windows, it is time for the courts to reevaluate the reasons for according vehicles a lesser expectation of privacy. The Carney dicta is simply no longer persuasive.

Finally, tinted windows are legal in Maryland, although the degree of tinting is regulated.179 Until the legislature outlaws tinted windows, law enforcement should respect the privacy sought by drivers taking this measure.180

175. See United States v. Chadwick, 433 U.S. 1, 13 (1977) (recognizing that one fact that diminishes the privacy aspect of an automobile is that its contents are open to public view); see also Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) (claiming that “[a] car has little capacity for escaping public scrutiny” because its contents are in plain view).
177. Id. at 390.
178. Id.
Therefore, individuals who have cars with tinted windows are justified in having a somewhat greater expectation of privacy in their cars than those whose cars do not have tinted windows. The court in Stanfield failed to recognize Stanfield's privacy interest adequately, especially considering the lack of articulable facts by the police officers indicating Stanfield could be dangerous.

Given this analysis, it is clear that, contrary to the court's opinion, Officer Mackel's search of Stanfield's Pathfinder was unreasonable and unjustified under existing Fourth Amendment precedent. The court's attempt to fashion a bright-line rule regarding cars with tinted windows may have been predictable in light of the continuing trend toward limiting individual privacy rights in automobiles, but it is unnecessary because the "reasonable articulable suspicion" standard adequately protects officer safety while preserving the individual right to privacy. More importantly, the bright-line rule is likely to facilitate discrimination and abuse of discretion by police officers.

b. Potential Consequences of the Bright-Line Rule.—The wording of the new rule indicates the Fourth Circuit's intention to limit the availability of this rule to those situations in which officers fear for their safety. The court held that officers can only open a car door "when it appears in their experienced judgment prudent to do so," and further limited the search to a visual inspection from outside the plane of the vehicle "to ascertain whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who might pose a danger to the officers." However, as explained below, the new rule significantly differs from the "reasonable articulable suspicion" standard, because it calls for a subjective, rather than an objective test. This subjectivity is likely to lead to abuse.

The Supreme Court in Terry clearly stated that the "reasonable articulable suspicion" rule is "an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?'" It further indicated that a subjective standard would be unconstitutional: "'If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.'"

181. Stanfield, 109 F.3d at 981.
183. Id. at 22 (quoting Beck, 379 U.S. at 97 (quoting U.S. Const. amend. IV)).
The Fourth Circuit’s bright-line rule eliminates the objectivity inherent in the “reasonable articulable suspicion” rule in cases involving the searches of cars with tinted windows. Under the new rule, officers can open the doors of cars with tinted windows whenever it appears “in their experienced judgment prudent to do so.” The rule does not require that a reasonable officer would feel it prudent to open the door. It only requires that the officer in question feels it prudent to do so. This rule is subjective and potentially unconstitutional because it puts individual rights in the hands of police discretion.

Too much police discretion creates a potential for arbitrary and discriminatory law enforcement, and this is especially likely when dealing with tinted windows. The courts should avoid creating a stereotype that cars with tinted windows belong to drug dealers or some other type of criminal. In a recent poll, researchers found that many African-American men “take measures such as avoiding tinted windows or special detailing on cars ... that might draw police attention.” With the Stanfield rule, an officer’s claim, no matter how unreasonable, that he felt he was in danger during a traffic stop of a car with tinted windows because of the tinting on the windows, will justify a search of that car. Thus the existence of tinted windows provides a smokescreen to disguise the officer’s true motives. “And, through this smokescreen, it becomes possible for an officer to overly rely on stereotyped conceptions of race when deciding which motorists to investigate.”

The courts have tried to avoid the facilitation of stereotypes, because stereotypes are unreliable. For instance, the courts generally reject the use of “drug courier profiles,” relied on by police officers in traffic cases to establish a reasonable suspicion of criminal activity, because they tend to describe too many law-abiding individuals. Permitting the existence of tinted windows to be a justification for opening people’s car doors without notice is analogous, because many law-abiding non-dangerous individuals have cars with tinted windows.

184. Stanfield, 109 F.3d at 981 (emphasis added).
186. Cf id. at 570-71.
187. Id.
188. See, e.g., United States v. Tapia, 912 F.2d 1367, 1371 (11th Cir. 1990) (rejecting a profile because it included “a combination of factors that could plausibly describe the behavior of a large portion of motorists engaged in travel upon our interstate highways”); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418-19 (9th Cir. 1989) (rejecting a profile because it describes “too many individuals” including “many law-abiding motorists”).
Nonetheless, they are all now subject to searches by police officers, at the officers’ discretion. The court’s rule indicates that in almost any stop of a car with tinted windows, police officers may open the car’s door and look inside.

The subjective standard set forth in the court’s bright-line rule cannot be justified under the Constitution. As the court in United States v. Colbert189 aptly stated:

It would perhaps reduce the danger inherent in the job if we allowed the police to do whatever they felt necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility. As long as it is in existence, police must carry out their often dangerous duties according to certain prescribed procedures . . . .190

5. Conclusion.—The general trend toward limiting the privacy rights of individuals in automobiles reached a new level with the Fourth Circuit's decision in United States v. Stanfield. The court’s holding that Officer Mackel acted properly when he searched Stanfield’s car with tinted windows was not justified under the standard of “reasonable articulable suspicion,” because the officer did not have sufficient articulable facts to support a reasonable suspicion of danger. Further, Stanfield’s interest in maintaining privacy in his vehicle outweighed the officer’s interest in protecting his safety because there was no objective threat of danger. Finally, the court’s bright-line rule that police officers may search cars with tinted windows whenever they feel it “prudent” to do so introduces a subjective element that may result in police abuse of discretion and discrimination.

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189. 76 F.3d 773 (6th Cir. 1996).
190. Id. at 778.
V. HEALTH CARE

A. Limiting Psychiatrists’ Full Recovery for Services Rendered to Qualified Medicare Beneficiaries

In *Maryland Psychiatric Society, Inc. v. Wasserman*, the Fourth Circuit Court of Appeals concluded that states participating in the Qualified Medicare Beneficiary (QMB) program are not required to pay the 37.5% Medicare exclusion of costs incurred for outpatient psychiatric services provided to Qualified Medicare Beneficiaries (QMBs). Based on its interpretation of the Medicare and Medicaid statutes, the court made three findings: (1) the 37.5% exclusion does not fit under the definition of “coinsurance” as that term is defined in the Medicare/Medicaid statutes; (2) psychiatrists do not possess a statutory right to recover 100% of the costs for services they provide; and (3) by designating less funding for mental health services than for physical health services, Congress could not have intended to require states to fund a larger share of these mental health expenses. In reaching these conclusions, the court failed to give adequate attention to established case law, and it neglected to address Congress’s overall intent in creating the QMB program. While the court’s decision succeeds in sparing the states the burden of paying the 37.5% exclusion, it does so by undermining the purpose of the QMB program.

1. The Case.—The Maryland Psychiatric Society, Inc. (the Society), a professional association of psychiatrists, brought suit, demand-
ing injunction and declaratory relief, against the United States Secretary of Health and Human Services and the Maryland Secretary of Health and Mental Hygiene, challenging their interpretation of the federal laws concerning payments for outpatient psychiatric services under the QMB program.\(^8\)

The QMB program is a joint Medicare/Medicaid program that allows impoverished elderly or disabled persons to be eligible for both Medicare Part A enrollment and Part B insurance coverage.\(^9\) Although QMBs are eligible for Medicare Part A enrollment and Part B insurance coverage, they may not be able to afford the Part B supplementary coverage premiums or Part A's or Part B's deductibles or coinsurance amounts.\(^10\) Therefore, the QMB program requires that states use state Medicaid funds to pay for QMBs' Medicare Part B premiums and the deductibles and coinsurance payments that beneficiaries incur under both Medicare Part A and Part B.\(^11\)

Under Medicare Part B, enrollees are required to pay a monthly premium and an annual deductible.\(^12\) Once the deductible is depleted, the federal government will pay for 80% of any "reasonable charge" for services provided.\(^13\) The provider can then charge the beneficiary the remaining 20% of the fee schedule amount.\(^14\) As part of the QMB program, states are required to pay the remaining 20% on behalf of their QMBs.\(^15\)

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8. Id. at 718-19. A QMB is defined as an individual who (a) is entitled to benefits under Medicare Part A, (b) has an income that does not exceed the federal poverty line, and (c) has resources not exceeding twice the maximum amount of resources that an individual may retain in order to receive benefits under the Supplemental Security Income program. 42 U.S.C. § 1396d(p)(1). There are two types of QMBs: dual eligibles and pure QMBs. Rehabilitation Ass'n, 42 F.3d at 1447. Dual eligibles are persons who are eligible for both Medicare and Medicaid benefits under the strict Medicare and Medicaid requirements. Id. Pure QMBs are individuals who are eligible for Medicare, but are ineligible for Medicaid despite their satisfaction of certain criteria for poverty. Id.

9. Rehabilitation Ass'n, 42 F.3d at 1447-48.

10. Id.

11. Id.


13. See 42 U.S.C. § 1395l(a) (explaining payment of Medicare benefits for services not including mental disorders). The reasonable charges are determined annually by the Secretary of Health and Human Services and are contained in the Model Fee Schedule. See 42 U.S.C. § 1395w-4 (1994).

14. 42 U.S.C. § 1395l(a). This remaining 20% is usually referred to as a copayment or coinsurance. Rehabilitation Ass'n, 42 F.3d at 1446.

15. In order to receive federal funding for their Medicaid programs, states must participate in the QMB program and agree to pay the "Medicare cost-sharing" expenses for QMBs. 42 U.S.C. § 1396a(a)(10)(E) (1994). "Medicare cost-sharing" includes four categories that the state must pay for through its Medicaid program: premiums, coinsurance,
Although Medicare pays for 80% of the entire fee schedule amount for most services, outpatient psychiatric services are only partially reimbursed. Under 42 U.S.C. § 1395l(c), the federal government is responsible for only 80% of 62.5% of the total fee schedule amount for any outpatient mental health services. For QMBs, the states are required to pay the remaining 20% of the 62.5%. After both Medicare and Medicaid have reimbursed the provider for the requisite amount, there is still 37.5% of the fee schedule amount that has not been paid. Although the provider may charge most beneficiaries for the remaining 37.5% of costs, federal law exempts QMBs from such charges.

Under the Secretaries' interpretation of the QMB program, the states are not required to pay for the 37.5% exclusion that remains after the federal and state governments have paid their required amounts. In opposition, the Society contended that the states are required to pay the 37.5% exclusion when outpatient psychiatric services are provided to QMBs.

Judge Smalkin of the United States District Court for the District of Maryland agreed with the Society's interpretation of the relevant statutes and granted summary judgment in its favor. The court specifically addressed whether the 37.5% exclusion for mental health services fell within any of the four categories of "Medicare cost-sharing," which, under the QMB program, states are obligated to pay. Relying on principles of statutory interpretation, relevant legislative history, case law, and the broader policies behind the QMB program, the court focused its inquiry on subsections (B) and (D) of 42 U.S.C. § 1396d(p)(3).

deductibles, and the 20% that remains after Medicare pays 80% of specified services. 42 U.S.C. § 1396d(p)(3) (1994).

16. See 42 U.S.C. § 1395l(c) (describing Medicare coverage of outpatient mental health services).

17. Id.


20. Maryland Psychiatric Soc'y, 102 F.3d at 719.

21. Id.


23. Id. at 11-17.

24. See supra note 15 (stating that participation in the QMB program and payment of "Medicare cost-sharing" expenses is required of all states in order to receive federal Medicaid funding).

25. Maryland Psychiatric Soc'y, No. S 95-894, slip op. at 9-20. Section 1396d(p)(3)(B) describes "coinsurance" as a cost that is incurred by the states on behalf of their QMBs.
The Secretaries argued that the court should grant deference to the statutory interpretation of the government agency in charge of administering the Medicare and Medicaid programs, the Department of Health and Human Services. The court recognized that, in general, deference should be granted to the expertise of an administrative agency when the statutory language is not clear. Judge Smalkin, however, refused to do so in this case because the Secretary had taken inconsistent positions regarding the states' obligation to pay the 37.5% exclusion. The court stated that "far less deference is warranted when the administrative agency's interpretation of the statute at issue has been inconsistent." In light of this inconsistency and the legislative history of the QMB program, the court determined that it would grant no deference to Secretary Shalala's current interpretation of the statute.

In its analysis of subsection (B), the court examined the term "coinsurance" to determine its meaning within the statute. Judge Smalkin noted that because Congress did not define "coinsurance," the court must use the common meaning of the word when interpreting the statute. To determine the common meaning of "coinsurance," the court relied on Webster's Collegiate Dictionary and found that

Section 1396(p)(3)(D) explains that the states are responsible for the remaining 20% of costs that are left after the federal government has paid its required 80% of the fee schedule amount. The court found that the 37.5% exclusion "does not fit comfortably within the language of subsection (D)." Id. at 12. The court came to this conclusion by noting that section 1396d(p)(3)(D) contains no provision that allows QMBs' "cost-sharing responsibilities," in the case of mental health services, to be greater than 20% of the fee schedule amount. Id. at 12-13.

26. Id. at 9-10. Secretary Shalala, the Secretary of the Department of Health and Human Services, opined that the QMB statutes do not require the states to pay the 37.5% exclusion. Id. at 7.
27. Id. at 10 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).
28. Id.; see infra notes 158-160 and accompanying text (discussing the specific inconsistencies in the Secretary's interpretation).
30. Maryland Psychiatric Soc'y, No. S 95-894, slip op. at 10-11 ("Because the Court determines that Congress has expressed its intent on the issues in this case, and because the Department of Health and Human Services has espoused varying interpretations of the statutory provisions governing reimbursement for mental health services, no deference to the Department's current interpretation of the statute is warranted.").
31. Id. at 13-17.
32. Id. at 13. The court stated that "[i]t is a well-known principle of statutory construction that 'words should be given their common and approved usage,' unless 'it is obvious from the act itself that the legislature intended that [the word] be used in a sense different from its common meaning.'" Id. (quoting 2A Norman J. Singer, Sutherland Statutory Construction § 46.01, at 82-83 (5th ed. 1992) (alteration in original)).
"the statute's treatment of the 37.5% amount places it squarely within the ordinary concept of coinsurance as a shared obligation or 'joint assumption of risk.'"\textsuperscript{33}

Continuing its analysis, the court turned to legislative history and noted that Congress had repeatedly referred to the disputed 37.5% as "coinsurance."\textsuperscript{34} The court cited four specific examples where, in the case of mental health services, Congress referred to the costs remaining after Medicare reimbursement as "coinsurance."\textsuperscript{35} Referring to the legislative history, the court recognized that it does not provide conclusive evidence as to how the 37.5% should be characterized.\textsuperscript{36} Nevertheless, Judge Smalkin emphasized the importance of using the legislative history to determine whether the disputed amount should be classified as "coinsurance" under 42 U.S.C. § 1396d(p)(3)(B).\textsuperscript{37} The court acknowledged that the legislative history regarding "coinsurance" pertained to the mental health limitation contained in 42 U.S.C. § 1395l(c), rather than to the provision defining cost-sharing under the QMB program contained in 42 U.S.C. § 1396d(p)(3).\textsuperscript{38} However, it stated that because the QMB program is a combination of the Medicare and Medicaid programs, "[i]f the disputed amount is coinsurance under section 1395l(c), then it is coinsurance under section 1396d(p)(3)(B)."\textsuperscript{39}

Addressing the case law, the court looked to four recent circuit court decisions discussing the QMB program.\textsuperscript{40} In each case, the court addressed whether, under the QMB program, states were obligated to pay providers the entire 20% Medicare coinsurance for their QMBs, or whether the coinsurance payment could be limited if the amount charged by the provider exceeded the Medicaid fee schedule

\textsuperscript{33. Id. (quoting Webster's Ninth New Collegiate Dictionary 257 (1986)).}
\textsuperscript{34. Id. at 14.}
\textsuperscript{36. Id. at 14-15.}
\textsuperscript{37. Id. at 15.}
\textsuperscript{38. Id.}
\textsuperscript{39. Id. at 15-16.}
\textsuperscript{40. Id. at 17 (citing Rehabilitation Ass'n v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994); Haynes Ambulance Serv., Inc. v. Alabama, 36 F.3d 1074 (11th Cir. 1994); Pennsylvania Med. Soc'y v. Snider, 29 F.3d 886 (3d Cir. 1994); New York City Health & Hosps. Corp. v. Perales, 954 F.2d 854 (2d Cir. 1992)).}
amount. All four courts held that QMB patients were primarily Medicare patients, that providers were entitled to receive the Medicare fee schedule amount, and that the states must pay the entire 20% copayment on behalf of their QMBs. Judge Smalkin quoted language from three of the cases that supported the providers' right to collect the complete amount of their reasonable costs and charges for services rendered. The court added specific emphasis to the Fourth Circuit's view of the states' obligation: "Our reading of the statute, and the contemporaneous legislative history, discloses to us clear Congressional intent that state copayments under the buy-in program for [QMBs] be, except for optional nominal charges ..., complete."

Lastly, the district court noted that the QMB program's overall purpose is to provide medical care to indigent people. The court supported the position that providers should not have to bear the financial burden of treating poor Medicare recipients, but rather that the states should assume complete responsibility for the Medicare obligations of QMBs. In addition, Judge Smalkin recognized that the purpose of the QMB program would be undermined if providers of mental health services began avoiding treatment of QMBs because they received incomplete payment.

In light of these findings, the court concluded that the 37.5% of the Medicare fee schedule amount that is excluded by Medicare under 42 U.S.C. § 1395f(c), is "Medicare cost-sharing" within the meaning of 42 U.S.C. § 1396d(p)(3). Consequently, the court granted summary judgment in favor of the Society and concluded that the states are required to pay the 37.5% exclusion when outpatient psychiatric services are provided to QMBs. Secretaries Wasserman and Shalala both appealed the trial court's ruling to the Fourth Circuit Court of Appeals.
2. Legal Background.—

a. Legislative History.—The Social Security Amendments of 1965 established the Medicare and Medicaid statutes. These statutes included a combined Medicare/Medicaid program, usually referred to as the “buy-in” or “QMB” program. The buy-in provisions required that state plans for medical assistance meet certain requirements for “eligible individuals 65 years of age or older who [were] covered by either or both of the insurance programs established by [Medicare].” These requirements included mandatory and total state coverage of Medicare Part A deductibles and mandatory, but not necessarily total, state coverage for any cost-sharing under Medicare Part B.

Since the creation of the QMB program, Congress has frequently revisited and modified this area of legislation to create the current version of the QMB program. Most recently, in 1988, Congress made three changes with regard to QMBs and cost-sharing. First, it


52. See id. § 121(a). The QMB program is referred to as a “buy-in” program because the states, by paying the enrollment premiums and annual deductibles for QMBs, are buying individuals into Medicare Part B insurance. See Rehabilitation Ass’n v. Kozlowski, 42 F.3d 1444, 1448 (1994).


54. Rehabilitation Ass’n, 42 F.3d at 1451. See supra note 4 for an explanation of Medicare Parts A and B.

55. Congress first modified the buy-in statutes in 1967. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1968). After these amendments, all dual eligibles qualified to participate in the buy-in program. Rehabilitation Ass’n, 42 F.3d at 1452. Additionally, the states would not receive matching Medicaid funds if they did not “buy-in” their dual eligibles, and the states’ required contribution under the buy-in provision included premiums, deductibles, and cost-sharing on either a total or a less-than-total basis. Id.

Next, Congress amended the buy-in statutes through the Omnibus Budget Reconciliation Act of 1986. Pub. L. No. 99-509, 1986 U.S.C.C.A.N. (100 Stat.) 1874. These amendments introduced QMBs into the Medicaid buy-in provision of Medicare. Id. § 9403, 1986 U.S.C.C.A.N. (100 Stat.) at 2053-56. The Act defined QMBs as individuals who were eligible for insurance benefits under Medicare Part A but not eligible for Medicaid, had incomes no greater than a state-determined limit, and had resources no greater than the benefit maximum under the Supplemental Security Income program. Id. § 9403(b), 1986 U.S.C.C.A.N. (100 Stat.) at 2053-54. The amendments granted the states the option to use their Medicaid funds for “Medicare cost-sharing” for QMBs. Id. § 9403(a), 1986 U.S.C.C.A.N. (100 Stat.) at 2053. The Act defined “Medicare cost-sharing” to include premiums under Part B, deductibles and coinsurance under Part A, the annual deductible under Part B, and the difference between the federal payment of 80% and 100% of the reasonable charges under Part B. Id. § 9403(d), 1986 U.S.C.C.A.N. (100 Stat.) at 2054; Rehabilitation Ass’n, 42 F.3d at 1453 (interpreting part (D) of the Medicare cost-sharing definition in 42 U.S.C. § 1396d(p)(3)).
made the QMB buy-in provision mandatory for all states by eliminating the states' option to participate.\textsuperscript{56} Second, it expanded the definition of QMBs by increasing the required maximum income level and resource amount.\textsuperscript{57} Third, through the Technical and Miscellaneous Revenue Act of 1988,\textsuperscript{58} Congress redefined what constitutes a QMB.\textsuperscript{59} After the revisions, QMBs could be covered under the state Medicaid program and consequently receive benefits.\textsuperscript{60} The revised definition of QMB required the individual to be eligible for Medicare and meet the stipulated income and resource limitations.\textsuperscript{61} Thus, by the end of 1988, the QMB provisions had been greatly expanded.\textsuperscript{62} As a result, all Medicare-eligible individuals whose incomes fell below the federal poverty line, regardless of whether those individuals were eligible for Medicaid, were covered by the QMB provisions.\textsuperscript{63} This definition of QMBs has remained unchanged since the 1988 amendments.

\textit{b. Case Law.}—From 1992 through 1994, many courts addressed the issues of provider reimbursement and states' obligations under the QMB program.\textsuperscript{64} In this time, the Second, Third, and Eleventh Circuits all held that health care providers who render services to QMBs are entitled to 100\% reimbursement for their reasonable costs and charges.\textsuperscript{65} The courts established that states may not limit payment to QMB care providers by capping reimbursement at the Medicaid fee schedule amount.\textsuperscript{66} Rather, the courts found that QMBs are
primarily Medicare patients, and therefore, providers who render services to QMBs are entitled to complete reimbursement under the Medicare fee schedule. In 1994, the Fourth Circuit addressed the issue of state obligations under the QMB program in Rehabilitation Ass'n v. Kozlowski. In that case, the court reaffirmed the states' obligation "to pay any and all premiums, deductibles and copayments for the elderly poor, with the exception of the nominal charges allowed under [42 U.S.C.] §1396o." The court recognized that Congress, when it created the QMB program, intended to relieve impoverished elderly persons from the burden of paying for the cost-sharing provisions of the Medicare program. In Kozlowski, the Fourth Circuit recognized Congress's intention to assure that indigence not affect an individual's opportunity to receive quality health care.

c. Statutory Interpretation.—When analyzing statutory language, courts use methods of statutory interpretation to determine the meaning of specific words or phrases within the statute. In Chev-
ron U.S.A., Inc. v. Natural Resources Defense Council, Inc., the Supreme Court set forth guidelines for judicial review of an administrative agency's interpretation of a statute. The Court stated that there is a two-part inquiry that courts should follow when deciding the meaning of statutory language. First, the court should determine whether Congress has directly addressed the question at issue and whether Congress's intent is clear. If the court finds that Congress has not directly addressed the question at issue, it should then consider the interpretation of the administrative agency that executes the statute. When addressing the agency's interpretation, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." To do this, courts must apply traditional principles of statutory interpretation.

Statutory interpretation begins with the plain language of the statute and then, if necessary to clarify the statutory language, expands to any relevant legislative history. Generally accepted principles of statutory construction direct that "words should be given their common and approved usage" unless "it is obvious from the act itself that the legislature intended that [the word] be used in a sense different from its common meaning." When a word has both a technical meaning and a common meaning, absent contrary legislative intent, the common meaning controls. The United States Supreme Court followed these same principles of statutory interpretation in United States v. Alvarez-Sanchez. In that case, the Supreme Court used the American Heritage Dictionary to define the term "delay." In doing so, the majority stated that because "delay" was not defined in the stat-

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74. See id. at 842-45.
75. Id.
76. Id. at 842.
77. Id. at 843.
78. Id. Less deference is granted to an agency's interpretation of a statute when the agency has made inconsistent interpretations. See infra notes 156-157 and accompanying text.
79. See Chevron, 467 U.S. at 843 n.9.
81. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 82, 83 (5th ed. 1992).
82. See id. § 47.29, at 260; see also Palestine Info. Office v. Shultz, 853 F.2d 932, 937-38 (D.C. Cir. 1988) (discussing "the basic principle of statutory construction that words are ordinarily to be given their 'plain meaning.'").
84. Id. at 357-58.
ute's plain text, the Court was required to "construe the term 'in accordance with its ordinary or natural meaning.'" In United States v. Southern Management Corp., the Fourth Circuit Court of Appeals used Webster's Third International Dictionary to define "addiction" and "addict" within the meaning of the Fair Housing Act. Similarly, the Fourth Circuit used Webster's Ninth New Collegiate Dictionary to define the terms "employ" and "assist" in United States v. Murphy. When the court decides that a word is a term of art, as in Media General Cable v. Sequoyah Condominium Council, it has used Black's Law Dictionary to determine the technical or legal meaning of that term. As these cases illustrate, courts have relied on dictionaries to determine the statutory meaning of various words.

3. The Court's Reasoning.—In Maryland Psychiatric Society v. Wasserman, the Fourth Circuit Court of Appeals held that under the QMB program, states are not required to pay the 37.5% of costs for outpatient psychiatric services that are excluded from the federal Medicare fee schedule. The court focused on four issues in reaching its conclusion.

First, the court considered whether the term "coinsurance," as it is spelled out in 42 U.S.C. § 1396d(p)(3), allows an inference that Congress intended the 37.5% exclusion to be paid by the states. Using language from Pennhurst State School & Hospital v. Halderman, the court recognized that when the federal government expects the states to use state funds as part of a federal program, Congress must be explicit and unambiguous about such expectations. Following this principle, the court noted that the QMB provisions do not explicitly and unambiguously require the states to pay the 37.5% exclusion for outpatient psychiatric services. Similarly, the court reasoned that if Congress intended the term "coinsurance" to encompass every Medi-

85. Id. at 357 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).
86. 955 F.2d 914 (4th Cir. 1992).
87. Id. at 920-21.
88. 35 F.3d 143, 145 (4th Cir. 1994).
89. 991 F.2d 1169 (4th Cir. 1993).
90. Id. at 1173.
91. Maryland Psychiatric Soc'y, 102 F.3d at 722.
92. Id. at 719-22.
93. Id. at 719-21.
95. Maryland Psychiatric Soc'y, 102 F.3d at 719-20 (stating that when Congress sets conditions for states to meet in order to receive federal funds, "such conditions...must be explicit and unambiguous, so that states understand the bargain they have made when they sign up for federal programs" (citing Pennhurst, 451 U.S. at 17)).
96. Id. at 720.
care payment obligation shared by the federal and state governments, then coinsurance would necessarily include the 20% copayment that states are required to pay under the QMB program. The court stated that if that were true, then Congress would not have needed to include section 1396d(p)(3)(D) in the QMB provisions, which specifically requires states to pay the 20% copayment for QMBs.

Consequently, the court refused to accept the district court's position that the term "coinsurance" includes the 37.5% exclusion. Instead, the court interpreted the term "coinsurance" to refer specifically to those expenses that Congress explicitly labeled as "coinsurance" in the statutes that 42 U.S.C. § 1396d(p)(3)(B) references.

Second, the court considered the current interpretation of the QMB provisions as propounded by the Secretary of Health and Human Services. The court found it significant that both the Federal Secretary of Health and Human Services and the State Secretary of Health and Mental Hygiene agreed as to the meaning of the terms in their QMB contract. As a result, the court took the position that it should not "casually change [the contract] terms and require the states to spend millions of additional dollars on psychiatric services."

Third, the court rejected the Society's assertion that its members have a right to be reimbursed 100% of their reasonable charges in providing services. The court recognized that while the statutory language allows providers to charge for the full amount of their serv-

97. Id.
98. Id. The Fourth Circuit reasoned that if the QMB provisions were read broadly to include the 37.5% under the definition of "coinsurance," the provision requiring states to pay the 20% copayment would be superfluous. Id. The court supported its position by stating that "[r]ules of statutory construction forbid us to construe one provision in a way that renders another provision of the same enactment superfluous." Id. (citing Freytag v. Commissioner, 501 U.S. 868, 877 (1991)).
99. Id.
100. Id. Section 1396d(p)(3)(B) requires states to pay QMBs' "[c]oinsurance under subchapter XVIII of this chapter (including coinsurance described in section 1395e of this title.)" 42 U.S.C. § 1396d(p)(3)(B) (1994). Section 1395e only uses the term "coinsurance" for certain identified costs that are not covered by Medicare. 42 U.S.C. § 1395e. Such costs include charges for inpatient hospital services, outpatient hospital diagnostic services, blood, and post-hospital extended care services. Id.
101. Maryland Psychiatric Soc'y, 102 F.3d at 721 (discussing the amount of deference granted to Secretary Shalala's interpretation of the QMB statutes). Secretary Shalala maintained that the states are not required to pay the 37.5% exclusion. Id.; see infra notes 159-160 and accompanying text.
102. Maryland Psychiatric Soc'y, 102 F.3d at 721.
103. Id.
104. Id.
ices, it does not establish a right for complete recovery of their charges.\textsuperscript{105}

Fourth, the court concluded that Congress intended for mental health services to have a lesser claim than physical health services to federal resources.\textsuperscript{106} In reaching its holding, the court reasoned that "[i]t would be ironic to conclude that when Congress designates a particular service for lesser funding it expects states to spend a greater percentage of their limited Medicaid funds on that disfavored service."\textsuperscript{107}

4. Analysis.—

There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanding with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.\textsuperscript{108}

a. Defining the Undefined in a Statutory Context.—Because the term "coinsurance" is not defined in the Medicare or Medicaid statutes, the court in \textit{Maryland Psychiatric Society} used rules of statutory construction to determine whether the 37.5\% exclusion fits within Congress's definition of coinsurance.\textsuperscript{109} The Fourth Circuit rejected the district court's dictionary definition of coinsurance and established its own interpretation.\textsuperscript{110} In doing so, the court reasoned that if it accepted the district court's interpretation, the Medicare cost-sharing provision requiring the states to pay a 20\% copayment for

\textsuperscript{105} Id. (citing 42 U.S.C. § 1395cc(a)(2)(A)).

\textsuperscript{106} Id. at 721-22 (stating that "the state's interpretation of the statute complies with Congress' judgment that mental health services have a lesser claim than physical health services on scarce governmental resources"). By comparing the percentage of costs that Medicare covers for physical health services (80\%) to the percentage of costs that it covers for mental health services (50\%), the court concluded that Congress places a greater importance on physical health services. \textit{Id.}

\textsuperscript{107} Id. at 722.

\textsuperscript{108} Rehabilitation Ass’n v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994).

\textsuperscript{109} \textit{Maryland Psychiatric Soc’y}, 102 F.3d at 719-21.

\textsuperscript{110} Id. at 720. The court "read the word ‘coinsurance’ to refer specifically to those expenses which Congress identified as ‘coinsurance’ in the statutory sections that 1396d(p)(3)(B) references." \textit{Id.}
QMBs would be superfluous. However, the court's reasoning in applying these particular statutory construction rules is not strong. The court should have followed the district court by acknowledging the principles of statutory interpretation established by the Supreme Court in *United States v. Alvarez-Sanchez* and the Fourth Circuit in three recent cases.

Congress's definition of "Medicare cost-sharing" includes four separate and distinct categories. The fourth category that the "Medicare cost-sharing" definition establishes is a standard 20% copayment or coinsurance that states are obligated to pay for their QMBs. The language of this fourth section explicitly states that this 20% copayment is applicable only when the Medicare Part B payment is 80% under 42 U.S.C. § 1395l(a). However, for outpatient psychiatric services the reference to the Medicare Part B payment is contained in 42 U.S.C. § 1395l(c). The percentage of services covered in section 1395l(c) does not correspond with the 80% federal and 20% state ratio established in 42 U.S.C. § 1395l(a). Although there is a shared obligation and joint assumption of risk involved in each of these statutory sections, the percentage of that obligation and risk differs. Each section is necessary to define the obligations and risks for which the federal and state governments are responsible under each category of health care service. Consequently, regardless of whether coinsurance is defined as a joint assumption of risk, 42 U.S.C. § 1396d(p)(3)(B) is not superfluous. Accepting the district court's definition of coinsurance simply adheres to Congress's overall intent in creating the QMB program by placing the financial burden of costs

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113. See supra notes 86-90 and accompanying text.
114. See supra note 15.
116. *Id.* Section 1396d(p)(3)(D) defines coverage for "[t]he difference between the amount that is paid under section 1395l(a) of this title and the amount that would be paid under such section if any reference to '80 percent' therein were deemed a reference to '100 percent.'" *Id.*
117. 42 U.S.C. § 1395l(c) (1994). This section states that for outpatient psychiatric services "there shall be considered as incurred expenses for purposes of subsections (a) and (b) of this section only 62 1/2 percent of such expenses." *Id.*
118. See 42 U.S.C. § 1395l(a) (explaining payment of Medicare benefits for services not including mental disorders); supra note 117.
119. See 42 U.S.C. § 1395l(a) (explaining payment of Medicare benefits for services not including mental disorders); supra note 117.
on the states.\textsuperscript{120} Rules of statutory interpretation as well as prior case law and legislative history support the district court's definition of coinsurance.\textsuperscript{121}

Following well-established principles of statutory construction, the district court was correct in using a *Webster’s Collegiate Dictionary* to obtain the common meaning of the term “coinsurance.”\textsuperscript{122} “Coinsurance,” in a common, legal, or technical sense, means an allocation or a sharing of risk between the insurer and the insured. *Black’s Law Dictionary* defines coinsurance as “[a] relative division of risk between the insurer and the insured.”\textsuperscript{123} The same definition of “coinsurance” is found in a more technical source, *Couch on Insurance*.\textsuperscript{124} The “common meaning,” as stated in the district court opinion, is a shared obligation or “joint assumption of risk.”\textsuperscript{125} Therefore, regardless of which specific definition is used, the district court was correct when it stated that “the statute’s treatment of the 37.5% amount places it squarely within the ordinary concept of coinsurance.”\textsuperscript{126} The *Maryland Psychiatric Society* court should have followed the precedent set by the Supreme Court and the Fourth Circuit in deciding the meaning of “coinsurance.”\textsuperscript{127}

The Fourth Circuit Court of Appeals refused to use the general dictionary definition of coinsurance to interpret the meaning of 42 U.S.C. § 1396d(p)(3)(B).\textsuperscript{128} In doing so, the court reasoned that “[i]n all events, the general dictionary definition of coinsurance is too loose to support the imposition of substantial financial burdens on state governments.”\textsuperscript{129} By using this reasoning, the court has ignored methods of statutory interpretation that have been accepted and exercised by the United States Supreme Court as well as the Fourth Circuit Court of Appeals.\textsuperscript{130} What the court fails to recognize is that there is no statutory authority that supports eliminating the 37.5% of fee schedule charges for outpatient psychiatric services from the coinsurance that states must pay under 42 U.S.C. § 1396d(p)(3)(B). More-
over, there is no statutory language that forces providers of outpatient psychiatric services to absorb a 37.5% loss for treating QMBs. If Congress intended providers of outpatient psychiatric services to absorb the 37.5% exclusion for QMBs, it certainly did not indicate its intention in the statute.

The legislative history contains additional support for finding that the 37.5% exclusion fits under the definition of coinsurance. A committee report from the Medicare Catastrophic Coverage Act of 1988 explains that Medicare pays only 80% of 62.5% for mental health services, and therefore, “the effective coinsurance rate is 50 percent.” The report also states that the proposed amendment would not affect the relevant percentages, stating that “[t]he coinsurance requirement would remain the same.” Similarly, in the committee report of the Budget Reconciliation Act of 1989, the legislative history notes that for mental health services, “the patient is responsible for 50 percent coinsurance, instead of the standard 20 percent.” As the district court in Maryland Psychiatric Society indicated, although these remarks do not definitively confirm Congress’s intent regarding the appropriate characterization of the 37.5% exclusion, they provide valuable guidance and helpful insight.

To determine the meaning of “coinsurance” in the QMB provisions, the Fourth Circuit should have looked to the principles of statutory interpretation established by both the Supreme Court and the Fourth Circuit. In addition, the court should have considered the legislative history of the QMB provisions as it related to the meaning of coinsurance. Had the court done so, it could have found that the 37.5% exclusion appropriately falls under the definition of “coinsurance,” and therefore, the states are responsible for paying this excluded amount.

131. See Maryland Psychiatric Soc’y, 102 F.3d at 720 (citing 42 U.S.C. § 1395d(c) and stating that “nothing in the statute mentions who, if anyone, is required to pay the excluded amount for QMB patients”).

132. Cf. id. (“If Congress intended states to pay the 37.5% exclusion for outpatient psychiatric services for QMBs, it certainly did not say so explicitly, clearly, and unambiguously. The QMB provisions do not mention the exclusion at all.”).

133. See Maryland Psychiatric Soc’y, No. S 95-894, slip op. at 14 (recounting references in the legislative history to the 37.5% amount as “coinsurance”).


135. Id. (emphasis added).


b. Recognizing the Providers’ Right to 100% Reimbursement.—The Fourth Circuit in *Maryland Psychiatric Society* refused to recognize that providers of outpatient mental health services have a right to be reimbursed 100% for the reasonable cost of services that they provide. In doing so, the court declined to accept the opinions of other courts regarding this matter, and it failed to recognize Congress’s overall intent in creating the QMB program.

In *New York City Health & Hospitals Corp. v. Perales*, the Second Circuit followed the opinion of other circuits by recognizing that “providers who furnish medical care to Medicare-eligible patients have the right to collect 100% of their reasonable costs or charges.” The *New York City Health & Hospitals Corp.* court noted that the Medicare Act, on its face, entitles providers to collect their reasonable costs or charges and that such entitlement should not be frustrated. Furthermore, the court held that “a Medicare provider need not be satisfied with inadequate payment, i.e., less than reasonable costs or charges, even when that provider is treating a Medicare patient who happens also to be poor.” In addition, the court identified that the purpose of fully compensating providers is to ensure that they continue to treat the elderly, poor, and disabled.

Two years later, the Third Circuit followed the rationale of *New York City Health & Hospitals Corp.* In *Pennsylvania Medical Society v. Snider*, the court noted that “the Medicare Act contains no exception to the reimbursement of 100% of the reasonable costs and charges for QMBs and dual eligibles.” In addition, the court reaffirmed that Congress’s intent in creating the QMB program was to

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139. 594 F.2d 854 (2d Cir. 1992). *New York City Health & Hosp. Corp.* held that a New York regulation eliminating the right of health care providers to receive reasonable compensation for services provided to poor Medicare patients violated the Medicare and Medicaid Acts. *Id.* at 860.
140. *Id.* at 858 (citing *Mercy Community Hosp. v. Heckler*, 781 F.2d 1552, 1556-57 (11th Cir. 1986); Regents of the Univ. of Cal. v. Heckler, 771 F.2d 1182, 1188-89 (9th Cir. 1985); Menoran Med. Ctr. v. Heckler, 768 F.2d 292, 296 (8th Cir. 1985); St. James Hosp. v. Heckler, 760 F.2d 1460, 1472 (7th Cir. 1985)).
141. *Id.*
142. *Id.* at 860.
143. *Id.* The court summarized this significant notion by stating that “[a] guarantee of reimbursement, by protecting providers, protects patients.” *Id.* at 861.
144. 29 F.3d 886 (3d Cir. 1994). The *Pennsylvania Medical Society* court held that Pennsylvania must pay the entire amount of Medicare Part B costs on behalf of its QMBs. *Id.* at 903.
145. *Id.* at 891.
have the states accept the complete burden of paying Medicare cost-sharing for their QMBs.  

In *Haynes Ambulance Service, Inc. v. Alabama,* the Eleventh Circuit agreed with the Second and Third Circuits' interpretation of the QMB program. In reversing the lower court's opinion, the *Haynes* court held that health care providers who render services to QMBs are entitled to 100% reimbursement for their reasonable costs and charges.

These three circuits provide persuasive support for the notion of providing 100% reimbursement for services that health care providers deliver to persons who qualify as QMBs. In addition to these cases, the legislative history confirms that Congress intended to make available to QMBs the best health care possible. The QMB program's purpose is to guarantee that poverty will not affect participation in the Medicare Part B program. As the district court in *Maryland Psychiatric Society* noted, "[t]his purpose would surely be undermined if providers of mental health services began avoiding the QMB population because of the inadequate payment they receive."  

The Fourth Circuit refused to follow the opinions of the Second, Third, and Eleventh Circuits when it failed to recognize a right to 100% reimbursement for all health care providers. Although the court provides reasoning for such a decision, the distinctions that the court makes are insignificant when viewed in light of Congress's over-


147. 36 F.3d 1074 (11th Cir. 1994) (per curiam).

148. *Id.* at 1075-1076 (following the Third Circuit's reasoning in *Pennsylvania Medical Society* to determine the state's payment responsibilities under 42 U.S.C. § 1396d(p)(3)(D)).

149. *Id.* at 1076.

150. See S. Rep. No. 404, at 27 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1967-68. The Senate Report that accompanied the original Medicare Act shows Congress's intent to avoid a wealth-based, two-tiered system of health care for elderly persons and those with certain disabilities. *Id.* It states that because the service's reasonable cost would be covered under Medicare and Medicaid, providers of health care would not be deterred from providing the best of modern care to nonpaying or underpaying patients over 65. *Id.* The report notes the incentive that providers would have to make their services available: "The provision of insurance against the covered costs would encourage participating institutions, agencies, and individuals to make the best of modern medicine more readily available to [those covered by the program]." *Id.* at 24, 1965 U.S.C.C.A.N. at 1965.

151. Rehabilitation Ass'n v. Kozlowski, 42 F.3d 1444, 1459 (4th Cir. 1994) (explaining that by enacting the QMB statutes, Congress has extended the Medicare program to include the elderly poor).


153. *Maryland Psychiatric Soc'y,* 102 F.3d at 721 (stating that the Society's assumption that its members have a right to 100% reimbursement has no statutory basis).
all intent in creating the QMB program. Congress's intent in creating the QMB program was to provide the best health care possible for persons who are elderly, poor, or have certain disabilities. There is no doubt that quality health care providers, individual or institutional, will shy away from treating those patients who will furnish less that 100% reimbursement for services provided. Consequently, the Fourth Circuit's decision creates a wealth-based, two-tiered system of health care in which indigent persons receive lower quality health care than those persons who are wealthy.

c. Inconsistency in Interpretation Leading to Less Agency Deference.—Generally, deference is granted to an administrative agency's interpretation of a statute when the language of that statute is unclear or ambiguous. However, if an agency's current interpretation of a relevant statute conflicts with its earlier interpretation, the agency's current interpretation is "entitled to considerably less deference."

The Department of Health and Human Services, the government agency charged with administering the Medicare and Medicaid programs, has taken inconsistent positions regarding the financial responsibility for the 37.5% exclusion. In 1989, in response to an inquiry from the State of Missouri, the Department declared:

"[W]hile the 37.5 percent of approved charges referred to is not usually called a coinsurance in Medicare administrative issuances, that is what it, in fact, is. Therefore, the State is responsible for 37.5 percent of the approved charges, plus 20 percent of the remainder of those charges, for outpatient psychiatric services, in the situation described."

Three years later, in response to an inquiry from the State of Georgia, the Department changed its position:

154. The court stated that although 42 U.S.C. § 1395cc(a)(2)(A) enables providers to charge the full amount of services provided, it does not guarantee 100% recovery. Id. In addition, the court noted that 42 U.S.C. § 1395cc(a)(2)(A) applies only to "providers of services," not including psychiatrists or other physicians. Id. (quoting 42 U.S.C. § 1395cc(e) (1994)).

155. See supra note 150 and accompanying text.


159. Id. (quoting Memorandum from Kathleen A. Buto, Acting Director, Bureau of Eligibility, Reimbursement and Coverage, to the State of Missouri (1989)).
"[T]he remainder following the 62 and 1/2 percent reduction is not labeled coinsurance under the statute, regulations, or section 2170 of the Medicare Carriers Manual. Therefore, Medicaid will not require States to pay toward the 37 and 1/2 percentage which is excluded from incurred cost as a coinsurance amount."  

Because the Department of Health and Human Services has advocated inconsistent positions regarding the 37.5% exclusion amount, the district court in *Maryland Psychiatric Society* correctly granted less deference to Secretary Shalala's interpretation of the relevant provision. Similarly, the Fourth Circuit should have granted less deference to the Secretary's interpretation of the statute. As the *New York City Health & Hospitals Corp.* court noted, "[t]he expertise in statutory interpretation to which we normally defer becomes dubious when the expert cannot make up its own mind."  

**d. Comparing Coverage for Outpatient Mental and Physical Health Services.**—Finally, the Fourth Circuit asserted that because Congress has allotted a smaller percentage of funds for outpatient mental health services than for outpatient physical health services, mental health services are "disfavored." Therefore, the court concluded that Congress does not expect the states to take responsibility for spending a greater amount of their Medicaid funds on outpatient mental health services. Although this may be a reasonable inference, it does not provide sufficient support for the Fourth Circuit's conclusion because it conflicts with Congress's overriding intent in creating the QMB program—to provide high quality health care to impoverished elderly persons. Once again, the *Maryland Psychiatric Society* court has addressed a specific portion of the QMB provisions without considering Congress's overall intent in creating the QMB program. 

By allowing states to avoid paying the 37.5% exclusion, the *Maryland Psychiatric Society* court has placed a financial burden on psychiatrists who treat QMBs. These psychiatrists are forced to absorb the

160. *Id.* at 8 (quoting Memorandum from Christine Nye, Director, Medicaid Bureau, to the State of Georgia (1992)).
161. *Id.* at 11 (granting no deference to the Department's current interpretation of the statute).
164. *Id.*
165. *See infra* note 174 and accompanying text.
37.5% loss for providing services to QMBs. A logical and obvious result of this lack of reimbursement is that providers of outpatient psychiatric services will refuse to accept QMBs as clients. The incentive to deliver high quality care to poor elderly persons would then be greatly diminished. As a result, low-income persons with mental illness are likely to experience continued mental deterioration. Without the opportunity to receive quality mental health care, an increasing number of elderly poor persons will face social consequences such as homelessness, increased levels of addiction, and suicide. In addition, "[w]hile most mentally ill people are non-violent, mental patients on the whole have consistently higher arrest rates and higher rates for certain types of violent crime than the general population." Clearly, these are not the kind of statistics that Congress was intending to support when it created the QMB program. It would make much more sense for states to incur the costs of quality services now to decrease the risk of increasing future societal problems.

It seems that if the states were required to make the investment in quality outpatient psychiatric care now, the financial burdens of providing inpatient care in the future could be lessened. For the past three decades, states have worked toward deinstitutionalization of mental patients. "While the number of institutionalized patients has decreased dramatically, the funding has not followed the patients out into the community." Without adequate resources in the community, persons with mental illness will continue to end up homeless or reinstitutionalized in state-funded psychiatric facilities. The decision in *Maryland Psychiatric Society* simply adds to the problem of de-

166. See supra notes 16-19 and accompanying text. The relevant statutes state that providers are usually entitled to charge beneficiaries for the 37.5% of costs, but for QMBs, providers are prohibited from collecting these charges. See supra notes 16-19 and accompanying text.
168. *Id.* at 316; see also Wayne Edward Ramage, *The Pariah Patient: The Lack of Funding for Mental Health Care*, 45 VAND. L. REV. 951, 953-55 (1992). The suicide rate for persons with a major affective disorder is 15 to 30 times greater than the rate in the general population. *Id.* at 953. Studies have shown that between 28 to 56 percent of homeless adults suffer from mental illness, and 28 percent of mentally ill persons have been homeless at some point in their adult life. *Id.* at 954-55.
170. *Id.* at 956.
171. *Id.*
172. The cost of inpatient psychiatric care is much more expensive than outpatient care. Notwithstanding this fact, mental health coverage under most insurance plans, including Medicare and Medicaid, is biased toward institutional care. See Rubenstein, *supra* note 167, at 324.
increased funding and resources for the mentally ill. There is no doubt that Congress intended to use the QMB program to increase the amount and level of health care services to persons who are impoverished and elderly. Through its decision, the court in *Maryland Psychiatric Society* chose to ignore Congress's intentions and instead, became a catalyst for decreased quality health care for QMBs.

Beyond these issues,

society has certain moral obligations towards the mentally ill. The process of deinstitutionalization removed the mentally ill from situations in which they could be treated. Although there were undeniable instances of abuse and mistreatment, the abuse mandated reform and better treatment, not necessarily the cessation of all care. Society has not supported adequately the hoped-for alternative of community-based treatment, breaking the implied promise of better care. Instead of a bed—be it in a hospital or community center—many of the mentally ill will sleep on a sidewalk grate tonight. Society owes it to these people, and to itself, to provide adequate care.173

It is apparent that through the QMB program, Congress has made efforts to increase the quality of care provided to persons who are poor and elderly. However, there is some uncertainty in the statutory language outlining the states' financial obligations to their QMBs. In light of these uncertainties in the QMB statutes, Congress should take the time to readdress this important program so that its true intentions are carried out by all parties involved. By doing this, Congress would ensure that persons in the QMB program have access to quality health care services regardless of their financial status.

5. Conclusion.—In *Maryland Psychiatric Society v. Wasserman*, the Fourth Circuit ignored relevant case law and used a narrow interpretation of congressional intent in determining that states are not financially responsible for the 37.5% exclusion for outpatient psychiatric services rendered to QMBs. As a result, the court has created a deficiency in adequate psychiatric care for QMBs, thereby undermining Congress's intent in creating the QMB program.

As the statutes, legislative history, and case law illustrate, Congress's overall purpose in establishing the QMB program was to "guarantee[ ] that indigency should not affect an individual's participation in the Medicare Part B program."174 By declining to secure adequate

174. Rehabilitation Ass'n v. Kozlowski, 42 F.3d 1444, 1459 (4th Cir. 1994).
reimbursement to psychiatrists for their services to QMBs, the court failed to ensure the guarantee that Congress intended to make. The precedent set by the court opens the door for other courts to ignore Congress's intent in creating the QMB program, and consequently, to contribute to diminished health care for the elderly poor.

Christopher L. Coffin
VI. Securities Law

A. Affirming the Unique and Complementary Roles of the NASD and SEC

In *Jones v. SEC*, the Fourth Circuit considered for the first time whether disciplinary action by the National Association of Securities Dealers (NASD) has a preclusive effect on similar proceedings brought by the Securities and Exchange Commission (SEC or Commission). The court held that principles of res judicata, the Maloney Act of 1938, and the Double Jeopardy Clause of the Fifth Amendment did not bar the SEC from initiating its own action subsequent to an NASD disciplinary action. In so ruling, the court legitimized the SEC's unique ability to review NASD actions and to begin its own investigation following an NASD sanction. Although the Fourth Circuit's decision rested on well-grounded legal principles, the court left open the question whether monetary penalties imposed by both the NASD and the SEC constitute multiple punishments in violation of the Double Jeopardy Clause.

1. **The Case.**—In 1989, Ivan D. Jones, Jr., a stockbroker, became director of a registered broker-dealer, Jones & Ward Securities, Inc. (Jones & Ward). Soon thereafter, Jones notified the NASD that he had assumed all management responsibilities of the firm as president and “control person.” The year before, Jones and two other owners of Trask, Hunt, Hunt, Jones, Ltd. (THHJ) formed Sidbury Land Company (Sidbury), which issued stock in order to raise money for a recent acquisition of land by THHJ. The same three owners then formed One Virginia Partners (OVP) to raise money for other land...
and office building acquisitions in the vicinity of the land they purchased under the corporate name THHJ.\footnote{Id.}

In April 1989, Jones obtained the assistance of his attorney, L. Bruce McDaniel, to draft a circular for Jones & Ward’s underwriting of the Sidbury offering.\footnote{Id.} The offering would provide 38,400 shares of common stock at $10 per share, sold in units of 1200 shares, to no more than thirty-two purchasers.\footnote{Id.} Moreover, the circular promised investors a refund with interest if fewer than half of the shares, valued at $192,000, were sold by August 10, 1989.\footnote{Id.} Payments were to be made to the “Sidbury Land Company Escrow Account,” and “the first $192,000 of sales proceeds [were to] be escrowed with United Carolina Bank of Wilmington, North Carolina.”\footnote{Id.}

McDaniel then advised Jones that in order to comply with the terms of the circular and avoid having to refund the investors’ money, he would have to establish a true escrow account by August 10, 1989.\footnote{Id.} Instead of following his attorney’s advice and opening a true escrow account, Jones opened a regular checking account under his exclusive control.\footnote{Id.} The checking account was labeled “Sidbury Land Co., Inc. Escrow Account.”\footnote{Id.} Throughout the month of July, Jones withdrew funds from the escrow account for a variety of reasons, including paying Jones & Ward for underwriting commissions, and compensating THHJ for expenses incurred in relation to the offering.\footnote{Id.} After Jones withdrew $32,410 for various expenses from the account, the account ultimately failed to meet the $192,000 balance requirement.\footnote{Id.} Rather than restart the entire offering procedure and refund investors as advised by his attorney and as promised in the circular,\footnote{Id.} Jones extended the offering period, and in March 1991, Sidbury purchased the unimproved land from THHJ.\footnote{Id.}

In May 1989, Jones offered some investors in the Sidbury offering the right to have their shares repurchased at the purchase price at any
time by THHJ. Although Jones later claimed that THHJ had a sufficient line of credit to repurchase these shares, at the time of the offer, THHJ did not have sufficient assets to fulfill the repurchase agreements.

Contemporaneous with the Sidbury offering, OVP was attempting to raise $490,000 for the purchase of a THHJ-owned building. As he had previously done with the Sidbury offering, Jones opened a checking account under his own control instead of an escrow account. Again, Jones withdrew funds from this account to pay various expenses, including payments to THHJ. He loaned $20,000 from the account to Southeastern Car Care Center #1 (SCCC). Shortly after receipt of the loan proceeds, SCCC declared bankruptcy and failed to repay the borrowed money. Jones, however, covered the loss with his own money. Moreover, Jones withdrew $20,000 from the OVP account and loaned it to Jones & Ward. Jones & Ward repaid the loan about ten months later.

During this time period, from April 1989 to April 1990, the SEC required broker-dealers who held funds or securities, or owed money or securities to customers, to maintain $25,000 of net capital, and it required independent escrow-agents to maintain a minimum of $5000 net capital. Because Jones & Ward did not have an independent escrow account, it had to meet the SEC's $25,000 minimum balance requirement. However, Jones & Ward did not even have enough capital to meet the less stringent $5000 requirement for independent escrow accounts. Nevertheless, Jones falsely represented the accuracy of the firm's financial records to obtain NASD approval to open Jones & Ward Securities in 1989.

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.; see Exchange Act Rule 15c3-1(a), 17 C.F.R. § 240.15c3-1(a) (1997) (stating that every broker or dealer must maintain net capital equal to or greater than the highest minimum requirement).
34. Jones, 115 F.3d at 1176.
35. Id.
36. Id.
Furthermore, although Jones agreed to the NASD's request that he qualify as a Financial Operations Principal (FINOP) within ninety days, it took him over two years to do so. Moreover, Jones & Ward did not file quarterly financial reports from April 1989 through December 1990, failed to timely file its 1990 annual report, failed to maintain an accurate broker-dealer registration, and failed to give the SEC required records regarding net capital and record-keeping problems.

In 1989, the NASD examined Jones & Ward Securities and issued a ten-count complaint against Jones, another firm officer, and the firm. As a result of negotiations with Jones, the NASD issued its "Decision and Order of Acceptance of Offers of Settlement" on October 9, 1992. Pursuant to the settlement, Jones was required to requalify by examination to remain a general securities principal, and he received a censure, a $22,500 fine, and a three-day suspension as sanctions.

On May 6, 1993, the SEC instituted an administrative proceeding against Jones for the same actions that resulted in the NASD's sanctions. The SEC claimed that Jones violated various sections of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and it further alleged antifraud violations, net capital violations, and reporting violations. Jones argued, inter alia, that he had already been sanctioned by NASD, and therefore further sanctions by the SEC would be inappropriate. An administrative law judge (ALJ) suspended Jones "from association with any broker or dealer or investment advisor for 12 months and [barred Jones] thereafter . . . from association with a broker or dealer or investment advisor in a proprietary, supervisory, or managerial capacity with a right to reapply to become so associated after 18 months."

37. Id. at 1176-77. A Series 27 Financial and Operations Principal "is for people who supervise the preparation of broker-dealer financial reports, the maintenance of broker-dealer books and records, and other back office operations, including custody of customer funds and securities." Melaine Kimmel, How Does It Work? A Look at NASD Continuing Education, MANAGERS MAG., June 1995, at 28, 29.
38. Jones, 115 F.3d at 1177.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
45. Jones, 115 F.3d at 1177; see also Jones & Ward, 56 S.E.C. Docket at 270.
Pursuant to Rule 17(b) of the Rules of Practice, Jones filed a petition for review with the Commission. Again, Jones argued that he had already been punished by the NASD sanctions. On October 10, 1995, the Commission affirmed the holding of the ALJ. Jones appealed the Commission's ruling to the Court of Appeals for the Fourth Circuit, arguing that principles of res judicata, the Maloney Act of 1938, and the Double Jeopardy Clause of the Fifth Amendment precluded the SEC action subsequent to the NASD disciplinary action.

2. Legal Background.—

a. Res judicata.—The doctrine of res judicata, also referred to as claim preclusion, serves the dual purpose of reducing the amount of litigation in the courts and protecting individuals from the burden of litigating the same claim twice. Res judicata acts as an affirmative defense when the following requirements are met: "(1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Modern courts rely on common law rules to formulate and develop the concept of res judicata.

The Fourth Circuit case law provides guidance on the specific requirements of each element of res judicata. The first prong of the res judicata test requires a final judgment in the first action. In federal cases, because judgments are set forth on a separate document, "identifying whether a judgment has been entered rarely poses great difficulty." Thus, in attempting to define the requirements of res judicata, the Fourth Circuit has focused its analysis on the second and third elements of the test—whether the cause of action is the same as that in the prior suit, and whether the same parties or persons in privity with those parties are involved in both suits.

46. See 17 C.F.R. § 201.410(b) (1997) (providing Rule 17(b) of the Rules of Practice).
48. Id. at 1392 (order).
49. Jones, 115 F.3d at 1175.
53. Meekins, 946 F.2d at 1057.
54. FRIEDENTHAL ET AL., supra note 50, § 13.1, at 582 n.2.
55. See, e.g., Meekins, 946 F.2d at 1057.
The Fourth Circuit addressed the second requirement—identity of the causes of action—in *Meekins v. United Transportation Union*, and concluded that res judicata did not apply where the claim advanced in the second suit did not exist at the time of the first suit. In applying the three-prong test to determine whether res judicata barred the plaintiffs’ claims, the court found that res judicata did not apply because the second prong of the test—identity of the cause of action in both the earlier and the later suit—was not satisfied. The court concluded that the two causes of action were not identical because the plaintiffs’ current claims did not exist at the time of the first suit. The court explained that the standard is “objective, and ‘it is the existence of the present claim, not party awareness of it, that controls.’”

The Fourth Circuit addressed the third prong of the res judicata test, the privity requirement, in *Nash County Board of Education v. Biltmore Co.*. In that case, the Nash County Board of Education sued dairy companies supplying milk and other products to the school system, alleging violations of federal antitrust laws. That suit was filed subsequent to a similar settled suit brought by the Attorney General under state antitrust laws. In determining that res judicata barred the Nash County Board of Education from bringing an antitrust suit against the Biltmore Company, the court found that all three re-

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56. 946 F.2d 1054 (4th Cir. 1991).
57. Id. at 1058 (holding that union members could not have obtained the same relief in the first suit as they sought in the second suit). The facts of the case indicate that in 1970, the plaintiffs’ former employer, Seaboard Coast Line Railroad Co., merged with their current employer, Richmond, Fredricksburg & Potomac Railroad Co. Id. at 1055. The railroads entered into a consolidation agreement that allowed union members formerly employed by Seaboard to transfer to Richmond; however, it did not allow the new employees to receive the same pay. Id. at 1055-56. As a result, Meekins and Koenig sued their union, the United Transportation Union, alleging breach of the union’s duty of fair representation under the Railway Labor Act. Id. at 1056. On remand, the district court ruled that the plaintiffs were entitled to receive the same pay as other employees under the consolidation agreement, and entered judgment in their favor. Id. When the union failed to comply with that order for the time period after the court’s entry of judgment, the plaintiffs again filed suit on April 11, 1989, seeking damages and attempting to enjoin the union from refusing to honor the pay scheme for the period after the court’s judgment in the first suit. Id.
58. Id. at 1057-58.
59. Id.; see supra note 57 for a description of the claims.
60. Meekins, 946 F.2d at 1057 (quoting Harnett v. Billman, 800 F.2d 1308, 1313 (4th Cir. 1986)).
61. 640 F.2d 484 (4th Cir. 1981).
62. Id. at 486.
63. Id. at 485-86.
64. Id. at 497.
quirements of the res judicata test were met. The court concluded that Nash County Board of Education was in privity with the Attorney General who brought the first antitrust suit. The court asserted: “Privity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.” Based on the close relationship and aligned goals of the Board of Education and the Attorney General, the Court held that the second suit was barred.

In Comite de Apoyo a Los Trabajadores Agrícolas (CATA) v. United States Department of Labor, the Fourth Circuit held that “[e]ven in its most abstract conception, privity attaches only to those parties whose interests in a given lawsuit are deemed to be ‘aligned.’” Comite de Apoyo involved a challenge by a group of migrant farm workers to the Department of Labor’s (“DOL”) approval of a $3.50 per hour wage to perform orchard work for two western Maryland orchards—Hepburn Orchards, Inc. and Fairview Orchards Associates. CATA and a number of other individual plaintiffs filed a complaint against the two orchards and the DOL, claiming that the $3.50 per hour wage was “too low.” After considering several motions, the district court granted Hepburn’s motion to dismiss because the plaintiffs had not worked for Hepburn during the season in question. The court also dismissed Fairview by relying on a clause in the plaintiffs’ labor contract requiring all disputes to be resolved through arbitration. Lastly, the court rejected the plaintiffs’ motion for a preliminary injunction because the wage rate calculations were “complex, and best left to the expertise of the Department of Labor.”

Despite the fact that the district court deferred to the expertise of the DOL to formulate fair wages, the DOL soon professed that it had erred in approving the $3.50 per hour wage. To rectify the situat-
tion, the DOL increased the wage to $3.84 per hour under a new wage-correlation methodology. Plaintiffs responded by amending their complaint to challenge the DOL's new calculation formula. The district court awarded summary judgment to the DOL and the plaintiffs appealed, arguing that they were entitled to a declaratory judgment that the DOL improperly computed the wages.

Upon consideration of the matter, the Fourth Circuit held that the plaintiffs lacked standing to challenge the newly calculated wages. The court explained that to have standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." In response, the plaintiffs asserted that a declaratory judgment would preclude Fairview from challenging the back pay claim in arbitration. Thus, the plaintiffs explained, such relief would redress their injuries, a required element to show standing, because it would allow them to obtain an arbitration back pay award. By requesting a declaratory judgment when a party that would be adversely affected by the judgment was not present, the plaintiffs essentially urged the court to deem that Fairview and the DOL were in privity.

The court refused to find that Fairview and DOL were in privity because the two did not "have [any] of the special relationships—e.g., familial, commercial, fiduciary—to which courts have traditionally assigned the status of privity." In so concluding, the court stressed that the interests of the parties were not aligned by contrasting the DOL's interest in establishing a fair wage rate with Fairview's desire to have a low wage rate.

In United States v. Manning Coal Corp., the Fourth Circuit once again evaluated the meaning of privity and took "into account how the regulatory scheme" affected the operation of res judicata. The source of the controversy in Manning stemmed from several contracts that Manning Coal Corporation entered into with Red River Coal

77. Id.
78. Id.
79. Id. at 513.
80. Id.
81. Id. (internal quotation marks omitted) (alteration in original).
82. Id.
83. Id.
84. Id. at 514.
85. Id.
86. Id.
87. 977 F.2d 117 (4th Cir. 1993).
88. Id. at 121.
Company to mine coal from property owned by Red River.\textsuperscript{89} In these contracts, Manning Coal agreed to pay all taxes levied against the coal it mined, including the thirty-five cents per ton fee required by the Surface Mining Control and Reclamation Act (SMCRA).\textsuperscript{90} Manning Coal did not live up to its end of the contract—although it mined over 450,000 tons of coal between June 1981 and December 1983, Manning Coal paid no SMCRA reclamation fees.\textsuperscript{91} Red River attempted to obtain a declaratory judgment against the government, arguing that it did not owe any SMCRA reclamation fees.\textsuperscript{92} The government countersued.\textsuperscript{93}

Red River eventually settled with the government and paid almost $185,000 in fees on the coal mined by Manning Coal.\textsuperscript{94} In exchange, the government assigned Red River the right to collect from Manning Coal itself.\textsuperscript{95} In Red River’s action to reclaim those fees from Manning Coal, however, the government intervened and attempted to recover interest and other administrative expenses on those same fees from Manning Coal.\textsuperscript{96} The district court held that Manning Coal did not have to pay additional fees to the government because Manning Coal was in privity with Red River by virtue of their principal-agent relationship.\textsuperscript{97}

On appeal, the Fourth Circuit disagreed that Red River and Manning were in privity by focusing on how the regulatory scheme under the SMCRA affected the application of res judicata.\textsuperscript{98} The court first cautioned future courts to hesitate before “interposing a view of preclusion that is wholly at odds with the purposes of a statutory scheme.”\textsuperscript{99} To elaborate on this point, the court stressed that the language of the SMCRA provides that “[a]ll operators of coal mining operations’ should pay fees to help reclaim mined lands.”\textsuperscript{100} Moreover, the court stated that “operator[s],” which include both mining contractors and landowners, should be jointly and severally liable for SMCRA reclamation fees.\textsuperscript{101} The court then concluded that “[i]t

\textsuperscript{89} Id. at 119.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 121.
\textsuperscript{99} Id.
\textsuperscript{100} Id. (alteration in original) (quoting SMCRA).
\textsuperscript{101} Id.
would confound the administration of the Act to hold, for purposes of preclusion, that jointly and severally liable parties like Red River and Manning are in privity."102 By looking at the SMCRA, the court also recognized the congressional intent not to limit government action against either the mineral owner or the mining company.103 Thus, in light of the fact that Congress can amend the common law defense of res judicata at any time, the court adhered to the congressional intent behind the SMCRA.104

When the Fourth Circuit ruled on the above cases, it established valuable guidelines for evaluating the proper scope and application of res judicata. These cases provide specific guidance to determine such essential factors as when parties are in privity and when congressional intent behind a statutory scheme contradicts the court's three-pronged analysis of res judicata. Against this legal background, the Fourth Circuit ably looked to existing case law on res judicata when it decided Jones.

b. The Creation of the Maloney Act.—The Great Depression spawned many legislative initiatives aimed at strengthening the financial market.105 Of these enactments, the Securities Exchange Act of 1934 (Exchange Act) had a significant impact on the securities industry106 and paved the way for additional statutory regulation of the financial markets.107 Because the origin and purpose of the Maloney Act108 are directly rooted in the Exchange Act, a brief examination of the function and purpose of the Exchange Act is appropriate.

102. Id.
103. Id.
104. Id. The court warned that courts should be "hesitant to interpose a view of preclusion that is wholly at odds with the purpose of the statutory scheme." Id. Reasoning that because Congress can change the application of res judicata, congressional intent behind an act is relevant even if it defies the basic principles of res judicata. Id.
106. See Choi & Guzman, supra note 105, at 1856 (stating that the Securities Act of 1933 and the Exchange Act "form the core of the modern-day securities regulation regime").
107. See id. (listing subsequent acts relating to the securities industry, including the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940).
In addition to establishing the Securities and Exchange Commission, the Exchange Act provided regulations for securities exchanges and promulgated rules to prevent unfair practices in the exchanges and markets. The Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." The Act also stipulates that a dealer is any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

Upon enacting the Exchange Act, Congress mandated that all exchanges regulate securities brokers who trade on the exchange. A considerable portion of other trading, however, did not occur within exchanges but rather "over the counter," by non-member brokers and dealers. Because Congress mainly vested the SEC with authority to regulate the securities exchanges, brokers who traded outside of the exchanges were inadequately regulated. This lack of direct supervision resulted in a need and a desire for a national securities association to govern non-member broker-dealers.

In 1938, Congress responded by passing the Maloney Act, which amended the Exchange Act to authorize national securities associations to regulate non-member broker-dealers. To carry out this role, the national securities associations are permitted to enact rules

109. An exchange is defined as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers and sellers of securities." 15 U.S.C. § 78c(a)(1) (1994).
114. Id.
115. Id. at 205.
116. Id. at 205-06.
117. See Maloney Act § 15A (codified as amended at 15 U.S.C. § 78o-3) (stating that "[a]n association of brokers and dealers may be registered as a national securities association"); 6 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2790 (3d ed. 1990) ("The new §15A added to the Exchange Act gave legislative sanction to the formation and registration of 'national securities associations' that would supervise the conduct of their members.").
subject to the oversight of the SEC. Moreover, the SEC may abrogate or amend the associations' rules as detailed in the Exchange Act.119

To date, the only entity that has applied for registration as a national securities association pursuant to the Maloney Act is the NASD, a nonprofit corporation under Delaware law.120 The NASD is a self-regulatory organization with over half a million registered representatives.121 The NASD is responsible for self-regulation of its members,122 and all disciplinary action taken by the organization is subject to oversight by the SEC.123 The Maloney Act grants the SEC power to review NASD orders and modify the NASD's sanctions if the Commission finds them to be excessive.124 The Commission cannot, however, increase NASD sanctions.125

c. Double Jeopardy.—The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution requires that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.”126 The purpose of the clause is to protect “against multiple punishments for the same offense.”127 Although the language of the Double Jeopardy Clause is seemingly straightforward, the clause is often the subject of controversy. Moreover, recent Supreme Court decisions have sparked a heated debate concerning the reach and pro-

119. See 15 U.S.C. § 78s(c) (1994) (stating that “[t]he Commission, by rule, may abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . . as the Commission deems necessary”); see also Michael, supra note 113, at 205-06 (explaining that the Maloney Act gave the SEC the power to review disciplinary proceedings and the ability to propose rule changes).
120. 6 LOSS & SELIGMAN, supra note 117, at 2794-95. In 1939, the Investment Bankers Conference, Inc., which had been a nonprofit corporation under Delaware law, became the NASD. On August 7, 1939, the Commission granted the NASD’s application for registration as a national securities association. Id.
121. NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., 1996 ANNUAL REPORT 2 (1997). “The NASD’s membership is comprised of more than 5,500 securities firms which operate over 60,000 branch offices and employ more than 535,000 registered representatives.” Id.
124. See 15 U.S.C. § 78s(e)(2) (stating that the Commission “may cancel, reduce or require the remission” of a NASD sanction); 15 U.S.C. § 78s(d)(2) (explaining the procedures by which the SEC can review NASD sanctions).
125. See 15 U.S.C. § 78s(e)(2) (stating that the Commission “may cancel, reduce, or require the remission of such sanction”).
126. U.S. CONST. amend. V.
tections of this constitutional component.\textsuperscript{128} Most recently the Supreme Court has addressed the issue of double jeopardy in the context of civil forfeiture cases.\textsuperscript{129}

In \textit{One Lot Emerald Cut Stones v. United States},\textsuperscript{130} a defendant who had been acquitted of criminal charges for smuggling jewels claimed that the Double Jeopardy Clause barred a subsequent civil forfeiture action initiated by the government for the same offense.\textsuperscript{131} The Court held that the civil action did not constitute a multiple punishment in violation of double jeopardy because the case “involve[d] neither two criminal trials nor two criminal punishments.”\textsuperscript{132} In establishing that the civil action was not punitive, the Court employed the following two-prong analysis: (1) whether the purpose of the action is “remedial rather than punitive,”\textsuperscript{133} and (2) whether the method of recovery “is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.”\textsuperscript{134} The Court then concluded that, in this case, the purpose of the civil forfeiture was remedial and not punitive, and that the method of recovery was not so excessive as to transform the civil remedy into a criminal penalty.\textsuperscript{135} Thus, a person may be subject to both criminal and civil punishment based on separate, independent causes of action without violating the Double Jeopardy Clause.\textsuperscript{136}

A decade later, the Court invoked the two-prong test articulated in \textit{One Lot Emerald Cut Stones} to dismiss a double jeopardy defense. In \textit{United States v. One Assortment of 89 Firearms},\textsuperscript{137} the Bureau of Alcohol,

\textsuperscript{128} See Peter J. Henning, \textit{Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy}, 31 AM. CRIM. L. REV. 1, 3 (1993) (stating that the Supreme Court constantly “tinker[s]” with the Double Jeopardy Clause thereby “generat[ing] greater confusion than clarity”).

\textsuperscript{129} See generally United States v. Ursery, 116 S. Ct. 2135 (1996) (holding that a civil forfeiture was not considered punishment under the Double Jeopardy Clause); United States v. Halper, 490 U.S. 435 (1989) (holding that imposing a civil forfeiture subsequent to a criminal conviction violates the Double Jeopardy Clause if the civil sanction is “sufficiently disproportionate” to the amount of harm caused by the defendant); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (applying the test from \textit{One Lot Emerald Cut Stones} to determine that the civil forfeiture in question was not punishment and therefore did not invoke the protections of the Double Jeopardy Clause); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam) (holding that a civil forfeiture action by the government is not barred subsequent to a criminal suit).

\textsuperscript{130} 409 U.S. 232 (1972) (per curiam).

\textsuperscript{131} Id. at 232-33.

\textsuperscript{132} Id. at 235.

\textsuperscript{133} Id. at 237.

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 236.

Tobacco, and Firearms seized firearms from Patrick Mulcahey's home and charged him with knowingly dealing firearms without a license.\textsuperscript{138} After Mulcahey was acquitted of the criminal charges, the government pursued an in rem action for the forfeiture of the firearms.\textsuperscript{139} Upon applying the test set out in One Lot Emerald Cut Stones, the Court concluded that because the forfeiture was not intended as punishment, the Double Jeopardy Clause was not applicable.\textsuperscript{140} The government, therefore, was free to pursue its in rem action.\textsuperscript{141}

In \textit{United States v. Halper},\textsuperscript{142} the Court held that where a defendant previously endured a criminal penalty, and the penalty sought in the subsequent proceeding "bears no rational relationship to the goal of compensating the Government for its loss," the defendant is entitled to an accounting to determine if the second penalty constitutes a punishment.\textsuperscript{143} The Court compared the $130,000 fine sought by the government to the $16,000 of costs incurred by the government.\textsuperscript{144} Because the disparity between the government's costs and the defendant's liability was "sufficiently disproportionate," the Court held that the civil sanction constituted a second form of punishment for the same offense.\textsuperscript{145}

The Court again contemplated the relationship between the Double Jeopardy Clause and civil forfeitures in \textit{United States v. Ursery}.\textsuperscript{146} The Ursery Court held that a civil forfeiture subsequent to a criminal conviction did not constitute two punishments for the same offense.\textsuperscript{147} Reversing the rulings of the Sixth and Ninth Circuits below, the Court demonstrated that the two circuits had misconstrued previous Supreme Court holdings.\textsuperscript{148} Specifically, the Court reasoned that it is impossible to quantify the nonpunitive purposes of civil for-

\textsuperscript{138} \textit{Id.} at 355-56.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 362-66.
\textsuperscript{141} \textit{Id.} at 366.
\textsuperscript{142} 490 U.S. 435 (1989).
\textsuperscript{143} \textit{Id.} at 449.
\textsuperscript{144} \textit{Id.} at 452. The defendant in \textit{Halper} faced a 65-count indictment for violating a criminal false-claims statute. Shortly after his conviction, the government filed a new suit under the civil False Claims Act, which allowed a $2000 statutory maximum penalty for each violation of the Act. \textit{Id.} at 437-39.
\textsuperscript{145} \textit{Id.} at 452.
\textsuperscript{146} 116 S. Ct. 2135 (1996).
\textsuperscript{147} \textit{Id.} at 2149.
\textsuperscript{148} \textit{Id.} at 2142-47. According to the Court, the Sixth and Ninth Circuits had interpreted previous Supreme Court decisions, including \textit{Halper}, to mean that, "as a categorical matter, forfeitures under § 981(a)(1)(A) and § 881(a)(6) always constitute 'punishment.'" \textit{Id.} at 2139.
feitures, as required by Halper.149 The Court noted that nothing in its previous cases "purported to replace [the] traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause."150

As evidenced by the above cases, the Supreme Court established unclear precedent with regard to whether civil forfeitures constitute punishment under the Double Jeopardy Clause. The two-prong test laid down in One Lot Emerald Cut Stones is inadequate in that it requires a vague inquiry into the excessiveness of the action.151 Thus, when the Sixth and Ninth Circuits struggled to apply the two-prong test, these courts were reprimanded for misconstruing previous Supreme Court holdings.152 Fortunately, however, the Supreme Court's decision in Ursery, by explaining that certain sanctions are immeasurable for the purposes of the Double Jeopardy Clause, provided additional guidance in determining whether an action falls under the civil or criminal domain.153 Thus, when the Fourth Circuit ruled on whether a debarment was civil or criminal, it strongly relied on the Supreme Court's reasoning in Ursery.154

In United States v. Hatfield,155 the Fourth Circuit held that the debarment156 of a government contractor for a period of twenty-six months was not punitive and did not implicate the Double Jeopardy Clause.157 In so concluding, the court utilized the two-prong analysis enunciated in One Lot Emerald Cut Stones to determine whether the debarment constituted a civil or criminal sanction.158 The first part of the analysis yielded the conclusion that "debarment cannot be imposed to punish but only to serve the remedial goal of protecting the government."159 In answering the second prong of the analysis, the court invoked the Ursery reasoning and refused to measure the govern-

149. Id. at 2145.
150. Id. at 2147.
151. See supra notes 133-134 and accompanying text.
152. See supra note 148 and accompanying text.
153. See supra notes 146-150 and accompanying text.
154. See infra note 160 and accompanying text.
155. 108 F.3d 67 (4th Cir. 1997).
157. Hatfield, 108 F.3d at 70. Hatfield argued that after his debarment, the Double Jeopardy Clause protected him from the government's criminal indictment. Id. at 68.
158. Id. at 68-69; see supra notes 130-136.
159. Hatfield, 108 F.3d at 69.
ment’s harm against the value of the debarment because of the impossibility of quantifying the value of a debarment.\textsuperscript{160}

Other circuits have addressed whether a non-governmental entity can be considered an agent of the U.S. government for purposes of invoking constitutional provisions.\textsuperscript{161} In the Second Circuit’s \textit{United States v. Solomon},\textsuperscript{162} the defendant argued that the New York Stock Exchange (NYSE) is an arm of the federal government because it administers portions of the Exchange Act.\textsuperscript{163} The court rejected this argument by reasoning that the Fifth Amendment only restricts the conduct of “government in the narrowest sense,” and that “[n]o private body, however close its affiliations with the government, can . . . subject a person ‘for the same offense to be twice put in jeopardy of life or limb.’”\textsuperscript{164}

Other circuits have held that the SEC’s revocation of a broker’s license does not constitute punishment.\textsuperscript{165} In \textit{Blaise D’Antoni & Associates v. SEC},\textsuperscript{166} the Second Circuit held that “[t]he Commission’s order [revoking a broker’s registration] is not punitive; it is not a penalty imposed on the broker. Revocation and denial of registration are but means to protect the public interest.”\textsuperscript{167} The court explained that rev-

\textsuperscript{160} Id. at 70.

\textsuperscript{161} See Bernstein v. Lind-Waldock & Co., 738 F.2d 179, 186 (7th Cir. 1984) (holding that actions initiated by the Chicago Mercantile Exchange are not considered governmental); \textit{United States v. Solomon}, 509 F.2d 863, 869-70 (2d Cir. 1975) (declaring that actions by the New York Stock Exchange (NYSE) are not governmental in nature and therefore have no effect on the Fifth Amendment right against self-incrimination).

\textsuperscript{162} 509 F.2d 863 (2d Cir. 1975). Solomon, a broker-dealer and member of the NYSE, was summoned by the NYSE to testify about a matter. \textit{Id.} at 865. Soon thereafter, the government relied on the statements made during his appearance before the NYSE to pursue a criminal action against Solomon. \textit{Id.} Based on these statements, Solomon was held criminally responsible for violating SEC regulations. \textit{Id.} at 865-66. Solomon then appealed, arguing that his statements during his NYSE testimony were inadmissible in his criminal trial because of the protections of the Fifth Amendment’s privilege against self-incrimination. \textit{Id.} at 866. Judge Friendly of the Second Circuit pronounced that the Self-Incrimination Clause of the Fifth Amendment only restricts government action and not private actions like that of the NYSE. \textit{Id.} at 869-70. In holding that the NYSE was a private, non-governmental entity, Judge Friendly rejected Solomon’s Fifth Amendment self-incrimination claim. \textit{Id.}

\textsuperscript{163} \textit{Id.} at 868.

\textsuperscript{164} \textit{Id.} at 867 (quoting U.S. Const. amend. V).

\textsuperscript{165} See \textit{Blaise D’Antoni & Assocs. v. SEC}, 289 F.2d 276, 277 (5th Cir. 1961) (determining that revocation of registration is not punitive, but rather a method used to protect the public); Pierce v. SEC, 239 F.2d 160, 163 (9th Cir. 1956) (holding that the SEC’s revocation of a broker’s license protects the public and is not a penalty against a broker).

\textsuperscript{166} 289 F.2d 276 (5th Cir. 1961).

\textsuperscript{167} \textit{Id.} at 277.
ocation of a registration was not unreasonable in light of the broker's violation of the Commission's net capital rule.\textsuperscript{168}

The Supreme Court has sent mixed signals regarding the Double Jeopardy Clause.\textsuperscript{169} It is clear, however, that remedial civil sanctions that are impossible to quantify cannot be deemed punishment under the Due Process Clause.\textsuperscript{170} The Court's pronouncement of this concept in \textit{Ursery} was followed by the Fourth Circuit's refusal in \textit{Hatfield} to qualify a debarment as punishment.\textsuperscript{171}

3. \textit{The Court's Reasoning}.—In \textit{Jones v. SEC}, the Fourth Circuit held that an action taken by the NASD did not have a preclusive effect upon a subsequent action by the SEC.\textsuperscript{172} In reaching this conclusion, the court carefully considered principles of res judicata, the Maloney Act, and the Fifth Amendment's Double Jeopardy Clause.\textsuperscript{173}

The court first addressed Jones's argument that because the SEC did not choose to review, modify, or cancel the NASD's sanction, it should be barred from initiating its own investigation by the principles of res judicata.\textsuperscript{174} The court then ruled that Jones failed to establish the second and third elements required for a successful res judicata defense.\textsuperscript{175} Specifically, Jones was unable to demonstrate that the SEC's subsequent enforcement action was the same as the NASD's enforcement action, and he could not show privity between the NASD and the SEC.\textsuperscript{176}

The court next explored the statutory authority of the Maloney Act by examining legislative intent.\textsuperscript{177} Jones did not espouse any statutory interpretation or provide legislative history to support his theory that the SEC is not authorized to initiate its own action subsequent to similar NASD sanctions.\textsuperscript{178} The court found that Congress provided the SEC with the authority to modify, reduce, or cancel sanctions imposed by the NASD.\textsuperscript{179} The court also recognized the SEC's need for

\begin{itemize}
  \item \textsuperscript{168} \textit{Id.}; see also 17 C.F.R. § 240.15c3-1 (1997) (stating that "[e]very broker or dealer shall at all times have and maintain net capital no less than . . . its ratio requirement [outlined in this section]").
  \item \textsuperscript{169} See \textit{supra} note 128 and accompanying text.
  \item \textsuperscript{170} See \textit{supra} notes 146-150 and accompanying text.
  \item \textsuperscript{171} See \textit{supra} notes 155-160 and accompanying text.
  \item \textsuperscript{172} 115 F.3d at 1175.
  \item \textsuperscript{173} \textit{Id.} at 1177.
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} at 1178-81.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 1181-82.
  \item \textsuperscript{178} \textit{Id.} at 1182.
  \item \textsuperscript{179} \textit{Id.} at 1181.
\end{itemize}
authority to execute securities laws in order to protect the public's interest in maintaining a fair and safe market.\textsuperscript{180} While emphasizing the SEC's unique supervisory role, broad responsibilities, and enforcement rights, the court held that the Maloney Act does not limit the SEC's enforcement rights and obligations in this situation.\textsuperscript{181}

The court next rejected Jones's argument that the Double Jeopardy Clause prohibits punishment by both the NASD and the SEC for the same conduct.\textsuperscript{182} In reaching this conclusion, the court emphasized that the Double Jeopardy Clause functions to "prohibit[ ] successive governmental criminal prosecutions and successive governmental punishments for the same conduct."\textsuperscript{183} Because the NASD is considered a closely regulated corporation, the court deemed it to be a private corporation rather than a governmental agency.\textsuperscript{184} Thus, the court concluded that disciplinary action taken by the NASD cannot implicate the Double Jeopardy Clause.\textsuperscript{185} This conclusion was also rooted in the \textit{Solomon} court's observation that the Double Jeopardy Clause "restricts the conduct of the 'government in the narrowest sense,' and 'no private body, however close its affiliation with the government, can ... subject a person' to double jeopardy."\textsuperscript{186}

The court further explained that Jones had not endured two punishments under the Double Jeopardy Clause because he failed to illustrate the "clearest proof . . . that the proceeding is not civil but criminal in nature."\textsuperscript{187} To assess whether Jones carried his burden, the court invoked the two-prong analysis laid down in \textit{One Lot Emerald Cut Stones} and examined whether the sanction (1) was designated to be remedial and (2) whether the remedy "'is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.'"\textsuperscript{188} Because Jones did not sufficiently demonstrate that the SEC's suspension was disproportionate to the benefits received by the government in protecting the public, the court concluded that he failed to satisfy the required burden.\textsuperscript{189} In so ruling, the court emphasized that the detrimental nature of Jones's conduct

\textsuperscript{180} Id. at 1182.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 1182-83.
\textsuperscript{183} Id. at 1183.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. (alteration and ellipsis in original) (quoting United States v. Solomon, 509 F.2d 863, 867 (2d Cir. 1975)).
\textsuperscript{187} Id. (ellipsis in original) (internal quotation marks omitted).
\textsuperscript{188} See supra notes 133-134 and accompanying text.
\textsuperscript{189} Jones, 115 F.3d at 1183.
may have resulted in investor losses.\textsuperscript{190} The court also invoked the reasoning in \textit{Blaise D'Antoni \& Associates v. SEC} to assert that the suspension of a broker-dealer is not punitive, but rather a way to protect the public interest.\textsuperscript{191} Thus, the court held that the Double Jeopardy Clause did not prevent the SEC from initiating its own action.\textsuperscript{192}

Finally, the court briefly discussed Jones's challenge to the "sufficiency of the evidence to support the finding of scienter and the illegal conduct related to it" and his claim that a thirty-month suspension was "unduly harsh."\textsuperscript{193} Because the SEC was the fact finder in this case, the Fourth Circuit was not in a position to review the facts.\textsuperscript{194} The court accepted the findings of the SEC that Jones acted with scienter.\textsuperscript{195} Moreover, the court found that the SEC properly protected the interests of the investing public by suspending Jones.\textsuperscript{196}

4. \textit{Analysis}.—In Jones \textit{v. SEC}, the Court of Appeals for the Fourth Circuit determined that the SEC was not barred from initiating its own proceeding subsequent to a NASD disciplinary action.\textsuperscript{197} In so concluding, the court found that concepts of double jeopardy, res judicata, and the Maloney Act did not prohibit the conduct of the SEC.\textsuperscript{198} The court correctly applied precedent and legislative intent to establish that any action taken by the NASD does not bar future action by the SEC.\textsuperscript{199}

\textit{a. Res Judicata}.—The Fourth Circuit analyzed Jones's res judicata claim by applying the three requirements of res judicata set forth in \textit{Meekins v. United Transportation Union}.\textsuperscript{200} The court correctly rejected the res judicata argument by determining that the situation did not meet all three required elements.\textsuperscript{201}

The court correctly assumed "that a prior SEC decision based on the NASD's disciplinary order would have preclusive effect to the same extent as any other agency decision where the agency acts in an..."}

\textsuperscript{190. Id.}
\textsuperscript{191. Id.}
\textsuperscript{192. Id.}
\textsuperscript{193. Id. at 1183-84 (internal quotation marks omitted).}
\textsuperscript{194. Id. at 1184.}
\textsuperscript{195. Id.}
\textsuperscript{196. Id. at 1184-85.}
\textsuperscript{197. Id. at 1175.}
\textsuperscript{198. Id.}
\textsuperscript{199. Id. at 1178-83.}
\textsuperscript{200. See supra note 51 and accompanying text.}
\textsuperscript{201. See supra notes 50-104 and accompanying text for a discussion of the three required elements.}
adequately judicial capacity.” This first element of res judicata was clearly identified by the court, because the NASD unequivocally issued a final judgment on Jones’s dealings with Sidbury and OVP.

Second, the court’s rejection of the “same cause of action” prong was a conservative measure to preserve the integrity of the Maloney Act, and to prevent the potential flood of cases that would have resulted had the court adopted Jones’s argument that the identity of the cause of action in both the earlier and the later suit was the same. The court correctly discarded this contention in light of congressional intent to grant the NASD and the SEC “overlapping disciplinary authority” under the Maloney Act.

Third, the court properly established that the SEC and the NASD were not in privity. The court, in making this conclusion, looked to many recent Fourth Circuit cases that focused on whether the interests of the parties were aligned for purposes of privity. The court then examined the objectives that the SEC and the NASD serve in initiating actions. When the SEC reviews an NASD disciplinary proceeding, the court explained, the SEC’s purpose is to take a neutral interest in the outcome of the case, and to promote a fair proceeding. In contrast, when the NASD initiates an action, it takes on a prosecutorial role. By highlighting these unique and complementary attributes, the court established that the two parties were not in privity. The SEC’s goal is to protect the public; the NASD’s role is self-regulation.

When the Jones court rejected the second and third prongs of Jones’s res judicata argument, it greatly deferred to congressional intent. Absent the existence of the Maloney Act, however, there is a strong indication that the court would have deemed the NASD and

203. Id.
204. Id. at 1181 (recognizing the relationship between Jones’s res judicata claim and Congress’s intent behind passing the Maloney Act).
205. Id. at 1178.
206. Id. at 1180.
207. Id. at 1180-81.
208. See supra notes 61-104.
209. Jones, 115 F.3d at 1180.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id. at 1180-82.
the SEC to be in privity.\textsuperscript{215} The court even acknowledged that the two suits involved similar causes of action when it noted that the actions are "undoubtedly similar and arguably duplicative in some respect."\textsuperscript{216} By recognizing that the second cause of action would have a preclusive effect absent the existence of a statute, the court essentially eliminated the res judicata defense in future actions involving the NASD and the SEC. Future defendants who raise the defense of res judicata will do so with virtually no chance of success unless Congress aligns the goals of the SEC and the NASD.

\textit{b. The Court Avoided Conflict Between the Maloney Act and Res Judicata.}—The \textsc{jones} court interpreted the Maloney Act both logically and thoughtfully. There is a compelling indication that the Maloney Act was enacted to require the NASD to serve as a self-regulating entity.\textsuperscript{217} This is evidenced by the fact that Congress vested the SEC with considerably more powerful disciplinary tools than the NASD, such as the right to seek injunctive relief and initiate criminal prosecution.\textsuperscript{218} The greatest sanction of the NASD, in contrast, is to "expel a member, revoke his registration, and bar him from association with NASD members."\textsuperscript{219} Had the court found the two parties in privity, the SEC would, in all likelihood, involve itself in all NASD actions because the SEC would fear the preclusive effect of NASD sanctions. Moreover, because of the distinct roles and interests of the SEC and the NASD,\textsuperscript{220} defendants would have greater difficulty negotiating a settlement with the two parties. In turn, this could result in a drain on judicial resources as parties are unnecessarily forced to litigate cases. To protect the integrity of the market and the securities industry, therefore, it was important for the \textsc{jones} court to shield the SEC from the res judicata effect of an NASD sanction.

\textit{c. Double Jeopardy.}—By questioning whether the suspension of a broker-dealer constitutes punishment under the Double Jeopardy Clause, the court entered a confusing web of Supreme Court decisions on civil forfeiture actions.\textsuperscript{221} The court, however, did not ad-

\begin{itemize}
  \item \textsuperscript{215} See \textit{id.} at 1180 (stating that "when enacting the Maloney Act, Congress consciously divided the securities regulatory effort between industry self-regulation and SEC regulation").
  \item \textsuperscript{216} Id.
  \item \textsuperscript{217} See supra notes 116-123 and accompanying text.
  \item \textsuperscript{218} \textsc{jones}, 115 F.3d at 1179-80.
  \item \textsuperscript{219} Id. at 1179.
  \item \textsuperscript{220} See supra notes 105-125 and accompanying text.
  \item \textsuperscript{221} See Henning, supra note 128, at 3 (blaming the Court’s double jeopardy decisions for creating confusion rather than clarity).
\end{itemize}
dress the inconsistencies and illogical distinctions found in these past
decisions. Because Jones was unable to show that the harm he would
suffer by virtue of his suspension would outweigh the benefit to the
government, the court relied on the reasoning of One Lot Emerald Cut
Stones, Ursery, and One Assortment of 89 Firearms in concluding that the
sanction did not qualify as punishment under the Double Jeopardy
Clause.\textsuperscript{222} Because these cases could be applied to the facts of Jones,
the Fourth Circuit avoided discussing other Supreme Court cases that
set forth unclear precedent with regard to the Double Jeopardy
Clause.\textsuperscript{223} Moreover, because the Ursery Court somewhat clarified the
confusion surrounding the Double Jeopardy Clause, the Jones court
confidently cited Ursery and the stream of Supreme Court cases that
limited the definition of punishment.\textsuperscript{224}

The Jones court properly accepted the government’s argument
that the Double Jeopardy Clause is not applicable because (1) the
NASD is a private party and not a governmental entity,\textsuperscript{225} and (2) the
SEC’s sanctions were remedial and not penal.\textsuperscript{226} By determining that
the NASD was not a governmental entity, the court heeded the Sec-
ond Circuit’s determination that no one “except [the] government in
the narrowest sense” is capable of violating the Fifth Amendment.\textsuperscript{227}
Moreover, “[n]o private body, however close its affiliations with the
government, can hold a person . . . ‘for the same offense to be twice
put in jeopardy of life or limb.’”\textsuperscript{228} The NASD does possess many
characteristics of a private association because it is a nonprofit corpo-
ration chartered in Delaware with jurisdiction solely over its own
members.\textsuperscript{229} Therefore, in a sense, the Jones decision was supported
by this line of reasoning. Yet, some courts have left open the question
whether the NASD serves as a governmental entity.\textsuperscript{230} The Jones court
did not enter this debated area, but instead dismissed this issue with

\begin{itemize}
\item \textsuperscript{222} Jones, 115 F.3d at 1183.
\item \textsuperscript{223} See United States v. Ursery, 116 S. Ct. 2135, 2142 (1996) (stating that the Ninth
Circuit misread three of the Supreme Court’s civil forfeiture decisions).
\item \textsuperscript{224} Jones, 115 F.3d at 1183.
\item \textsuperscript{225} Id. at 1182-83. But see Briccetti, \textit{supra} note 122, at 586-605 (arguing that the NASD
acts in a “governmental manner” and should therefore be subject to the Fourth and Fifth
Amendments).
\item \textsuperscript{226} Jones, 115 F.3d at 1182-83.
\item \textsuperscript{227} Id. at 1182-83. Id.
\item \textsuperscript{228} United States v. Solomon, 509 F.2d 863, 867 (2d Cir. 1975).
\item \textsuperscript{229} 6 LOSS & SELIGMAN, \textit{supra} note 117, at 2794.
\item \textsuperscript{230} \textit{See}, \textit{e.g.}, Ross v. Bolton, 106 F.R.D. 315, 316 (S.D.N.Y. 1984) (stating that “the exact
status of the NASD is unsettled: it is granted governmental-type powers for some functions,
while maintaining its private nature for others”).
\end{itemize}
little exploration of the matter.\textsuperscript{231} Perhaps the Jones court did not want to go so far as to classify an SRO as an extension of the government and thereby extend the application of constitutional rights. In future decisions of this nature, however, the court may be forced to analyze the question in more detail.

After explaining that the NASD was not a governmental entity for the purposes of the Double Jeopardy Clause, the court further demonstrated that Jones did not incur two punishments because the SEC's sanctions were remedial and not penal.\textsuperscript{232} While the sanctions in the SEC's action were nonmonetary and therefore, immeasurable under the Halper test, a different outcome may have resulted if the SEC's sanctions had included a monetary fine. This holds true because the Ursery Court constricted the use of Halper to instances where the nonpunitive purpose of a sanction can be quantified.\textsuperscript{233} Thus, if the SEC imposes a monetary fine and a future court determines that the fine is disproportionately higher than the costs incurred by the NASD and SEC, the fine may constitute a form of punishment.\textsuperscript{234} Under this analysis, a defendant similarly situated to Jones would likely succeed in obtaining the protections of the Double Jeopardy Clause.

5. Conclusion.—The Fourth Circuit's holding in Jones v. SEC validated the unique role of the SEC as an investigator, reviewer, judge, and prosecutor. Brokers must realize the harsh repercussions of their illegal and unethical activities. The holding in this case emphasizes that brokers who break the law cannot be shielded by weak settlements administered by their own trade association. Rather, they will continue to be subject to the Commission's own investigation and prosecution. By allowing subsequent action by the SEC, the court reinforced the structure of the securities industry as mandated by Congress.

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\textsuperscript{231} Jones, 115 F.3d at 1183.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} United States v. Ursery, 116 S. Ct. 2135, 2145 (1996).
\textsuperscript{234} \textit{Id.}