

The MARYLAND LITIGATOR



MSBA LITIGATION SECTION

OCTOBER 2014

MESSAGE FROM THE CHAIR

By JOHN P. MARKOV

As fall approaches and the warmth of summer escapes into a distant memory, I am reminded of Heraclitus, the ancient Greek philosopher who is famous for his insistence on ever-present change in the universe. He is credited with the statement that "No man ever steps in the same river twice." Heraclitus also believed in the unity of opposites, "The path up and down are one and the same." My personal spin is that there is no going back and you must always strive for success in everything you do. Last year, the Section enjoyed great success under the leadership of The Honorable Glenn T. Harrell, Jr. Over the summer, I lost sleep thinking about how to keep moving the Section forward so as to avoid Heraclitus' "path down." Fortunately, Judge Harrell left our Section on firm ground for which I am very grateful. In addition, our Section Council is replete with talented lawyers and judges and we have planned another year of fantastic programs and events for you to attend. Get your calendar out as you read this issue of *The Maryland Litigator* and let me highlight several programs and projects for you.

One Day Boot Camp Trial Training for Young Lawyers – "Anatomy of a Trial" will be held on November 21, 2014, in the United States District Court for the District of Maryland (Baltimore Division). This trial program will use the infamous 1921 case of Sacco and Vanzetti to help new lawyers develop their trial skills. Some of the top litigators and jurists in the country will explain and demonstrate each stage of trial as they work their way through the case. This program is presented

by the Litigation Section with the MSBA CLE Department, Litigation Institute for Trial Training ("LITT") of the ABA Section of Litigation, American College of Trial Lawyers-MD Chapter, and Federal Bar Association-MD Chapter.

On November 14, 2014, the Litigation Section and the Federal Bar Association-MD Chapter are co-sponsoring a Fourth Circuit Court Impact Decisions program that will be held at the United States District Court for the District of Maryland (Greenbelt Division). Watch for further details in the coming months.

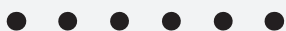
On March 19, 2015, the Litigation Section is sponsoring a Maryland Impact Decisions program to review the recent appellate decisions. Last year's program was outstanding and I expect that the program next March will be equally valuable to our members. The program will be held at the Court of Appeals. Watch for further details in the coming months.

On March 20, 2015, the Litigation Section and the Construction Law Section are co-sponsoring a program titled "Evidence, Experts, and Exhibits – Building and Supporting a Complex Construction Case." The program will be held at RTI, Inc., in Stevensville, MD. The Honorable Paul W. Grimm from the United States District Court for the District of Maryland will speak on the admissibility of expert testimony. In addition, there will be programs for handling evidence inspections, developing

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Keep up to date with the Litigation Section E-mail Discussion List!

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APRIL 23, 2015

Maryland Circuit Court and Federal District Court Practice: The Judge's Perspective

*Receive Advice and Enjoy an Opportunity to Dine and Chat
with the Members of Maryland's Circuit Court Bench and
Federal District Court Bench*

TIME: 6:00 – 8:30 p.m.

WHERE: Doubletree Hotel Annapolis
210 Holiday Court, Annapolis, MD

UPCOMING APPELLATE PROGRAMS

November 14, 2014

The Litigation Section will be co-sponsoring with the Maryland Chapter of the Federal Bar Association a program on Fourth Circuit "impact" decisions to be held at the United States District Court's Greenbelt courthouse.

March 19, 2015

The Appellate Practice Committee (co-chaired by Andy Baida of Rosenberg Martin Greenberg and Court of Special Appeals Judge Robert Zarnoch) is planning an evening educational program in the courtroom of the Maryland Court of Appeals on recent Maryland appellate impact decisions issued by the Courts of Appeals and Special Appeals.

June 12, 2015

The Appellate Practice Committee will present at the MSBA Annual Meeting in Ocean City its popular year-in-review of high profile cases decided by the United States Supreme Court. The panel will consist of experienced and well-known Supreme Court practitioners, scholars, and journalists.

MAKING YOUR OWN RULES: PROPOSING REGULATIONS TO MARYLAND ADMINISTRATIVE AGENCIES AND UNDERSTANDING HOW MARYLAND COURTS WILL REVIEW THE DENIAL OF A PROPOSAL

BY PATRICE MEREDITH CLARKE, ESQ.

I. Introduction

More and more today's litigator works in the world of "administrative law." This world is governed by the Administrative Procedure Act ("APA")¹. Lawyers who practice in this world must deal with "regulations" rather than statutes. But where do these regulations come from? How do administrative agencies adopt such regulations? Is there any judicial review of an agency's decision to reject a proposed regulation? This article addresses some of these basic questions, including the question of how the Maryland appellate courts will review denial of a proposed regulation in the future.

II. What is a Regulation?

Maryland lawyers know that regulations can be found in the Code of Maryland Regulations ("COMAR"), and that they are the rules that govern administrative agency proceedings. Lawyers know that agencies generally adopt regulations to carry out whatever duties they have been charged with. But what exactly is the definition of a regulation?

A regulation is:

A statement or an amendment or repeal of a statement that:

- (i) has general application;
- (ii) has future effect;
- (iii) is adopted by a unit to:
 - 1. detail or carry out a law that the unit administers;
 - 2. govern organization of the unit;
 - 3. govern the procedure of the unit; or
 - 4. govern practice before the unit; and
- (iv) is in any form, including:
 - 1. a guideline;
 - 2. a rule;
 - 3. a standard;
 - 4. a statement of interpretation; or
 - 5. a statement of policy.²

A regulation does not include any rule that concerns only the internal procedures of an administrative agency, or that does not affect the public generally.³ An agency's power to adopt regulations generally comes from that agency's enabling statute.⁴

III. How and Where Do Proposals for Regulations Originate?

Most commonly proposals for regulations come from either within an agency or from the Governor's office.⁵ However, any "interested person" may submit a "petition for adoption of regulation."⁶ The APA mandates that within 60 days of the submission of such a petition, the administrative agency must either "deny the petition" or "initiate the procedures for adoption of the regulation."⁷

Under the Federal APA, "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."⁸ Often these proposals come from Associations,⁹ individuals,¹⁰ or groups of individuals.¹¹

IV. Adopting Regulations

The system for adopting a regulation requires agencies to take multiple steps. Before a proposed regulation can be adopted, it must be published in the Maryland Register for review and comment by the public, and a public hearing to review the regulation must be scheduled.¹² But before an agency can even publish a proposed regulation in the Maryland Register, it must submit the proposed regulation to the Attorney General or to the agency counsel for approval as to legality,¹³ and to the Department of Legislative Services, and to the Joint Committee on Administrative, Executive, and Legislative Review ("AELR Committee").¹⁴ The AELR Committee is a standing legislative committee composed of 10 senators and 10 delegates.¹⁵ The AELR Committee "functions as the watchdog of the General Assembly in overseeing the activities of State agencies as they relate to regulations . . . [and] to determine whether the regulations conform both with statutory authority of the unit and the legislative intent of the statute under which the regulations are proposed."¹⁶

The AELR Committee is not required to take any action when a proposed regulation is submitted to it, but it may oppose the regulation. The AELR Committee "may not veto a proposed regulation, [however,] it may hold hearings, get public input, and object to the proposal."¹⁷ If the AELR Committee does object, the agency "may withdraw the proposed regulation, [] may amend the regulation, which essentially requires starting the process anew, or [] may submit the proposal to the Governor with a statement explaining why it refuses to withdraw or amend the proposal."¹⁸ A proposed regulation that

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TRIAL PUBLICITY AND THE LIMITATIONS ON ATTORNEYS' SPEECH

BY LYDIA E. LAWLESS, ESQ., ASSISTANT BAR COUNSEL

The Maryland Lawyers' Rules of Professional Conduct ("MLRPC") limit attorneys' speech in various ways. There is a general prohibition against making misrepresentations, both within the practice of lawⁱ and in the attorney's private life.ⁱⁱ The confidentiality rules limit what an attorney may say to the court or a non-clientⁱⁱⁱ. The Rules limit what an attorney may say to a prospective juror, sworn jury and judge involved in a proceeding.^{iv} They prevent an attorney from speaking, at all, about the subject matter of the representation with a person who the lawyer knows is represented in the matter by another lawyer.^v When a person is not represented, the Rules limit what an attorney may ask that individual to reveal.^{vi} The advertising rules limit what an attorney may say about herself or her services^{vii} and limit how and when she may solicit professional employment.^{viii} Rule 8.2 prohibits an attorney from making statements concerning the qualifications or integrity of a judge or other legal officer that she knows to be false or with reckless disregard for its truth or falsity.

Rule 3.6(a) of the MLRPC substantially limits what a lawyer, who is participating or has participated in, the investigation or litigation of a matter may say outside of the courtroom. The Rule provides that generally the lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

The limitations of Rule 3.6 are triggered by three conditions. First, a lawyer must be involved in the proceeding. Unaffiliated lawyers, including legal commentators and law professors, do not fall within the scope of the Rule. Second, the lawyer must know, or reasonably should know, that her statement will be disseminated by means of public communication. It appears, therefore, that a lawyer's private comments or communications would be protected. Third, the lawyer, applying the objectively reasonable standard, should know that the comments will have a substantial likelihood of materially prejudicing the proceeding. A statement made, for example, one year before trial may not materially prejudice the proceeding, but when the same statement is made on the eve of jury selection, the Rule may be triggered. Similarly, whether a trial is a criminal or civil jury trial or a bench trial or arbitration may determine the likelihood that an extrajudicial statement will materially prejudice the proceeding.^{ix}

The exception to the general prohibition of Rule 3.6(a) is found in Rule 3.6(b). The exception allows a lawyer to

provide certain information including the claim, offense or defense involved, any information contained in the public record, and that an investigation is in progress. Similarly, an attorney may request assistance in obtaining evidence and information related to the matter and may warn of danger concerning the behavior of a person involved "when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest." In criminal cases, in addition to providing information necessary to aid in the apprehension of an individual, an attorney may provide information including the identity, residence, occupation and family status of the accused, the fact, time and place of the arrest and the identity of officers and agents involved. The exceptions should not be read, however, as a complete safe harbor. Comment [4] provides that the types of statements outlined in (b) would not ordinarily be considered to present a substantial likelihood of material prejudice. It seems, therefore, that statements that appear to fall within one of the exceptions may still expose an attorney to discipline if the lawyer knew, or should have known, that the comments would have a substantial likelihood of materially prejudicing the proceeding. For example, a prosecutor may run afoul of the Rule if, at a press conference on the eve of jury selection, she reads from a detailed indictment, despite the fact that the indictment is part of the public record.^x

Some subjects are believed to materially prejudice the proceeding and should not be discussed. Those subjects include: (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; (2) the identity of a witness, or the expected testimony of a party or witness; (3) the possibility of a plea of guilty in a criminal case; (4) the contents of any confession, admission, or statement given by a defendant or suspect in a criminal case; (5) the fact that a defendant or suspect in a criminal case refused or failed to make a statement; (6) the performance or results of any examination or test; (7) the fact that an individual refused or failed to submit to an examination or test; (8) the identity or nature of physical evidence expected to be presented; (9) any opinion as to guilt or innocence of a defendant or suspect in a criminal case; (10) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; and (11) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that

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COURT OF APPEALS RELAXES RULES OF EVIDENCE FOR SMALL CLAIMS ACTIONS INVOLVING DEBT BUYERS

By E. BARRETT “RHETT” DONNELLY, Esq.

On May 19, 2014, a divided Court of Appeals of Maryland issued a decision confirming that the relaxed Rules of Evidence applicable to small claim actions (defined as claims for monetary judgments not exceeding \$5,000) also pertain to cases involving assigned consumer debts or “debt buyer” cases. The Court ruled that once a small claim action arising from an assigned consumer debt is contested and proceeds to a trial on the merits, the relaxed Rules of Evidence contemplated by Maryland Rule 3-701 will still apply, notwithstanding the heightened pleading requirements for debt buyer cases set forth in Maryland Rule 3-306(d). Judges are only required to determine the reliability and credibility of the evidence in such cases without being constrained by the Rules of Evidence. Judge Greene authored the majority opinion, in which Chief Judge Barbera, Judge Harrell, and Judge Battaglia joined. Judge Watts wrote a separate concurrence, and Judge MacDonald, joined by Judge Adkins, submitted an opinion concurring in part and dissenting in part.

Generally, in debt buyer cases, the debts sued upon arise from consumer credit, such as credit card accounts and other unsecured debts, which are then “charged off” by the creditor and then sold to a debt buyer. The debt buyer then has the right to collect the debt in exchange for paying the original creditor an amount significantly lower than the amount of the original debt.

This case arose from two consolidated debt buyer small claim actions that originated in the District Court of Maryland for Baltimore City: *Bartlett v. Portfolio Recovery Associates, LLC* and *Townsend v. Midland Funding, LLC*. At the crux of the debate was how the admissibility and credibility of evidence in light of the heightened pleading requirements of Maryland Rule 3-306(d) intersected with the relaxed Rules of Evidence dictated by Maryland Rule 3-701. The plaintiffs and defendants disputed whether Maryland Rule 3-306(d) was compatible with Maryland Rule 3-701, under which the Rules of Evidence were not applicable in small claim actions.

In both cases, the plaintiffs introduced evidence by affidavit to satisfy the requirement of proving debt ownership, arguing that the evidence was admissible under the business records exception to the hearsay rule. At trial, however, the plaintiffs argued that the Rules of Evidence were inapplicable under Maryland Rule 3-701, thus making the affidavits admissible and properly before the judges to determine the weight and credibility of the evidence submitted. The defendants, in turn, argued that the evidence should be deemed inadmissible because of the enhanced requirements of Maryland Rule 3-306(d),

and that the evidence did not meet the personal knowledge requirement under the law for the evidence to be admissible.

The District Court ruled in favor of the plaintiffs in both cases, determining that the plaintiffs satisfied Maryland Rule 3-306(d) and proved the existence of the debts and the plaintiffs’ ownership thereof. Both defendants appealed, and *de novo* trials were held in the Circuit Court for Baltimore City. The Circuit Court also ruled in both cases that the plaintiffs established the burden of proof necessary to satisfy Maryland Rule 3-306(d), and that the Rules of Evidence did not apply. The defendant in each of the cases filed a petition for certiorari in the Court of Appeals, and the cases were consolidated after the Court granted certiorari.

The Court of Appeals set out to answer three questions regarding these actions: (1) whether the evidentiary standard under Md. Rule 3-306(d), which contemplates that the documents submitted to support a judgment on affidavit pass muster under the business records exception, applies to a contested small claim proceeding; (2) whether the trial courts abused their discretion when they considered business records and hearsay evidence in entering judgment for the plaintiffs; and (3) whether the trial courts committed clear error when they found in favor of the plaintiffs in the present cases.

Pursuant to Maryland Rule 3-306, a plaintiff may file a complaint for judgment on affidavit if the affidavit is accompanied by supporting documents showing that the plaintiff is entitled to judgment as a matter of law. If the defendant files a timely notice of intention to defend (NID) under Maryland Rule 3-307, the defendant is entitled to a trial on the merits, and Maryland Rule 3-306 expressly requires the plaintiff to appear in court on the trial date prepared for a trial on the merits. For small claim actions, the trial is conducted pursuant to Maryland Rule 3-701, and the parties are not constrained by the Rules of Evidence.

A 2011 amendment to Maryland Rule 3-306 added a special provision relating to debt-buyer cases. The new subsection (d) requires debt-buyer plaintiffs to provide additional documents with their complaints and affidavits to satisfy the Assigned Consumer Debt Checklist, which is included in the Assigned Consumer Debt Complaint form prescribed by the Chief Judge of the District Court. This heightened condition requires that plaintiffs must produce certified or otherwise

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MSBA ANNUAL SUPREME COURT PROGRAM

BY ANDREW H. BAIDA, ESQ.

On Thursday, June 12, 2014, the Litigation Section and the Appellate Practice Committee, which I co-chair with the Honorable Robert A. Zarnoch, presented for the seventh consecutive year a review of the Supreme Court's most recent Term. The panelists for this year's program, "United States Supreme Court Year in Review," discussed significant cases decided and pending during the Court's October 2013 Term. The panelists were Jesse J. Holland, a national writer for The Associated Press in Washington, D.C., who spent five years covering the Supreme Court; Louis Michael Seidman, the Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law Center, who has also taught at Harvard Law School, New York University Law School, and the University of Virginia Law School and served as a law clerk for Judge J. Kelly Wright of the U.S. Court of Appeals for the D.C. Circuit and U.S. Supreme Court Justice Thurgood Marshall; and John P. Elwood, an appellate partner of Vinson & Elkins LLP and former Assistant to the Solicitor General, who argued seven cases before the Supreme Court, is a regular contributor to the Supreme Court legal blog, SCOTUSblog, and is a former law clerk for Judge J. Daniel Mahoney of the U.S. Court of Appeals for the Second Circuit and U.S. Supreme Court Justice Anthony M. Kennedy.

After brief introductions, Professor Seidman began the program by discussing *Schuetz v. Coalition to Defend Affirmative Action*, the most recent judicial pronouncement in this country's continuing debate, which dates back to 1978 when *Regents of the University of California v. Bakke* was decided, over race-conscious admissions policies in higher education. Following the Supreme Court's 2003 decisions in *Gratz v. Bollinger* and *Gutter v. Bollinger*, which addressed the constitutional propriety of the University of Michigan's undergraduate and law school admissions plans' consideration of race, Michigan's voters approved Proposal 2, an amendment to the Michigan Constitution prohibiting race-based preferences in the admissions process of the state's universities. Several interested parties, including the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, challenged the constitutionality of Proposal 2, which was upheld by the U.S. District Court for the Eastern District of Michigan but overturned by a majority of the U.S. Court of Appeals for the Sixth Circuit, sitting en banc. The Supreme Court granted certiorari and, in an opinion by Justice Kennedy joined by Chief Justice Roberts and Justice Alito announcing the judgment of the Court, held that the U.S. Constitution's Equal Protection Clause does not "restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended." Stating that "[t]his case is not about how the debate about racial preferences should be resolved" but rather "about who may

resolve it," Justice Kennedy concluded that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."

Mr. Holland and other panel members offered colorful insights about several other Supreme Court decisions, including *McCutcheon v. Federal Election Commission*, in which a 5-4 majority of the Court, in an opinion authored by the Chief Justice, struck down on First Amendment grounds the "aggregate limits" imposed by the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002, restricting the amount of money a donor may contribute in total to all federal candidates, political parties, or political action committees. Quoting *Buckley v. Valeo*, the Court concluded that the aggregate limits "intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'" In another First Amendment case discussed by the panel, *Town of Greece v. Galloway*, the Court held, by a 5-4 vote, that a town did not impose an impermissible establishment of religion by opening its monthly board meetings with a prayer.

The panel also addressed several cases that were pending as of the time of the program, including two related cases, *Riley v. California* and *United States v. Wurie*, which presented the question whether, under the Fourth Amendment, the police are required to obtain a warrant to search digital information on a cell phone seized from an individual who has been arrested. Mr. Elwood stated he could not predict how *Riley* and *Wurie* would be decided, but he certainly planted a suggestion by commenting that the outcome of a case is sometimes influenced by the effect it could have on the Justices in their personal lives. His suggestion proved to be prophetic when *Riley* and *Wurie* were decided less than two weeks after the conclusion of this program. Expressing concern about the "vast quantities of personal information" contained in a cell phone, the Court stated that "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search" considered in other cases, and unanimously held that police officers "must generally secure a warrant before conducting such a search."

It was truly a delight to listen to this impressive panel of Supreme Court specialists discuss these and other high profile cases from the 2013 Term, and I hope you were there to share the experience with me. But if you weren't, fret not. You can always attend next year's program.

HASLEY V. WARD MFG. AND MARYLAND'S ECONOMIC-LOSS RULE'S PUBLIC-SAFETY EXCEPTION

BY HARMON L. (MONTY) COOPER, ESQ.

In July, the Maryland federal district court in *Hasley v. Ward Mfg., LLC*, CIV.A. RDB-13-1607, 2014 WL 3368050 (D. Md. July 8, 2014) affirmed Maryland's version of the economic-loss rule. Overall, the economic-loss rule prohibits tort recovery for economic losses, which occur when a defective product damages only itself and does not cause personal injury or damage to other property.¹ Most states follow this rule. But a few states follow the minority rule which allows plaintiffs to recover economic losses in tort.² Other states, like Maryland, follow a more "intermediate" approach: one that bars economic-loss damages in tort and only allows such damages if the defective product created an unreasonable risk of harm to persons or other property.³ In particular, Maryland courts provide a public-safety exception. The exception allows for economic losses when the product creates a substantial risk of death or personal injury.⁴ Thus, *Hasley* provides a useful example of how courts apply Maryland's intermediate rule to the facts of a case.

In *Hasley*, Plaintiffs sued the manufacturer of the product Wardflex, a type of ultrathin, flexible piping (corrugated stainless steel tubing) that was installed in Plaintiffs' residential and commercial buildings. The manufacturer designed the product to transport natural gas, serving as an alternative to black iron pipes.

While Wardflex had been installed in over five million homes, only 141 fires were alleged to have occurred due to problems associated with the product. But Plaintiffs still argued that the presence of Wardflex was highly dangerous. According to Plaintiffs, if lightning struck near Plaintiffs' properties, the strike could cause a small puncture in the Wardflex's thin tubing wall. This puncture could then ignite the natural gas inside the tubing, causing the surrounding materials to flare up, eventually resulting in an extensive fire. Because of this risk, Plaintiffs alleged that the product was defective and had to be removed and replaced.

Ultimately, the court concluded that the economic-loss rule barred their claims, and the public-safety exception did not apply. As mentioned, the economic-loss rule denies recovery under tort law when a defective product damages only itself and does not cause personal injury or damage to other property. The rule's rationale is that contract law, as opposed to tort law, is expressly designed to handle economic losses.⁵ In order to apply Maryland's "public safety" exception, the court had to examine (1) the probability of damage occurring and (2) the nature of the damage threatened in order to determine whether the two, viewed together, exhibit a serious, substantial, and unreasonable risk of death or personal injury.⁶ So, if the probability of injury occurring is extraordinarily high, the

nature of the damage need not be as severe.⁷ Conversely, if the probability of injury occurring is very low, a plaintiff must allege a substantial risk of death or serious physical injury (e.g. multiple deaths in a residential building).⁸

In *Hasley*, the court concluded that Plaintiffs' potential scenario – i.e. a lightning strike that punctures the Wardflex and causes an extensive fire – was "extremely remote." As mentioned, only 141 fires had previously been catalogued out of over five million homes to contain the product at issue. In the face of such a small probability of damages, Plaintiffs had to allege a "substantial risk of death or serious physical injury" in order for the public-safety exception to apply. Accordingly, this remote potential for harm was simply not enough to satisfy the exception.⁹

To support their view, Plaintiffs relied on a previous Court of Appeals decision: *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336 (1986). In that case, the plaintiffs successfully argued that the defendant-condominium builder was liable for installing a defective electrical system that created a fire hazard for occupants of a particular building.¹⁰ The court, however, distinguished *Whiting-Turner*. In *Whiting-Turner*, the defendant created a substantial risk of death to multiple people because the building did not adhere to fire codes. In *Hasley*, however, the Defendant's product had been approved by numerous codes and standards, and any risk of fire was predicated upon the occurrence of unlikely events. Because Plaintiffs had not pled facts upon which the court could infer that the presence of Wardflex created a substantial risk of death or serious physical injury, the court found the public-safety exception to be inapplicable. Thus, the court dismissed the case.

Endnotes

¹ Gennady A. Gorel, "The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-Eating Monster," 37 Rutgers L.J. 517, 519 (2006) (citing case law in support).

² Glenn S. Ritter, "Economic Loss Rule in Arkansas: Everyone Else Has It, Why Don't We?," 64 Ark. L. Rev. 455, 478 n.4 (2011) (stating that Arkansas, Oklahoma, and Montana appear to be the only jurisdictions not adhering to the economic loss rule).

³ Daniel M. Alsup, "New Mexico's Economic Loss Rule, Unconscionability Doctrine, and the Gap Between Them: Concepts, Realities, and How to Mend the Gap," 38 N.M. L. Rev. 483, 486 (2008).

⁴ See *Hasley*, 2014 WL 3368050, at *4.

⁵ See Rebecca Korzec, "Lloyd v. General Motors Corporation: An Unfortunate Detour in Maryland Products Liability Law," 38 U. Balt. L.F. 127, 128 (2008).

⁶ *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631-32 (1995).

⁷ *Id.* at 632.

⁸ *Hasley*, 2014 WL 3368050, at *4.

⁹ Additionally, here in *Hasley*, the court held that Plaintiffs lacked standing because the threat of injury was too speculative to be an injury-in-fact. 2014 WL 3368050, at *3.

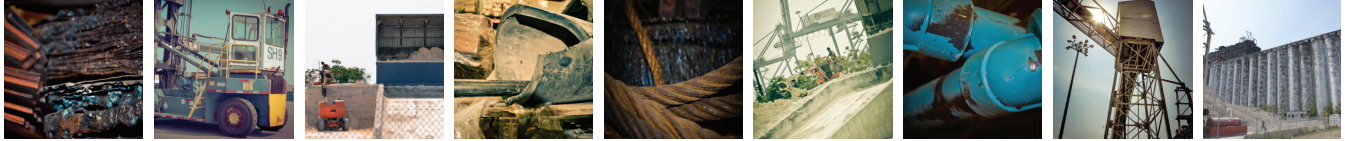
¹⁰ *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 517 A.2d 336 (1986).



SAVE THE DATE: MARCH 20, 2015

MSBA CONSTRUCTION LAW AND LITIGATION SECTIONS PRESENT:

EVIDENCE, EXPERTS AND EXHIBITS – BUILDING AND SUPPORTING A COMPLEX CONSTRUCTION CASE



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OCEAN CITY EDUCATIONAL PROGRAMS A SUCCESS

BY ANN M. SHERIDAN, ESQ.

At the MSBA Summer Meeting in Ocean City, the Litigation Section presented an informative and engaging program entitled, *This Case Settled Years Ago, How Can We All Be Liable?* The esteemed panel – comprised of Larry A. Ceppos, Esquire of Armstrong, Donohue, Ceppos Vaughan & Rhoades; Paul D. Bekman, Esquire of Salisbury, Clements, Bekman, Marder & Adkins; R. Scott Krause, Esquire of Eccleston & Wolf, P.C.; the Honorable Steven I. Platt, Circuit Court for Prince George's County (retired); and Jennifer C. Jordan, JD, MSCC of MEDVAL LLC – conveyed essential information regarding how complicated Medicare reimbursement issues can impact litigation. The panel focused particularly on the Medicare Secondary Payer Act ("MSPA") which makes both plaintiffs' counsel and defense counsel potentially *personally* liable to Medicare for failing to take steps to protect Medicare's interests when paying out proceeds from settlements or judgments.

Mr. Ceppos presented a detailed overview of the MSPA and outlined the obligations of the various players when Medicare payments are at issue. Mr. Bekman addressed the issues plaintiffs' counsel must consider when handling a case where Medicare has paid a portion of the client's medical expenses, including asking the right questions at intake, putting Medicare on notice, negotiating with Medicare regarding the size of the lien and set-asides for future medical expenses, and advising the client on the effect on settlement proceeds. Mr. Krause addressed the issues defense counsel must consider, including propounding discovery which elicits sufficient information to provide the necessary notifications and considerations of release language. Judge Platt discussed how a failure to adequately consider Medicare issues can derail mediation discussions. Ms. Jordan provided her view on future developments in the law and her predictions for where the law on Medicare liens and set-asides is going. The program was loaded with cautionary advice and practical pointers which were well-received by all in attendance. Those of you who were not fortunate enough to attend should review Mr. Krause's article *The Medicare Morass – Practice Pointers to Manage Attorney Risk in Personal Injury Cases*, published in the Sept./Oct. issue of The Maryland Bar Journal.



APPLAUSE!

The Litigation Section also co-sponsored an Ocean City program with the ADR Section and the Business Law Section entitled, *Making the Most of ADR in the Business Litigation Context: Putting the Counsel into Counsellor*. Judge Platt and Mala Malhotra-Ortiz, Esquire, Director of the ADR Division of the Court of Special Appeals, moderated the program. An impressive line-up of judges and lawyers participated as actors in various vignettes based on a litigation problem arising from an oil leak on school property caused by a faulty boiler. The Honorable Carol E. Smith and the Honorable Gale E. Rasin played the part of school officials. The Honorable Glenn T. Harrell, Jr. and the Honorable James A. Kenney, III played the inept boiler installers. The Honorable Barbara K. Howe played the part of president and CEO of the boiler manufacturer. The Honorable Diane O. Leasure played the part of general counsel to the liability insurance company. The Honorable Alexander Wright, Jr. and Toby Guerin, Esquire played the part of mediators. The Honorable Irma S. Raker, Bar Counsel Glenn Grossman, Esquire, Scottie Reid, Esquire, Frank Goldstein, Esquire, Jim Astrachan, Esquire, Erin Risch, Esquire, Cecilia Paizs, Esquire, and Ann Sheridan, Esquire, all played the part of lawyers attempting to advise their rather clueless clients. The format was fast-paced and entertaining, and the vignettes provided a jumping off point for discussing the various issues and competing interests involved in mediating a complex business dispute involving multiple players with varied interests.

CHAIR'S MESSAGE...

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demonstrative evidence, and addressing complex construction issues. More details will be shared in the coming months.

On April 23, 2015, from 6:00 – 8:30 p.m., the Litigation Section will host a dinner program titled “Maryland Circuit Court and Federal District Court Practice:

The Judge’s Perspective” with the members of Maryland’s Circuit Court Bench and Federal District Court Bench, at the Doubletree Hotel, 210 Holiday Court, Annapolis, MD. The Section Council voted five years ago to endorse a repeating three-year cycle of emphasizing our various courts in our program development, in Year One of each cycle, the District Court (and the federal magistrates in Maryland), in Year Two, the Circuit Courts (and the U.S. District Court for Maryland), and, in Year Three, Maryland’s appellate courts (and the U.S. Fourth Circuit). Watch for further details in the coming months and be sure to register early for the dinner.

Please take note of the deadlines for the Judge of the Year Award and the Litigator of the Year award. Nomination forms for both awards are included in this issue of The Maryland Litigator. The deadline for the nominations of the Judge of the Year Award is December 1, 2014. The deadline for the Litigator of the Year Award is April 1, 2015. The Judge of the Year Award will be presented at the judges’ dinner on April 23, 2015 and The Litigator of the Year Award will be presented at the 2015 MSBA Annual Conference in Ocean City. Please also note that although the dinner in April 2015 will be with Circuit Court and District Court judges, any judge can be nominated for the Judge of the Year award.

Lastly, a committee was formed in 2013 to draft proposed revisions to the Maryland Discovery Guidelines. The Honorable Michael A. Dipietro and Robert (Bob) Fiore, who are Co-Chairs of committee along with Richard J. Berwanger, Jr. and Alice M. Somers, drafted proposed revisions that were presented during the Litigation Section’s business meeting at MSBA Annual Meeting on June 13, 2014. Public comment was solicited from the Section and, on September 23, 2014, a meeting was held at Westminster Hall in Baltimore to receive additional public comments. The committee is reviewing all of the comments. Stay tuned for more information about the proposed revisions to the Maryland Discovery Guidelines.

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the AELR Committee objects to cannot be adopted without the approval of the Governor.¹⁹

If the AELR Committee does not object, the agency must submit the proposed regulation to the Maryland Register for publication.²⁰ The publication must include both the proposed regulation and a notice of proposed adoption, which includes, among other things, a statement of purpose, and sets a date and time for a public hearing where the public may submit comments.²¹ Additionally, the agency must publish the proposed regulation on its website.²²

V. Proposals of Regulations and Refusal by Agency to Initiate Rulemaking

There is only one Maryland appellate decision dealing with the proposal of a regulation by members of the public. In contrast, there are many Federal decisions dealing with an agency’s denial of a proposed regulation. Those cases make clear that an agency’s denial is reviewable under the arbitrary and capricious standard.

A. Maryland’s Brush with the Topic of Denial of Petition for Regulation

In *Ehrlich v. Maryland State Employees Union*,²³ the American Federation of State, County, and Municipal Employees (“AFSCME”) sued to enforce memoranda of understanding (“MOU”) that were reached with the State and ratified by outgoing Governor Glendenning’s Chief of Staff just one day before the end of his term on January 14, 2003. The MOUs provided for, among other things, a 2% increase in wages for all State employees.²⁴ Governor Glendenning’s term ended before the time for submitting the 2003 budget to the General Assembly. Governor Ehrlich never ratified the MOUs, and declined to fund them in the budget that he submitted to the 2003 General Assembly on January 17, 2003.

The AFSCME filed suit in the Circuit Court for Anne Arundel County against the Governor, the State, the Secretary of Budget and Management, and the State Labor Relations Board (“SLRB”). Among other claims, the AFSCME claimed that the Department of Budget Management had failed to adopt regulations that it was required to adopt, and that the SLRB breached its obligation under the APA to adopt procedural regulations.²⁵ The State moved for summary judgment. The Circuit Court found that the statute did not require the Department or the SLRB to adopt regulations, but merely authorized them to do so.²⁶ But the Circuit Court also found that a letter from the executive director of the AFSCME to the Secretary of Budget and Management for the SLRB,

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asking for a timetable for the promulgation of regulations and indicating that the AFSCME was concerned about the implementation of such regulations, was actually a petition for regulation pursuant to Section 10-123 of the APA and therefore, the AFSCME was not barred from bringing its claim based on failure to enact regulations.²⁷

The Court of Appeals granted *certiorari* on its own initiative prior to proceedings in the Court of Special Appeals.²⁸ The Court of Appeals disagreed that the letter from the executive director was a petition for regulation, and explained that the State Labor Relations Board had adopted regulations governing submission of petitions for regulations, and that the letter from the executive director of AFSCME "did not come close to complying" with those regulations.²⁹ The Court of Appeals did not address the standard for reviewing a decision of an agency to deny a properly proposed regulation.

B. Federal Cases Regarding Denial of Petition for Regulation

In *American Horse Protection Assn., Inc. v. Lyng*, the United States Court of Appeals for the District of Columbia held that the judiciary is not precluded from reviewing an agency's refusal to grant a petition for regulation.³⁰ Rather, a reviewing Court must examine whether the agency's decision was "reasoned." In that case, the Secretary of Agriculture refused to initiate the rulemaking process when the American Horse Protection Association ("AHPA") requested several times that regulations related to "soring"³¹ horses be updated to prevent the deliberate injuries that were being inflicted on horses.³² The Court of Appeals for the District of Columbia held that the Secretary had not "presented a reasonable explanation of his failure to grant the rulemaking petition of the [AHPA]."³³ The Court of Appeals remanded the case to the District Court with instructions to remand the case to the Secretary for further consideration consistent with the Court's opinion.

Although no review was sought of the *American Horse* decision, the Supreme Court of the United States had the opportunity to address a similar issue in *Massachusetts v. E.P.A.*³⁴ In that case, the Supreme Court agreed that denials of petitions for regulations are subject to judicial review, noting that "denials of petitions for rulemaking . . . [involve petitions that] the affected party had an undoubted procedural right to file in the first instance."³⁵ However, the Supreme Court noted that judicial review of refusals to promulgate regulations is "'extremely limited' and 'highly deferential.'"³⁶

Very recently the United States District Court for the Eastern District of Pennsylvania weighed in on this issue. In *Comite De Apoyo a Los Trabajadores Agricolas v. Perez*, plaintiffs,

an association and individuals, moved to vacate regulations previously held invalid by the Court. The Court treated that motion as a petition for rulemaking pursuant to 5 U.S.C. § 553(e)³⁷ because plaintiffs' request aimed "at compelling the agency to engage in new rulemaking to fill regulatory gaps that would be created by a grant of the requested vacatur."³⁸ The Court explained that a decision to deny rulemaking "is to be overturned if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; but this standard is applied at the high end of the range of deference and an agency refusal is overturned only in the rarest and most compelling of circumstances."³⁹ The Court went on to state that "[t]his standard has been said to be so rigorous as to be akin to non-reviewability. A court need only determine whether the agency's decision was the product of reasoned decision making, meaning that the agency considered the relevant factors."⁴⁰

VI. What Maryland Will Do

When the Maryland Appellate Courts are presented with the opportunity to review an agency's denial of a proposed regulation, they will likely do so under the arbitrary and capricious standard, as the Federal Courts have done.

In *Harvey v. Marshall*⁴¹, the Honorable Glenn T. Harrell, Jr. of the Court of Appeals of Maryland went to great lengths to discuss the definition of "arbitrary and capricious" in the context of review of discretionary decisions of administrative agencies. Judge Harrell explained that although most Maryland cases "recognize as a threshold matter the extremely deferential nature of the 'arbitrary and capricious' standard"⁴², the standard is "less than well-defined with respect to judicial review of discretionary actions."⁴³ Judge Harrell then discussed Professor Arnold Rochvarg's analysis of the arbitrary and capricious standard and Maryland decisions describing the arbitrary and capricious standard.⁴⁴

In a subsequent version of Professor Rochvarg's *Principles and Practice of Maryland Administrative Law*, professor Rochvarg explained that Judge Harrell's analysis in *Harvey* consisted of the following points:

1. The arbitrary and capricious standard is best understood as a reasonableness standard.
2. Each case must be evaluated on an individual basis because it is impossible to catalogue every circumstance when an agency acts in an arbitrary or capricious manner.
3. Dictionary definitions of "arbitrary" and "capricious" support the position that "so long as the actions of

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the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.^{xi}

Finally, the Rule provides one more exception to the general prohibition. The Rule recognizes that when prejudicial statements have been publicly made by another party, another party's lawyer, or third persons (and not initiated by the client) a lawyer may make a statement, when she reasonably believes that a statement is required to protect a client from the substantial undue prejudicial effect of the recent publicity.^{xii} The lawyer's statement, however, must be limited to such information as is necessary to mitigate the recent adverse publicity.

The Rule attempts to balance the right to a fair trial and the right of free speech. The Comments recognize the difficulty in balancing the curtailment of speech to protect procedural safeguards, particularly in a jury trial, with "the vital social interests served by the free dissemination of information about events having legal consequences and about the legal proceedings themselves" including threats to public safety.^{xiii}

In *Attorney Grievance Commission v. Gansler*, the Court of Appeals of Maryland examined Rule 3.6^{xiv}. The Court reviewed the history of rules related to trial publicity and their basis in the Sixth Amendment right to a fair trial.^{xv} The Court stated:

One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. Attorneys involved in a particular case have greater access to information through discovery, the ability to converse privately with knowledgeable witnesses, and an enhanced understanding of the circumstances and issues. Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess.^{xvi}

At issue was the conduct of Douglas F. Gansler, then-State's Attorney for Montgomery County, who made extrajudicial statements in connection with his office's prosecution of various well-publicized crimes.^{xvii} Gansler argued that his statements in the matters were protected by the safe harbor provisions of Rule 3.6(b), specifically that all three statements were merely statements about matters of public record and additionally argued that the rule did not

provide sufficient guidance as to what information is contained in the "public record."^{xviii} The Court of appeals agreed that there was no settled definition of "public record" and, in applying the phrase to Gansler, construed it in its broadest form. Nonetheless, the Court found Gansler ran afoul of Rule 3.6 when he commented on an accused's confession, when he discussed a plea offer made to a defendant and when he provided his opinion as to the guilt of two defendants.^{xix} The Court warned future respondents that they will not find shelter in the broad interpretation and that public policy mandates a more limited definition to protect the right to a fair trial.^{xx}

Lawyers associated with those lawyers prohibited from making extrajudicial statements are themselves bound by the prohibition.^{xxi} Additionally, it appears that a lawyer may not ask or encourage any individual to do what she is prohibited from doing pursuant to Rule 8.4(a) which prohibits an attorney from "violat[ing] or attempt[ing] to violate the [MLRPC], knowingly assist[ing] or induc[ing] another to do so, or do[ing] so through the acts of another[.]"

Attorneys' speech may be regulated more stringently than the speech of an ordinary citizen.^{xxii} The restriction on our right to speak is part of our role as lawyers and part of our obligation to serve our clients and the rule of law which includes, at its core, the right to a fair trial.

Endnotes

ⁱ MLRPC 3.3(a) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal . . .")

ⁱⁱ MLRPC 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), MLRPC 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice[.]")

ⁱⁱⁱ MLRPC 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [this rule]."), MLRPC 1.9(c) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter (1) use information relating to the representation to the disadvantage of the former client . . . (2) reveal information relating to the representation . . .")

^{iv} MLRPC 3.5(a) ("A lawyer shall not . . . (2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the jury list for trial of the case; (3) during the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with any member of the jury; (4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case. . .")

^v MLRPC 4.2(a) (" . . . [A] lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.")

^{vi} MLRPC 4.4(b) ("In communicating with third persons, a lawyer representing a

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properly authenticated photocopies or original documents proving the existence of the debts to satisfy the business records exception to the hearsay rule. The purpose of the 2011 amendment was to heighten standards for debt buyers to prove uncontested cases.

If the defendant fails to file a timely notice of intention to defend, or the defendant files a timely NID but fails to appear at trial, the trial judge will evaluate the merits of the plaintiff's case based on the affidavit and accompanying documents. If satisfied, the judge may grant judgment on affidavit for the plaintiff. If the defendant files a timely NID and appears for trial, the plaintiff will have to present evidence at trial to prove that the defendant owes the debt to the plaintiff.

In both *Bartlett* and *Townsend*, the defendants timely filed NIDs and appeared at the merits trials. Both plaintiffs obtained judgments, because the trial courts found that, pursuant to Maryland Rule 3-701, the Rules of Evidence did not apply in the individual cases. Furthermore, the trial judges evaluated the reliability and credibility of the submitted evidence and concluded that the evidence satisfied the requirements of Maryland Rule 3-306(d). On appeal, both plaintiffs prevailed. The Circuit Court, operating pursuant to Maryland Rule 7-112, which states that appeals heard in Circuit Court shall be conducted in an informal manner if the action in the District Court was tried under Maryland Rule 3-701, found that the evidence submitted contained sufficient evidence under the law, and the Rules of Evidence did not apply.

The Court of Appeals agreed with the lower courts in finding that, "once the small claim action moves beyond the demand for judgment on affidavit stage, the plaintiff will have to present evidence at trial to prove that the defendant owes the debt to the plaintiff, but will not be constrained by the Rules of Evidence in doing so." The Court further found that this conclusion "is true for all small claims, including a debt-buyer case," and, thus, "in a debt buyer small claim action, once the case is contested, the plaintiff need not conform its proffer to the Rules of Evidence." As such, a trial court is tasked only with weighing the reliability and credibility of the evidence before it, and then considering such evidence when making its determination. Because a significant portion of the evidence at hand consisted of business records, which courts have found trustworthy and reliable pursuant to past case law, the Court of Appeals was only tasked with finding whether the trial court erred in finding the evidence reliable and credible. Furthermore, in the context of small claims, while a live witness is always preferable, "the presence of a witness is not always necessary." Although the 2011 amendment to Md. Rule 3-306 created a

heightened standard for debt buyers in small claim cases, the Court of Appeals found that this amplified standard does not mean that debt buyers cannot benefit from the relaxed Rules of Evidence in small claim actions as set forth in Maryland Rule 3-701. It is now settled that, although debt buyers in small claim actions must satisfy the requirements of Maryland Rule 3-306(d) when filing their complaints, if the matters go to trial, judges are only tasked with determining the weight and credibility of the evidence, and the parties are not constrained by the Rules of Evidence.

In his dissent, Judge McDonald expressed concern over a precedent that now allows for relaxed requirements of authentication of documents by plaintiffs in small claim debt buyer cases when the matters are contested. Furthermore, Judge McDonald disagreed with the majority opinion that may preclude defendants from having the opportunity to cross-examine plaintiffs' witnesses if debt buyers can win cases on documents alone and no witnesses, as the primary purpose of small claims courts is to provide greater access to justice. Judge Watts concurred in the judgment, writing separately to urge the Standing Committee on Rules of Practice and Procedure to investigate whether there should be changes to the Maryland Rules concerning the level and type of proof in assigned consumer debt trials in small claim cases.

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client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived.")

vii MLRPC 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. . .")

viii MLRPC 7.3(a) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . .")

ix G.Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §32.5 (3d ed. 2011)

x *Id.* at §32.6

xi MLRPC 3.6, Comment [5]

xii MLRPC 3.6(c)

xiii MLRPC 3.6, Comment [1]

xiv 377 Md. 656, 835 A.2d 548 (2003)

xv *Id.* at 674-82, 558-63

xvi *Id.* at 559, 676

xvii *Id.* at 667, 554

xviii *Id.* at 683, 563-64

xix *Id.* at 693, 569

xx *Id.* at 569, 692

xxi MLRPC 3.6(d)

xxii *Gansler* 377 Md. at 684, 835 A.2d at 565 (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031, 111 S.Ct. 2720, 2722-23 (1991))

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administrative agencies are reasonable or rationally motivated, those decisions should not be struck down as arbitrary or capricious."

4. Arbitrary or capricious decision making occurs when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms.

5. An agency decision may be deemed arbitrary or capricious if it is contrary to or inconsistent with an enabling statute's language or policy goals.

6. An agency action may be arbitrary or capricious if it is irrationally inconsistent with previous decisions.

7. An agency action may be arbitrary or capricious if individuals are given substantially different sanctions for identical conduct.⁴⁵

As submissions of petitions for regulations, and potentially the refusal to initiate rulemaking, become more common, Maryland courts will likely need to establish what "arbitrary and capricious" means in the context of a denial of a petition for regulation. The list of guiding principles established by the Court of Appeals, and organized by Professor Rochvarg, will likely guide the Maryland Appellate Courts in determining whether an agency's refusal to initiate rulemaking is "arbitrary and capricious."

VII. Conclusion

The APA has specific provisions providing the public with the opportunity to propose regulations. As the public begins to utilize these provisions, and as denials of petitions for regulations become more common, the Maryland Appellate Courts will develop a standard for reviewing an agency's denial of such petitions. The development of this body of law is important because of the growing role administrative regulations play in today's litigation.

Patrice Meredith Clarke, Esquire is an associate of Kramon & Graham, P.A., practicing in the firm's litigation department.

Endnotes

¹ Maryland's APA is codified in Subtitles 1, 2, and 3 of Title 10 of the State Government Article of the Maryland Code.

² Md. Code, State Gov't § 10-101.

³ *Id.*

⁴ See, e.g., Md. Code Ann., Health-Gen. § 19-118 (enabling the Maryland Health Care Commission to adopt regulations); Md. Code Ann., Agric. § 2-504 (enabling the Maryland Agricultural Land Preservation Foundation to adopt regulations); Md. Code Ann., Bus. Reg. § 8-704 (Enabling the Maryland Home Improvement Commission to adopt certain regulations).

⁵ Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law*, § 2.9 at 14 (2011).

⁶ Md. Code Ann., St. Gov't Art. § 10-123.

⁷ *Id.* at § 10-123(b).

⁸ 5 U.S.C.A. § 553.

⁹ See *American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1 (C.A.D.C.1987) (discussed *infra*).

¹⁰ See *Comite De Apoyo a Los Trabajadores Agricolas v. Perez*, No. CIV.A. 09-240, 2014 WL 4473485 (E.D. Pa. Sept. 11, 2014) (discussed *infra*).

¹¹ See *Rios v. Washington Dep't of Labor & Indus.*, 145 Wash. 2d 483, 39 P.3d 961 (2002).

¹² Md. Code, State Gov't § 10-112.

¹³ *Id.* at § 10-107.

¹⁴ *Id.* at § 10-110.

¹⁵ MARYLAND GENERAL ASSEMBLY JOINT COMMITTEE ON ADMINISTRATIVE, EXECUTIVE, AND LEGISLATIVE REVIEW 1 (2011), available at <http://www.mabe.org/wp-content/uploads/2013/01/AELR-Cmte-handout.pdf>.

¹⁶ *Id.*

¹⁷ *Evans v. State*, 396 Md. 256, 348 (2006).

¹⁸ *Id.*

¹⁹ Md. Code Ann., St. Gov't Art. § 10-111.1(d).

²⁰ *Id.* at § 10-112.

²¹ *Id.*

²² *Id.* at § 10-112.1.

²³ 382 Md. 597, 613 (2004).

²⁴ *Id.* at 603.

²⁵ *Id.* at 612.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 606.

²⁹ *Id.* As discussed *infra*, agencies adopt specific regulations governing submissions of petitions for regulations.

³⁰ *American Horse*, 812 F.2d at 4.

³¹ Soring horses involves the practice of "deliberately injuring show horses to improve their performance in the ring" by using devices that hurt the horses' hooves, and in turn force the horses to lift their hooves higher so as to avoid pain. *Id.* at 1-2.

³² *Id.*

³³ *Id.* at 7.

³⁴ 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

³⁵ *Id.* at 527 (citing *American Horse*, 812 F.2d at 4; 5 U.S.C. § 555(e)).

³⁶ *Id.* (quoting *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (C.A.D.C.1989)).

³⁷ *Perez*, No. CIV.A. 09-240, 2014 WL 4473485 at * 1.

³⁸ *Id.* at *11.

³⁹ *Id.* (quoting *New York v. NRC*, 589 F.3d 551, 554 (2d Cir.2009)).

⁴⁰ *Id.* (internal quotation marks and citations omitted).

⁴¹ 389 Md. 243 (2005).

⁴² *Id.* at 299.

⁴³ *Id.* at 297.

⁴⁴ *Id.* at 295-304.

⁴⁵ Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law*, § 20.3 at 260 (2011).

Litigation Section – Maryland State Bar Association

NOMINATE A DISTINGUISHED MARYLAND LITIGATOR For The 2014-2015 “Litigator of the Year” Award

Background Information and Instructions:

- In the areas below and on the second page, provide requested information about you and any information that is reasonably available to you about the nominee. You may attach extra pages, as necessary.
- Any person may make nominations. A person may make more than one nomination.
- Current members of the Section Council are not eligible to be nominated.
- To be eligible for nomination, a person must:
 - Currently be licensed to practice in Maryland
 - Currently be a dues-paying member of the MSBA
 - Practice predominately in the area of litigation
 - Practice predominately (*i.e.*, have personal principal office location) in Maryland
 - Be actively engaged in the practice of law in the 12-month period prior to the nomination deadline
- Criteria for evaluation of nominations:
 1. assessment of litigation skills
 2. assessment of legal management skills
 3. results of litigation
 4. professionalism and civility
 5. extra-curricular contributions to the profession, *i.e.*, bar service, service to judiciary, etc.
 6. extra-curricular contributions to the community-at-large
- The award will be presented at the annual meeting of the Litigation Section in June 2015 in Ocean City during the Section's annual MSBA meeting program.
- The Section Council will select the recipient. Please submit your completed nomination form by mail or e-mail, by the close of business on **April 1, 2015**, to

John P. Markovs., Chair
MSBA Litigation Section
Office of the County Attorney
101 Monroe St. 3rd Floor
Rockville, MD 20850-2503
John.markovs@montgomerycountymd.gov

PAST AWARD WINNERS

Andrew Jay Graham, Esquire	2011-2012
Alvin I. Frederick, Esquire	2012-2013
Timothy F. Maloney, Jr., Esquire	2013-2014

Information about You:

Name:	_____
Law Firm/Employer:	_____
Business Address:	_____

Telephone No.	_____
Are you related to the nominee by blood or marriage: Yes _____ No _____	
(If yes, please describe relationship: _____)	

*Information about Nominee:
(Use additional sheets if necessary)*

Name: _____

Law Firm/Employer: _____

Business Address: _____

Telephone No. _____

Litigation experience (length of practice, experiences showing expertise and integrity, collegiality [including observance of the MSBA Code of Civility], etc.):

Contributions to Improving Litigation Practice (legislation, continuing legal education, community, etc.):

Personal Professional and Academic Accomplishments (bar, memberships and activities, professional association, etc.):

Other

To the best of my knowledge, the nominee meets the criteria for nomination set forth in the instructions above.

Signature of Person Making Nomination

Litigation Section – Maryland State Bar Association

NOMINATE A DISTINGUISHED MARYLAND JUDGE For The 2014-2015 “Judge of the Year” Award

Background Information and Instructions:

- In the areas below and on the second page, provide requested information about you and any information that is reasonably available to you about the nominee. You may attach additional pages, as necessary.
- Any person may make nominations. A person may make more than one nomination.
- Current members of the Section Council are not eligible to be nominated.
- To be eligible for nomination, a person must:
 - Currently be a judge in a State or federal court sitting in Maryland
 - Currently be a dues-paying member of the MSBA
- Criteria for evaluation of nominations:
 1. assessment of knowledge of the law
 2. assessment of courtroom management skills
 3. reputation for fairness and civility
 4. extra-curricular service to the Judiciary and the Bar
 5. extra-curricular contributions to the community-at-large
- The award will be presented at the Litigation Section's “Dinner with the Judiciary,” in Annapolis, Maryland, to be held in April 2015
- The Section Council will select the recipient. Please submit your completed nomination form by mail or e-mail, by the close of business on **December 1, 2014**, to:

John P. Markovs, Chair
MSBA Litigation Section
Office of the County Attorney
101 Monroe St., 3rd Floor
Rockville, MD 20850-2503
[John.markovs@montgomerycounty](mailto:John.markovs@montgomerycounty.md.gov) md.gov

PAST AWARD WINNERS

The Honorable Alan M. Wilner	2011-2012
The Honorable Stuart R. Berger	2012-2013
The Honorable John P. Morrissey	2013-2014

Information about You:

Name: _____

Law Firm/Employer: _____

Business Address: _____

Telephone No. _____

Are you related to the nominee by blood or marriage: Yes____ No____

(If yes, please describe relationship: _____)

*Information about Nominee:
(Use additional sheets if necessary)*

Name: _____

Law Firm/Employer: _____

Business Address: _____

Telephone No. _____

Judicial experience (length of service and on which courts, experiences showing expertise and integrity, collegiality, etc.):

Contributions to Improving the Operation of the Judiciary and the Practice of Law (legislation, continuing legal education, community, etc.):

Personal Professional and Academic Accomplishments (bar, memberships and activities, professional association, etc.):

Other

To the best of my knowledge, the nominee meets the criteria for nomination set forth in the instructions above.

Signature of Person Making Nomination

