

Mandel Argues Gov. Deserves Total Immunity from Civil Suits

O'Hara Case Raises Novel Md. Constitutional Issues

By Jef Feeley

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Representing all of Maryland's past and present governors, Marvin Mandel urged the state Court of Appeals yesterday to extend absolute immunity from civil lawsuits to the state's chief executive, eliminating possible litigation fueled by disagreements over political and policy decisions.

In a case of first impression involving Maryland constitutional law, the Court of Appeals heard arguments on whether the state's governor has the same immunity from civil liability as the President of the United States or Maryland lawmakers or judges.

Mandel, Maryland's governor from 1970 to 1978, argued that executive immunity shields the state's top official from liability when acting in his official capacity, making it impossible for two Prince George's County businessmen to maintain their civil lawsuit against Mandel and others for defrauding them of their interest in a racetrack.

It was Mandel's involvement in the sale of the Marlboro racetrack that ultimately led to his conviction on mail fraud and racketeering charges and cast a cloud over his tenure of governor. The U.S. Supreme Court later overturned the Mandel conviction.

But lawyers for James and Michael O'Hara, who are suing Mandel for fraud, countered yesterday that Maryland's Constitution does not cloak the governor with absolute immunity and no other state provides



Former Maryland Gov. Marvin Mandel asked the Court of Appeals to give the state's chief executives total immunity from civil suits.

its chief executive with such protection from civil liability.

Separation of powers raised

The case of *Marvin Mandel v. James F. O'Hara, III et. al*, No. 33, September Term 1990, raises separation of powers and executive privilege issues that have never before been addressed by Maryland's appellate courts.

Even Mandel — who argued briefly in his own behalf yesterday — urged the judges to look beyond the O'Haras' lawsuit and consider the implications of their decision in the case on the political structure of the state.

"I think this case should be entitled the Office of the Chief Executive of Maryland versus James
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Mandel Makes Immunity Plea

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O'Hara," Mandel said. "It involves a very important question that will determine how effectively the chief executive of this state [will be able] to perform his role in the future.

"Each time a governor exercises the constitutionally mandated act of vetoing a bill, if immunity doesn't apply, the result could be that every person who feels aggrieved by that veto would be free to bring a suit for damages," the former governor warned.

That would allow the governor's opponents or disaffected citizens to tie up the chief executive in court after he vetoes a bill they wanted or enacts one they did not, Mandel contended.

Mandel depressed race track value

In their lawsuit, the O'Haras allege that Mandel vetoed a bill adding racing days to the Marlboro track as part of a scheme to depress its value prior to its purchase from the O'Haras by a group of the governor's confidants in 1971. The businessmen contend that Mandel then encouraged lawmakers to override his veto of the extra racing days to increase the value of the track for his friends.

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Mandel, who was not questioned by any of the Court of Appeals members during his five minute presentation, added it was ironic that parties to a lawsuit get absolute immunity for defamatory statements made during litigation while Maryland's chief executive is not immune for his governmental acts.

"The O'Hara's are free to make any allegation they want, no matter how frivolous, scandalous or shocking and yet they know they are covered by the same immunity they want to deny to the chief executive of Maryland," Mandel pointed out.

Gov. and President deserve same immunity

Baltimore attorney Thomas Howell, who is representing the estate of the late Irv Kovens in the O'Hara case, told the judges that both the U.S. Supreme Court and the Court of Appeals have recognized that the President and the governor of Maryland warrant the same type of immunity protections.

Howell, a partner in Baltimore's Semmes, Bowen & Semmes, cited the high court's holding in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) and the Court of Appeals' decision in *Hamilton v. Verdow*, 287 Md. 544 (1980) to buttress his immunity argument.

In *Fitzgerald*, the Supreme Court held that the President was totally immune from civil suits for damages, while in *Hamilton*, the Court of Appeals found that the governor stood in the same relation to the state of Maryland as the President did to the entire United States.

But Maryland Court of Special Appeals Associate Judge Theodore G. Bloom, who heard arguments in the O'Hara case along with two of his CSA colleagues and two retired judges, questioned whether the Supreme Court's grant of total immunity was unique to the President.

"Wasn't the *Fitzgerald* decision a plurality in which four justices made it clear that the immunity the President received was unique and could not be compared to that extended to other executive officers?" asked Bloom, who stepped in to hear the case when five regular Court of Appeals judges recused themselves.

"As far as being unique, there are 50 governors around the country and each is unique in his state," Howell responded. "We believe that Maryland should track the path of federal government when it comes to these [executive immunity] issues."

If the Court of Appeals does not follow the Supreme Court's lead on immunity for chief executives, then it would "get into a whole range of unresolved issues" that impact on the separation of powers between the executive and judicial branches of government, Howell added.

"Things like how much attention the judiciary should give to looking into the motives behind things like vetoes," which often are based on political or policy decisions that courts have no business interpreting, the lawyer said.

Mandel not a lawmaker or judge

But the O'Haras' lawyer, Montedonico & Mason's Roy Mason, argued Mandel had no right to the immunity extended to a lawmaker or a judge because he had not been elected or appointed to either of those positions.

Under Maryland law, a legislator has absolute immunity from civil liability for his acts during the legislative process while judges are immune from suit for their decisions while on the bench.

"The governor was not elected a legislator. Legislators can't veto legislation like he did in this case," Mason pointed out. "If you agree with his argument, you would be the first state court in the nation to hold that a governor has the right to commit a fraud on the public with impunity."

But CSA Associate Judge Dale S. Cathell asked Mason whether when a governor vetos a bill, he is engaging in part of the legislative process.

"It's clearly part of the legislative process, but that doesn't make him a legislator," Mason countered. "There is no case I know of where the governor is held to be a member of the legislature or the President is found to be a member of Congress just because he exercises his veto power."

Mason noted in his brief, Mandel had acknowledged that "at first blush, the conclusion that the governor is entitled to the same immunity as the President may appear to be somewhat startling."

'They [Mandel and Howell] ought to be blushing about bringing this [immunity] argument before you and we ask you to reject it.'

— Roy Mason

The O'Haras' lawyer sarcastically characterized Mandel's position as "more than startling — but just plain stupid as well. They ought to be blushing about bringing this argument before you and we ask you to reject it."

Case could be tried in September

Mason said after the argument that if the Court of Appeals issues an opinion on Mandel's immunity claim within a month, then the trial of the O'Haras' lawsuit may be set for early September.

The case, which was originally filed in 1978, has been on hold for many years while the state's appellate courts decided whether it had been filed too late to meet the statute of limitations.

William Snyder, of Baltimore's Ober, Kaler, Grimes & Shriver originally filed suit on behalf of the O'Haras, but a Baltimore City judge ruled Snyder had missed the statute of limitations. Years later, the Court of Appeals sent the question back before a jury, which ruled in 1989 that the suit was time-barred.