

Recent Developments in the Law

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In order to keep you abreast of recent developments in the law, Saunders & Schmieler's *S&S Recent Developments in the Law* reports on the significance of current decisions of major import in the jurisdictions of Maryland, the District of Columbia, Virginia, and the federal Fourth Circuit.

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Recent Developments in the Law

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SUPREME COURT OF THE UNITED STATES

Regulation of Rent Charged by Oil Companies to Lessees of Gas Stations:

Lingle v. Chevron, U.S.A., Inc., 125 S. Ct. 2074 (2005).

Holding: The "substantially advances a legitimate state interest" standard for evaluating whether a taking has occurred for purposes of the Fifth and Fourteenth Amendments is inappropriate and will not be applied to "takings" questions. Chevron was not entitled to summary judgment that Hawaiian rent cap law was unconstitutional.

Case Summary: When this case began in 1997, only two refineries and six gasoline wholesalers were doing business in Hawaii, making the Hawaiian legislature acutely aware of the effects of market concentration on retail gasoline prices. In response to this concentration, the legislature passed an act that imposed restrictions on the ownership and leasing of service stations by oil companies. The restrictions included prohibitions on the conversion of lessee-dealer stations to company-owned stations; prohibited companies from locating new company-operated stations in close proximity to existing dealer-operated stations; and limited the amount of rent that an oil company may charge a lessee-dealer

to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline.

Chevron took issue with the rent cap portion of the act; most of Chevron's product was sold through 64 independently owned lessee-dealer stations that would be subject to the cap. The lessee-dealer station is one where Chevron builds the station and leases it to a dealer on a turnkey basis; the lessee-dealer's rent is a percentage of the dealer's margin on retail sales of gasoline and other products, and the lessee contracts with Chevron to purchase gasoline from Chevron at a wholesale price fixed by Chevron. Chevron's challenge to the rent cap was that the provision effected a taking of Chevron's property (rent payments from lessees) in violation of the Fifth/Fourteenth Amendments.

The Fifth Amendment's "Takings Clause" provides that private property shall not "be taken for public use, without just compensation." The Fourteenth Amendment makes the Fifth Amendment applicable to "takings" made by individual states. Chevron argued the rent cap was unconstitutional because it did not substantially advance any legitimate government interest, a standard previously understood to apply to some "takings" questions.

"SUBSTANTIALLY
ADVANCES" TEST NO
LONGER APPLICABLE
TO TAKINGS CLAUSE
QUESTIONS

At the U.S. District Court for the District of Hawaii, Chevron won its motion for summary judgment; the court agreed with Chevron that the act did not substantially advance a legitimate state interest." The decision was appealed to the Court of Appeals for the Ninth Circuit, which reversed the decision, finding that there was still an issue of material fact about whether the act would benefit consumers. On remand, the District Court again sided with Chevron, this time after a one-day bench trial where testimony was heard from two economists, explaining the act's potential effects on Hawaii's retail gasoline market. This time, the Ninth Circuit affirmed the District's holding, and also held that Chevron could not, at that stage, challenge the applicability of the "substantially advances" standard of review for the act.

The Supreme Court began its analysis by discussing the history and scope of application for the Takings Clause. The Takings Clause is not designed to prevent the government from taking property, but rather to ensure that just compensation will be provided for the legitimate taking of property. The traditional, and clearest, concept of a taking is one where the government directly appropriates or invades property, such as when it occupies a warehouse or seizes a coal mine. In a 1922 case, the Court recognized that, in addition to outright expropriation, other government actions - like regulation - may be so onerous that their effects are tantamount to expropriation. The question has always been what sort of regulation is "going too far."

The Court has recognized two types of regulatory act that automatically require compensation: first, where the regulation permanently physically invades the property, and second, where the regulation completely deprives the owner of all economically beneficial use of the property. For other types of regulation, though, the Court has only articulated a set of factors to consider, including the economic impact upon the owner (including consideration of investment-backed expectations), and the character of the government action (whether it amounts to physical invasion of the property or instead "adjust[s] the benefits and burdens of economic life to promote the common good").

The standard the lower court used to evaluate whether a taking had occurred was based on the Supreme

Court's holding in an earlier case that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." The Supreme Court used the Hawaii case to determine that the formula "prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in [the] takings jurisprudence."

The Court gave several reasons why a due process-like standard had been misapplied to takings questions: previous zoning cases were due process challenges; previous takings cases had implicated due process questions; and the Court had not, until recently, determined whether "regulatory takings" were properly governed by the Due Process clause or by the Takings Clause. But the "substantially advances" standard is one that probes whether a regulation is a legitimate exercise of governmental power, a legal question logically antecedent to the question central to the Takings Clause, namely: when a taking is legitimate, what is the appropriate measure of compensation? The "substantially advances" test misses the mark of a Takings Clause challenge, which is to prove the extent to which a property interest is burdened by the government's action.

The Court also cited two public policy-oriented reasons to eschew the "substantially advances" test: first, it would allow heightened review of virtually any regulation of private property, which would implicate a "vast array" of state and federal regulations, and second, it would empower courts to substitute their "predictive" judgments for the judgments of elected legislatures and expert agencies. The Court illustrated the latter problem by referring back to the economists' expert testimony that helped the Hawaii District Court decide that the Hawaii legislature's regulations would not actually achieve their objectives.

The Court's last order of business was to explain that its holding would not disturb its decisions in other cases where the "substantially advances" test was implicated. Justice Kennedy filed a concurring opinion, observing simply that "a regulation might be so arbitrary or irrational as to violate due process." Kennedy noted that "the failure of a regulation to accomplish a stated or obvious objective" would be relevant to the inquiry of whether the regulation violated due process, and thus, the essence of the "substantially advances" test could appear in a different format and forum.

COURT OF APPEALS OF MARYLAND

Loss of Consortium in Latent Disease (Mesothelioma) Cases; Pro-rata Reduction of Contribution in Joint Tortfeasor Situations:

Owens-Illinois, Inc. v. Cook, 386 Md. 468, 872 A.2d 969 (April 26, 2005).

Holding: Where neither the wrongful conduct nor the fact of injury was known prior to marriage, a claim for loss of consortium based on premarital injury accrues when the injury is discovered or reasonably discoverable.

Case Summary: This case has been litigated in various forms in the Maryland court system since 1987, with the current version commencing in 1999. Originally, the plaintiff, a former ceiling installer, sued to recover for occupational exposure to asbestos and his resultant diagnosis with "asbestos lung disease." He had been diagnosed with asbestosis in 1985 and got married in early 1986, shortly before Maryland's "cap" on non-economic damages, which limited the amount of damages recoverable for "pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury" in personal injury suits. The enactment of the "cap" became important because it was not until 1999 that the plaintiff was diagnosed with mesothelioma and, when he filed suit against the asbestos manufacturers, a major legal issue became whether his injury was suffered, legally speaking, before or

after the enactment of the "cap."

The court evaluated three approaches to resolving the question of when, for purposes of the cap statute, "a cause of action for cancer or other disease based on exposure to asbestos arises." Under one approach, the cause of action arises when the disease manifests; under another approach, the cause of action arises when the plaintiff first inhaled asbestos fibers that caused cellular changes; and under the last approach, the cause of action arises when the disease itself first arose in the body. The court selected the "exposure" approach, but stated that, for purposes of the "cap" statute, courts may "look . . . to the plaintiff's last exposure to the defendant's asbestos-containing product. If that exposure undisputedly was before July 1, 1986, [the cap statute] does not apply, as a matter of law."

"EXPOSURE"
APPROACH
ADOPTED TO
EVALUATE
WHETHER THE
1986 DAMAGES
CAP LAW APPLIES
TO LATENT
DISEASE CASES

The court was then faced with determining whether a loss of consortium claim based on a latent disease could go forward when the legal injury (exposure to asbestos) occurred before the parties asserting loss of consortium (the legal harm) were married. The court noted that there was no evidence that, at the time of marriage, the parties knew of the mesothelioma, nor could they have known of the injury that would form the basis for their joint claim. The court concluded that the loss of consortium claim could go forward and that, because the injury upon which it was predicated occurred before the enactment of the "cap," damages for loss of consortium could not be limited by the "cap." Another issue in this case concerned the construction of the settlement agreement in the plaintiff's 1987 asbestosis lawsuit. The court noted blithely that "[t]he cardinal rule of contract interpretation is to effectuate the intentions of the parties" as part of its evaluation of how to apply the term "future disease" as used in the release. The release provided that the signors specifically "do not release claims for cancer, mesothelioma and or other malignancies . . . (hereinafter described as 'future disease')." The asbestos manufacturer contended that the use of 'future disease' as at issue in the mesothelioma litigation, must have meant either that the disease arose after the settlement was signed, and thus should have been subject to the "cap," or, alternatively, that the disease must have been covered by another portion of the release, dealing with an existing "asbestos-related disease."

The court disagreed with the manufacturer's assertion. The trial court, as well as the intermediate court, had viewed the use of "future disease" in the release only as a kind of shorthand designation, not as a term with legal significance regarding the viability of a claim or the amount of damages potentially recoverable. The Court of Appeals agreed, and stated that "'Future disease,' as used in the release . . . means 'cancer, mesothelioma or other malignancies resulting therefrom' it does not address, or even purport to, the question of when any such disease arises."

The last issue the court addressed was the appropriateness of a pro rata reduction because of the liability of an alleged joint tortfeasor against whom default judgment had been entered. Previously, the Court of Appeals had held that, although not determined by a judge or jury finding, a default judgment (where the defendant fails to appear to defend itself) was a sufficient finding of liability against that defendant to make it a joint tortfeasor for purposes of court orders requiring all tortfeasors in a case to contribute to

damages payments. Thus, in this case, the asbestos manufacturer who did defend itself would have its contribution to the damages award reduced by the amount of damages assigned to the defaulting joint tortfeasor. The trial court in this case also found evidence that the plaintiff had actually settled its claims against the joint tortfeasor as part of the plaintiff's earlier asbestosis litigation, and thus, on that ground, the pro rata reduction was also justified.

Minimum Contacts, Personal Jurisdiction, Operation of Website:

Beyond Systems, Inc. v. Realtime Gaming Holding Co., L.L.C., 2005 WL 1458056 (June 22, 2005).

Holding: "[T]he existence of a website alone is not sufficient to establish general jurisdiction in Maryland"

Case Summary: As the dissenting judge pointed out, the relationship among the parties and non-parties in this case was "shrouded in the mists of holding companies, offshore entities, and multi-level licensing agreements." On a fundamental level, the case arose when Beyond Systems, Inc. had several of its e-mail accounts receive 16 non-solicited e-mails each, totaling 240 e-mails in the space of 24 hours. These unsolicited e-mails were advertisements for the "Golden Rhino Casino," a web-based gaming site owned by a New Mexico man (Travis Thom), but operated through software provided by a Georgia-based software developer (KDMS) and its holding company (Realtime Gaming).

The trail from BSI to KDMS is truly convoluted: Realtime Gaming, the holding company for KDMS, entered into an exclusive licensing agreement with Montana Overseas (a Panamanian corporation), which in turn would be responsible for issuing licenses for the use of KDMS software. Windowscasino.com, owned by a company called ADLM Ltd, based in St. Helier, Jersey (one of the U.K.'s Channel Islands) obtained the right to use the KDMS software, and ultimately sold an affiliate license to Thom. It was Thom who called his licensed site the Golden Rhino Casino, and hired an e-mail solicitation service to send 2.5 million advertising e-mails, 240 of which were received by BSI's employees.

About eight months after BSI received the e-mails, it filed suit against KDMS, BSI, and an unknown co-defendant in the Circuit Court for Montgomery County, alleging violations of the Maryland "anti-spam" statute. The anti-spam statute was passed in 2002 as part of an effort to curb unsolicited advertising e-mails; the statute prohibits transmission into the State of messages that contain false or misleading information about the origin or transmission path of the message or contains "false or misleading information in the subject line that has the capacity, tendency, or effect of deceiving the recipient." The statute includes a presumption that the sender knows that the intended recipient of commercial e-mail is a resident of Maryland as long as "the information is available on request from the registrant of the Internet domain name contained in the recipient's electronic mail address."

BSI's initial complaint against KDMS and Realtime Gaming was dismissed; BSI then filed an amended complaint, making specific allegations regarding the connection between Realtime Gaming, KDMS, windowscasino.com, and Travis Thom. The amended complaint also alleged a significant relationship among KDMS, Realtime Gaming, and a network of sub-licensees, one of which assisted in the e-mail transmission. Lastly, the amended complaint named Travis Thom as an additional defendant.

When the amended complaint was dismissed, BSI appealed. Without any proceedings before the intermediate appellate court, BSI immediately petitioned the Court of Appeals, the highest court in Maryland, to resolve the significant legal questions in the case. The reasons for doing so are unclear, but the effect is that the high court was able to make a clear and binding interpretation of the anti-spam statute as well as of the relationship between the anti-spam statute and Maryland's "long-arm" statute,

the statute granting Maryland courts jurisdiction over defendants located outside of the state.

The threshold issue in BSI's appeal was whether KDMS and the other defendants had clearly-established "minimum contacts" with the State of Maryland, subjecting the defendants to the jurisdiction of Maryland's courts. The minimum contacts inquiry operates on multiple levels: whether jurisdiction is authorized by Maryland's long arm statute and whether exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment to the federal Constitution.

The long arm statute was amended in 2000 to the effect that computer information and programs would be treated as goods and services for purposes of the long arm statute. The statute grants jurisdiction over a person who directly or by an agent "[c]ontracts to supply goods, food, services, or manufactured products in the State;" thus, with computer information equated to goods, one who supplies (or contracts to supply) computer information or programs in Maryland is subject to Maryland's jurisdiction.

Personal jurisdiction may arise in two different ways; through general contacts with the state or through specific contacts. When a defendant is subject to general personal jurisdiction, he may be sued for any cause of action; if, on the other hand, the defendant has only minimal contacts to the state, he may only be sued for causes of action that arise out of those contacts between him and the state. The court in this case had to determine whether the software company defendants had sufficient general or specific contacts with Maryland; if either were the case, BSI's suit could proceed.

As to general personal jurisdiction, BSI alleged that, because Realtime Gaming's website was "highly interactive," it permitted Realtime to solicit business in Maryland, as well as enter contracts, conduct sales, and accrue profits based on activity in Maryland. To evaluate this claim, the Court looked to the "sliding scale" model first developed by the U.S. District Court for the Western District of Pennsylvania; according to that model, personal jurisdiction should be "directly proportionate to the nature and quality of commercial activity conducted over the internet." At one end of the scale are clear cases where there are knowing and repeated transmissions of information between parties - personal jurisdiction is appropriate under such circumstances. At the other end of the scale are cases where information is simply posted on a website for viewing, accessible by users in other jurisdictions; personal jurisdiction should not be exercised under those circumstances. In the middle ground, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."

Working in this middle ground, the Court noted that no evidence was presented that Realtime's site was "highly interactive" or that it had been used extensively by Maryland residents. Thus, in addition to failing the "sliding scale" test, the site also did not amount to the "substantial, continuous, systematic contacts with Maryland" that the Court requires to exercise general jurisdiction.

Turning to specific personal jurisdiction, the Court evaluated three aspects of defendants' actions in Maryland: (1) the extent to which defendants purposefully availed themselves of the privilege of conducting activities in the state; (2) whether the plaintiff's claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable. BSI argued that Realtime and KDMS own or control windowcasino.com, the company that helped Thom design his Golden Rhino website and send the unsolicited e-mail advertisements, thus connecting Realtime and KDMS to Maryland through the e-mails sent by windowcasino.com and Thom. The Court did not accept this argument; in order to show that KDMS or Realtime were responsible for the e-mails, BSI had to show that there was an agency relationship between KDMS/Realtime and windowcasino.com/Thom. There was no evidence of any such formal agency or contractual relationship between those parties, and thus, the Court determined that exercising specific personal

jurisdiction over Realtime and KDMS would be constitutionally unreasonable.

INTERNET
CASINO'S SPAM E-MAILS
DID NOT CREATE
NECESSARY MINIMUM
CONTACTS WITH
MARYLAND

As a last matter, the Court passed on the trial court's decision not to allow BSI limited discovery for purposes of showing the Court's jurisdiction. Such "jurisdictional discovery" is often sought in order to determine at the outset whether a court has jurisdiction to entertain a case. In this case, the Court determined that, because BSI had nothing more than a web link on windowcasino.com that led to a Realtime Gaming site, discovery was not warranted.

The dissent seized on the denial of jurisdictional discovery and argued that the trial court's decision not to allow jurisdictional discovery was highly unusual, especially in light of "[t]he elusive nature of Internet presence, together with the strong incentives for 'spammers' to conceal their identities" Without some jurisdictional discovery, the dissent argued, the courts were closed to plaintiffs who might reasonably wish to invoke the legislature's anti-spam statute. The dissent was not certain that there was not an agency relationship leading from windowcasino.com back to KDMS and Realtime Gaming, but that jurisdictional discovery would have helped determine whether such agency did exist.

In sum, this case is an important development of Maryland personal jurisdiction jurisprudence, as it outlines the contours of Maryland's long arm statute and the hurdles plaintiffs must clear in order to apply Maryland's anti-spam statute.

Maryland Boulevard Law is not an Absolute Shield to Liability for Common Carrier:

Washington Metropolitan Area Transit Authority v. Seymour, 2005 WL 1122943 (May 13, 2005).

Holding: "[W]here a passenger on a common carrier suffers injury, and that injury may have been brought about . . . by negligence on the part of the common carrier driver, the common carrier is not shielded from liability by the boulevard law of this State, even where the common carrier enjoyed favored status on the roadway in respect to the driver of the other vehicle."

Case Summary: When the Metrobus she was riding in came to an abrupt stop near the intersection of Riggs Road and University Boulevard in Prince George's County, Ms. Josephine Seymour was thrown from her seat and suffered a fracture in her right leg. She sued WMATA and recovered \$20,000 at trial, an award that was confirmed by the Circuit Court of Prince George's County. WMATA appealed the award to the highest court, which again found that the trial and intermediate courts had not erred. Seymour, age 64, had seated herself in the "priority seating area" of the bus; this is the bench-like seat behind the driver that, rather than facing forward, faces toward the opposite side of the bus, allowing the handicapped and elderly easier access to seating. As the bus pulled away from a service stop, the driver observed a "phantom vehicle" approaching the road via a parking lot exit driveway. Thinking the car would stop, the bus driver continued to accelerate -- apparently somewhat rapidly; at the last second, however, the phantom vehicle pulled onto the road in front of the bus. The bus driver avoided hitting the car, but because of his abrupt braking, Ms. Seymour and another passenger were thrown from their seats and sustained injuries.

A common carrier, like WMATA, owes its passengers "*the highest degree of care* to provide safe means and methods of transportation." Accordingly, in this case, the pivotal question was "whether the act of

the common carrier that led to the injury, here the rapid acceleration and then the sudden stopping of the bus, under the circumstances, was a negligent act under the heightened duty of care applicable to common carriers." The court discussed several cases dealing with abrupt stops made by common carriers, and concluded that "if exigent circumstances require that a common carrier, *being operated normally and safely*, suddenly stops in an attempt to avoid a collision with an unanticipated and dangerous obstacle on the roadway," the act is not negligent. But the key to that analysis is that the common carrier was operated "normally and safely;" in the current case, there was testimony that the bus driver had accelerated abnormally quickly after leaving the service stop just before the incident.

**MARYLAND
BOULEVARD LAW
DOES NOT ALTER
DUTY OF CARE
OWED BY COMMON
CARRIER**

WMATA based its defense on Maryland's "boulevard rule," which creates a right of way for motorists operating on designated highways and requires drivers entering such highways to observe a duty to stop and yield the right of way. The vehicle traveling on the highway is known as the favored vehicle (or favored driver), while the vehicle seeking to enter the highway is known as the "unfavored vehicle." The Court of Appeals articulated eight categories of suits that may arise because of the boulevard rule, and noted that the current case was one where the passenger of the favored driver was suing the favored driver. WMATA argued that because it was the favored driver in this incident, it should be shielded from liability for Seymour's injuries, based on the facts found by the trial court.

WMATA relied on an earlier case, in which the favored driver (a bus) was forced to brake suddenly because a car pulled into its path unexpectedly; the bus ultimately collided with the car, but the court there found that the proximate (legal) cause of the plaintiff's injuries was the "unexpected intrusion" into the bus's path, not the bus driver's negligence. The Court of Appeals responded by stating that, although in several cases, passengers of common carriers have been unable to recover against the common carrier as a favored driver, the court has "not stated that the boulevard law acts as an impenetrable shield to the recovery of an injured passenger in a suit against the favored driver." Citing a different case, the Court concluded that, even though a driver (including a common carrier) may be favored under the boulevard rule, he is not relieved of the obligation to use due care under the circumstances. This is not unlike the "last clear chance" theory of liability, according to which the party with the last clear chance to prevent a wrong or injury may be assigned liability for the wrong if it is not prevented.

In the current case, the District Court found that the Metrobus driver neglected his (heightened) duty of care by accelerating rapidly and by mistakenly concluding that the phantom vehicle would stop. Thus, "the District Court judge found under the circumstances here present that the bus's imprudent acceleration under the circumstances was a proximate cause of Seymour's severe injury to her leg."

It is worth noting that each of the cases discussed in the Court's opinion, as well as the Seymour case itself, depends heavily on the circumstances surrounding an incident. Nevertheless, common carriers (and regular motorists alike) should note that the boulevard rule does not serve to alter the duty of care owed to passengers and other motorists.

**COURT OF SPECIAL
APPEALS OF MARYLAND**

Quasi-Easements, Easements of Necessity, Land Patents:

Stansbury v. MDR Development, L.L.C., 161 Md. App. 594, 871 A.2d 612 (April 4, 2005).

Holding: Property owner was entitled to an easement by necessity over adjacent owner's submerged land.

Case Summary: Adjudication of this case required the court to set forth the history of Maryland land ownership back to 1632, when the only holder of land was the head of one family, the Calverts, Irish Barons of Baltimore. The matter at hand, though, was whether a property owner could have an easement recognized, allowing him to build a footbridge traversing a small channel, where part of the footbridge would pass over the property of another. The properties were arranged as follows:

Running between the properties on the east-west line was a shallow channel that a previous owner had dredged. The boundaries between the 100-series lots and the A-series lots are below and approximately half-way into the channel. Lots 10A and 179 are bordered on the west by Pleasant Lake, and lots 9A and 10A are bordered on the south by the Chesapeake Bay.

In the 1950s, the owner of all four lots built a footbridge connecting lots 9A and 178. When he died in 1977, the lots were left to his wife, who was to convey the lots to their two children, Nancy and James. Ultimately, Nancy came to possess lots 179 and 9A, and James possessed lots 178 and 10A. James used his lots to secure a note, on which he defaulted, and his lots came into possession of David Caldwell, who filed the initial complaint seeking a declaratory judgment that he was entitled to an easement to build a footbridge from lot 178 to lot 9A, one of the lots retained by Nancy Stansbury. Caldwell entered an agreement with Anne Arundel County that caused lots 178 and 10A to be treated as one parcel of land and then sold the merged lot to MDR in 2001, making MDR the plaintiff in the easement suit. The trial court found that MDR was not entitled to a declaration of an easement over Stansbury's property, but did find that MDR was entitled to build a footbridge in spite of Stansbury's assertion that the footbridge would interfere with her rights to a portion of the submerged land. Stansbury appealed the court's decision to permit the footbridge, and MDR cross-appealed, claiming the trial court should have granted him an easement.

One of the reasons the trial court declined to declare MDR's requested easement was an 1807 land patent, according to which Ms. Stansbury was the "supreme" title holder to the submerged portions of the lots in question. A land patent is "an instrument by which the government conveys a grant of public land to a private person," and the appellate court here explained how and why land patents are "the first link in the chain of title of ownership of land in Maryland."

EASEMENT BY
NECESSITY
AVAILABLE FOR
LANDOWNER
SEEKING TO BUILD
FOOTBRIDGE
CONNECTING LOTS
SEPARATED BY
SHALLOW
CHANNEL

Until 1776, the Lord Baltimore had the sole right to grant or regrant land, but after 1781, his land powers were vested in the judges of the Land Office, which is currently known as the Commissioner of Land Patents. The patent to which Stansbury traced her land ownership was in issue because in 1862, the State passed an act which prohibited the issuance of patents to submerged lands covered by

navigable waters;" the purpose of the act was to enlarge the rights of persons who owned land fronting on navigable waters. Because the patent was issued prior to the 1862 act, though, the appeals court found that Stansbury and MDR were entitled to absolute ownership of the portions of their lots that were submerged beneath the channel, as the 1862 act did not have retroactive effect and the channel did not exist at the time the patent was issued.

The court's discussion of easements began with the possibility that MDR had a quasi-easement, which arises when one uses "part of his land for the benefit of another part." Here, the question was whether an easement to cross the channel by footbridge was "continuous and apparent, and necessary to the reasonable enjoyment of the property conveyed." The appeals court noted that the existence of the old footbridge could satisfy the requirement that the easement be apparent and continuous and that the trial court did not err by finding that pedestrian access to lots 10A and 9A was necessary. Nevertheless, the appeals court "punted" on whether a quasi-easement truly existed, because it found sufficient evidence to warrant declaration of an easement by necessity.

An easement by necessity is one that arises in order to make land "properly available for use." The trial court had found that the only way to access lot 10A from lot 178 was by small boat or by walking through the channel at low tide. The appeals court found this to be sufficient for a finding that a pedestrian walkway was necessary for MDR's use and enjoyment of its riparian rights in the Chesapeake Bay.

The only remaining question was where to construct the footbridge between Lots 10A and 178; the court stressed that the location of an easement should be fair to both parties and burden the "servient" parcel of land (the parcel over which the easement runs) as little as possible

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Timeliness of Suspension Imposed on State Employee,

White v. Workers' Compensation Comm'n, 161 Md.App. 483, 870 A.2d 1241 (Md. App. 2005).

Holding: Appointing authority must give an employee notice of suspension within 5 work days after the close of the employee's next shift after acquiring knowledge of employee misconduct sufficient to order an investigation.

Case Summary: Christina White, an employee of the Workers' Compensation Commission, was suspended without pay for 5 days, following an incident where White gave false testimony at the Office of Administrative Hearings. The veracity of White's testimony was called into question on January 14, 2003; White's supervisor reported the possible false testimony to Chairman O'Reilly on that date. O'Reilly ordered a transcript of White's testimony, which he received on January 31; after reviewing it, he met with White on February 4, 2003, and issued the suspension on February 6. The written notice White received indicated that she had violated several provisions of COMAR (the Code of Maryland Regulations), including: being guilty of conduct that has brought, or if publicized, would bring the State into disrepute; engaging in conduct involving dishonesty, fraud, deceit, misrepresentations, or illegality; and willfully making a false official statement or report.

Maryland law permits an appointing authority to take a variety of disciplinary actions against an employee, but when the disciplinary action is a suspension, it must be made "no later than 5 workdays following the close of the employee's next shift after the appointing authority *acquires knowledge of the misconduct* for which the suspension is imposed." (Md.Code Ann., State Pers. & Pens. § 11-106(c)(1) (emphasis added)). The issue thus becomes what "knowledge of the misconduct" is deemed sufficient to "start the clock" on the window of time in which a suspension may be made.

White initially appealed her suspension to an administrative law judge (ALJ) who found that in order for the suspension to be timely under 11-106, it would have needed to be imposed by January 23, 2003. Because the suspension was imposed on February 6, it was untimely, and the ALJ ordered that the suspension be rescinded. The WCC filed an appeal of the ALJ's decision, and the Circuit Court for Baltimore City reversed, finding that the suspension was issued in a timely fashion and should be reinstated.

On appeal from the Circuit Court's decision, the Court of Special Appeals first described its role in reviewing a decision made by an administrative agency: the court's review is limited to "determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised on an erroneous conclusion of law." This means that the Court of Special Appeals does not consider the decision of the Circuit Court, only the decision of the agency.

SUSPENSION
WITHOUT PAY OF
STATE EMPLOYEE
MUST BE RENDERED
MORE QUICKLY
THAN OTHER
DISCIPLINARY
ACTIONS

In this case, the Court of Special Appeals determined that the ALJ had relied on substantial evidence on the record, including the testimony both of Chairman O'Reilly and of Christina White, herself, and that the ALJ had read the statute correctly. The Court of Special Appeals focused on a precedential case, *Western Correctional Institution v. Geiger*, in which the Maryland Court of Appeals described the relationship of all the sections of 11-106. According to the *Geiger* case, the first part of 11-106 prescribes what must be done before imposing discipline, the second part sets the general time limitation on when imposition of discipline must occur (thirty days), and the third part provides a special time limit for suspensions without pay. The Court of Special Appeals in reviewing Christina White's situation concluded that this case required a holding that the appointing authority, based on the special time limit for issuing suspensions without pay, must give notice of suspension within 5 days of acquiring knowledge of employee misconduct sufficient to order an investigation.

Tacitly acknowledging that this outcome is slightly unusual, the Court noted that the Maryland General Assembly is presumed to be aware of the Court of Appeals' interpretation of its enactments, and thus, if the Assembly had wished to amend the statute after *Geiger* (which was decided in 2002), the Assembly could have done so. However, reading the statute as it appears, the Court found that the ALJ had made the correct decision and that White's suspension was untimely.

Commentary: This case should serve as a warning to employers, both public and private, to make sure that they understand the plain language of their employee regulations or guidelines, and, if necessary, change the regulations to achieve the most predictable and sensible outcome when disputes arise. This case produces the somewhat incongruous result that, for any disciplinary action except for a suspension without pay, the state agency has 30 days to make a decision, but in the case of a suspension without pay, the state only has 5 business days to do so. In both cases, before taking the disciplinary action, the state must investigate the alleged misconduct, meet with the employee, consider any mitigating circumstances, determine the appropriate disciplinary action (if any), and give the employee a written notice of the action to be taken as well as the employee's appeal rights. But the Court's holding indicates

that the employer has 30 days to do all of this if the discipline is anything other than a suspension without pay, but only 5 days to do it if a suspension without pay is forthcoming. Thus, the employer has less time to investigate before imposing the greater sanction.

The Court seems conscious of this incongruity; this is why the Court indicated that the Assembly had taken no steps to amend the statute since the Geiger decision. In effect, the Court says that it is merely interpreting the statute, and that the statute's drafters need to account for its abnormalities. The Court does the right thing by refraining from bending the statute, but the call to the Assembly is clear.

This type of problem is preventable, whether the employer is a state agency or a private company. The key is to review the relevant regulations or guidelines before they are implemented, screening them for ambiguity and inconsistency. When a disciplinary regulation appears to produce arbitrary results, or results that are not as well-supported as they might otherwise be, it fails to "afford certainty and uniformity" to employer and employee, opening the door for disputes and possible legal action. Of course, some problems are unforeseeable, but careful analysis and consideration of potential difficulties may prove to be the best way for employers (and their employees, too) to stay out of trouble.

**UNITED STATES COURT OF
APPEALS FOR THE
FOURTH CIRCUIT**

Maintaining Civil Action for Piracy of Satellite TV Signal,

DirecTV v. Nicholas, 403 F.3d 223 (4th Cir. 2005).

Holding: Federal wiretap laws allow a civil suit against one who "pirates" an encrypted satellite television signal.

Case Summary: Dennis Nicholas allegedly used a "pirate access device" to intercept the encrypted transmissions of DirecTV signal. DirecTV filed suit against Nicholas, citing a variety of alleged legal violations, but the U.S. District Court for the Eastern District of North Carolina dismissed the portion of DirecTV's claim that was based on the federal wiretap laws. The Court of Appeals disagreed and found that the plain language of the applicable statute (18 U.S.C. § 2520) allowed such a civil action to proceed.

DirecTV provides satellite TV service by relaying a signal to satellites, which in turn broadcast the transmissions back to Earth; to prevent unauthorized reception and use of DirecTV signal, the service encrypts its transmissions between the satellite and subscribers' receivers on Earth. The encrypted signal is decoded by an access card in each subscriber's receiver. Nicholas, like others in the U.S. and abroad, used a "pirate access device" to decrypt the DirecTV signal without having to pay for a DirecTV receiver and its access card.

The critical question on appeal was whether an individual victim of a violation of the federal wiretap statute can bring a civil action against the violator of the statute. Under 18 U.S.C. § 2511(a), it is unlawful to "intercept . . . any wire, oral, or electronic communication." After evaluating the definitions of certain terms within the statute, the court concluded that "using a pirate access device to intercept the encrypted satellite transmissions of a satellite television provider constitutes a violation" of the statute. Given that a violation of the statute occurred, the court then turned to the appropriate relief; the statute provides clearly that "any person whose . . . electronic communication is intercepted . . . may in a civil action recover from the person . . . which engaged in that violation such relief as may be appropriate." Examples of "appropriate" relief include declaratory relief, damages (including punitive damages), and attorney's fee awards for costs of litigation. The statute also provides two methods of calculating

damages, applicable for different types of violations. The first, for private viewing of a private satellite video communication that is not encrypted, allows the court to assess "the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$50 and not more than \$500." Alternatively, for other actions under the section (including those for pirating an encrypted signal), the court may award "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation," or may impose "statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000."

FEDERAL WIRETAP
LAW ALLOWS CIVIL
ACTION AGAINST
INDIVIDUAL WHO USES
A "PIRATE ACCESS
DEVICE" TO DECRYPT
SATELLITE TELEVISION
BROADCASTS

The District Court's error lay in only considering the first way of computing damages and assuming that, because it did not apply to the defendant's alleged wrongdoing, the statute itself did not provide a cause of action for DirecTV. The appeals court stated plainly that "under the plain language of the statutes, there is nothing to indicate that [the statute] excludes from its application intentional interceptions of encrypted satellite transmissions, as opposed to nonencrypted satellite transmissions." The essence of the District Court's error was its assumption that the statutory regime applied only to the interception of nonencrypted signals, rather than determining that only one portion of the penalty portions of the statute applied to interception of nonencrypted signals, while the remainder of the statute applied to any other violation of the statute.