Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General

April – June 2004

OPINIONS

CHILD SUPPORT – OBLIGATION OF CHILD SUPPORT ENFORCEMENT ADMINISTRATION TO PROVIDE SUPPORT STAFF FOR BALTIMORE CITY STATE'S ATTORNEY'S OFFICE

Question: To what extent is the Child Support Enforcement Administration (CSEA) in the Department of Human Resources required to provide support staff for the Collateral Nonsupport Unit of the Office of the State's Attorney for Baltimore City (SAO)? In particular, does CSEA have budgetary responsibility for support staff assigned to the Collateral Nonsupport Unit?

Answer: 1992 legislation contemplated that CSEA would furnish support staff for those SAO attorneys who provide legal representation in child support matters in Baltimore City. The number and duties of these employees should be determined by agreement between the SAO and CSEA.

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May 27, 2004

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CORPORATE INCOME TAX – METHOD OF COMPUTING ADDITIONAL TAX TO SETTLE TAX LIABILITY FOR PAST PAYMENTS TO TAX-HAVEN SUBSIDIARIES

Chapter 557, Laws of Maryland 2004, establishes a special settlement period for taxpayers affected by the decision in *Comptroller v. SYL, Inc.*, 375 Md. 78, 825 A.2d 399, *cert. denied*, 124 S.Ct. 478 (2003). The *SYL* decision rejected a corporate tax avoidance strategy that involved deductions for payments to subsidiaries commonly known as tax-haven subsidiaries or "Delaware holding companies." Entities that employed that strategy are subject to assessment by the Comptroller for unpaid taxes.

As part of the settlement procedure created by Chapter 557, a corporation may elect between two methods of computing the additional tax owed for the period 1995 through 2003. Under one alternative, deductions for payments to the subsidiary are eliminated, thus increasing the income of the parent company. Under the second alternative, deductions for the parent are maintained, and the additional tax is computed as though the subsidiary were a separate entity subject to Maryland corporate income tax.

Question 1: May a corporation make a different election for one subsidiary for each of the tax years included in the settlement period?
Answer: No; a corporation must make a single election for each subsidiary.

Question 2: If a corporation made payments to more than one subsidiary, may it make a separate election for each subsidiary?
Answer: Yes.

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COUNTIES – ESTABLISHING SPECIAL TAXING AREA TO FINANCE IMPROVEMENTS TO COUNTY ROADS WITHIN A MUNICIPALITY

Question: May Talbot County establish a special taxing district for the purpose of financing improvements to County roads within the corporate boundaries of the Town of Easton?

Answer: Yes. The special assessment on properties within the taxing district must be reasonably related to the benefits conferred by the improvements being financed.

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GUARDIANSHIP – APPLICATION OF FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT ("HIPAA") TO MEDICAL CERTIFICATIONS IN GUARDIANSHIP PROCEEDINGS

Question: Do new federal HIPAA regulations that protect the confidentiality of medical records affect guardianship procedures in Maryland? In particular, do those regulations prevent a health care provider from submitting the medical certification required under Maryland law to initiate a guardianship proceeding?

Answer: The HIPAA regulations and the requirements of State guardianship law can be harmonized in many instances. However, in light of the new federal regulations, the General Assembly and the Court of Appeals may wish to consider amending the statutes and rules governing guardianships, to address directly the confidentiality of medical information submitted to a court as part of a guardianship proceeding. In addition, the Governor could request that the Secretary of Health and Human Services grant an exception from any applicable HIPAA regulations for the issuance of medical certifications in guardianship proceedings.

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PUBLIC SCHOOL FUNDING – RETROACTIVE ADJUSTMENT TO COMPUTATION OF BASIC CURRENT EXPENSE AID

Until 2002, the main component of State aid to local school systems was "basic current expense" aid, an amount derived under a complex formula. A recent legislative audit of the Maryland State Department of Education (MSDE) determined that the computation of "basic current expense" aid for certain past years should be adjusted to take account of late submission of financial information by some local school systems, which would reduce the amount of State aid to all local school systems for the years in question.

Question: With respect to the computation for fiscal year 2002, may the State recover the difference between the original and the recalculated aid amount by reducing aid due to local school systems in future years?

Answer: The State education law does not contemplate an adjustment of the State basic current expense aid for a particular year after the passage of the budget bill and the distribution of funds to local school systems. With respect to fiscal year 2002, a retroactive adjustment would be inconsistent with the process by which the amount of State aid to local schools was computed for the State budget. Moreover, to the extent that the State attempted to recoup funds based on an adjustment, that action would affect all school systems – *i.e.*, it would penalize school districts that submitted financial information in a timely manner, as well as those that did not. Instead of providing for an adjustment that would be recouped in future years, the General Assembly has provided for specific remedies against jurisdictions that fail to provide timely reports to MSDE.

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WORKERS' COMPENSATION – REQUIREMENT THAT INSURER HAVE "COMPETENT INDIVIDUALS" IN THE STATE TO HANDLE AND ADJUST DISPUTED CLAIMS

The Workers' Compensation Act requires that insurers and self-insured employers "have in the State competent individuals who: (1) handle and adjust each disputed workers' compensation claim in the State ... and (2) possess the knowledge and experience to handle and adjust each disputed claim."

Question 1: *Disputed claim:* When does a claim become "disputed"?

Answer: A claim is "disputed" unless and until it is determined that the claim will be uncontested. A claim is no longer "disputed" once any issues have been resolved.

Question 2: *Competent individual*: What is the meaning of the term "competent individual"? Is any special training or ability required, or would a Maryland attorney be presumed to be a "competent individual" when the attorney represents an insurer in a disputed workers' compensation matter? Does an attorney whose office is located out-of-state, but who is admitted to practice in Maryland, qualify as a "competent individual"? Does the use of the undefined term "competent individual" render the law unconstitutionally vague?

Answer: For purposes of the Act, a "competent individual" is one who has sufficient skill, knowledge, and experience to handle and adjust workers' compensation claims. An attorney may satisfy that requirement, but there is no presumption to that effect. An attorney who works outside Maryland is not a competent individual "in the State," even if the attorney is admitted to practice in Maryland. The use of the term "competent individual" does not render the law unconstitutionally vague.

Question 3: *Handle and adjust in the State*: Does an attorney handle and adjust a disputed claim "in the State" if the attorney is required to place a call to an out-of-state insurer for authority to settle or resolve the claim?

Answer: The law does not preclude an out-of-state insurer from exercising oversight of its adjusters and attorneys in Maryland. However, if an attorney representing an insurer must routinely contact an out-of-state representative of the insurer for authority to settle any claim, those claims are not being handled and adjusted "in the State."

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ZONING AND PLANNING – EFFECT OF MUNICIPAL ANNEXATION ON OPEN SPACE EASEMENT PREVIOUSLY GRANTED TO COUNTY

The Queen Anne's County zoning law requires that landowners grant open space easements, to be recorded among the land records, as a condition of obtaining approval for certain types of development. A new provision of the County zoning law authorizes the County Commissioners, in their discretion, to release these easements under certain conditions, if the land is annexed by a municipality.

Question: How would annexation by the Town of Centreville, a municipality having its own planning and zoning authority, affect open space easements previously granted in accordance with the County zoning law?

Answer: Although the land would no longer be subject to County zoning regulation after annexation, the land use restrictions created by the open space easements would remain enforceable, and the new County ordinance would provide a permissible procedure for releasing those restrictions in certain cases.

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ADVICE LETTERS

GENERAL ASSEMBLY – SERVICE AS MEMBER WHILE ON ACTIVE DUTY

Question: If a member of the General Assembly is called to active duty for a protracted period, does the member lose his or her General Assembly seat?

Answer: No; the Maryland Constitution would not force the legislator to vacate his or her seat, and federal law would protect the legislator's right to keep the seat. The General Assembly could pass a statute authorizing the appointment of a temporary

replacement, whose term would end when the member returned from service.

Letter to
Delegate Anthony Brown
June 16, 2004

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NOTARIES – PERFORMANCE OF ESCROW, CLOSING, OR SETTLEMENT SERVICES AT REAL ESTATE SETTLEMENTS

Question: Is a notary public subject to licensing and regulation under the Insurance Code if the notary acts as a "notary signing agent" – that is, performs escrow, closing, or settlement services at a real estate closing?

Answer: Yes; in these circumstances the notary is going beyond traditional statutory notary functions and falls within the definition of "title insurance agent" or "title insurance broker" under the Insurance Code.

Letter to
Senator Katherine Klausmeier
April 14, 2004

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PHARMACISTS – REFUSAL TO FILL CERTAIN PRESCRIPTIONS BASED ON RELIGIOUS OR MORAL BELIEFS

A January 23, 2004 advice letter to Senator Andrew P. Harris concluded that Health-General Article, §20-214(a)(1) would protect a pharmacist who refused to fill a prescription for an abortifacient drug, but suggested that debate over what drugs were abortifacient might make clarifying legislation advisable. This is a letter on a similar question.

Question 1: Would Health Occupations Article, §12-501(a), which allows a pharmacist to refuse to dispense or refill a prescription on the basis of professional judgment, experience, knowledge, or available reference materials, permit a pharmacist to refuse to fill a prescription for contraceptives, based on the pharmacist's religious or moral beliefs?

Answer: No; §12-501(a) would not cover a decision based on religious or moral beliefs.

Question 2: Would the Free Exercise Clause of the First Amendment permit a pharmacist to refuse to fill a prescription for contraceptives?

Answer: No; the First Amendment would not free a pharmacist from a religiously neutral and generally applicable requirement to fill prescriptions.

Letter to
Delegate Samuel I. Rosenberg
June 15, 2004

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PUBLIC OFFICE – DUAL CITIZEN NOT DISQUALIFIED

Question: May an individual with dual citizenship hold public office in Maryland?

Answer: Yes; although United States citizenship is generally a requirement for public office in Maryland, dual citizenship is not a barrier.

Letter to
Delegate Donald H. Dwyer, Jr.
April 9, 2004

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PUBLIC SCHOOL TEACHERS – CAP ON SALARY OF RE-EMPLOYED RETIREE

House Bill 1254 (which passed both houses of the General Assembly, but died in conference committee) would, among other things, have imposed a cap on the salary that a re-employed, formerly retired public school teacher could earn without reduction in retirement benefits.

Question: Would such a cap impair the obligation of teacher collective bargaining contracts in violation of Article I, §10 of the United States Constitution?

Answer: No; the Contract Clause is not an absolute prohibition on the impairment of the obligations of a contract, and several circumstances would prevent application of the constitutional prohibition.

Letter to
Delegate Mary-Dulany James
April 6, 2004

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PUBLIC SERVICE COMMISSION – PERSONNEL

Question: Is the Chairman of the Public Service Commission authorized to fire five staff members without the participation of the other members of the Commission?

Answer: The Chairman has this authority only if it has been delegated to him by the Commission as a whole.

Letter to
Harold D. Williams & Gail C. McDonald
Maryland Public Service Commission
April 27, 2004

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TRANSPORTATION – REGULATION OF OFF-ROAD VEHICLES

Question: How does Maryland currently regulate "off-road" vehicles? (Is registration required? Where can the vehicle be operated? What types of regulations do counties impose?)

Answer: The Transportation Article defines "off-the-road motorcycle" as a motorcycle not registered under the article. The term includes motorcycles designed for off-the-road operation, motorcycles not otherwise eligible for registration, and motorcycles commonly known as "dirt bikes." Each county and Baltimore City is authorized to regulate the operation of these vehicles, to require that they be registered, and to impose a registration fee.

The Secretary of Natural Resources has adopted regulations for the operation of off-road vehicles on property owned or controlled by the Department of Natural Resources (DNR), and the Natural Resources Article prohibits the pursuit of wildlife with such a vehicle. DNR regulations call for registration with DNR and designate trails where operation of off-road vehicles is permitted.

The Criminal Law Article prohibits an individual from using an off-road vehicle on private property without the written permission of the owner or tenant, or from using such a vehicle on property known to be owned or leased by the State or a political subdivision. Certain types of off-road vehicles, but not dirt bikes or other off-road motorcycles, are excluded.

Letter to
Delegate Michael D. Smigiel, Sr.
April 21, 2004

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TRANSPORTATION – REGULATION OF ROADSIDE SALES AND SOLICITATIONS

Question 1: Are there laws that can be enforced against individuals who sell flowers or solicit donations at intersections of State highways in Cecil County?

Answer: Current law prevents an individual from standing in the roadway to solicit business, but except in Charles, Frederick, Harford, and Washington Counties, this law does not prevent standing on a median divider or at an intersection (other than in the roadway) to sell flowers or solicit donations.

Question 2: Does an individual who sells goods or solicits donations by the side of a State highway need a license or permit, and must the individual have the permit in his or her possession?

Answer: An individual soliciting donations does not ordinarily need a license, but an individual making sales needs a transient vendor's license and must display that license at the place of sale.

Question 3: Is there case law to guide the police in handling these matters?

Answer: There is very little case law in this area, except what has arisen in the context of laws or ordinances found to violate the First Amendment because of content-based distinctions in the regulation of roadside solicitation.

Letters to
Delegate David D. Rudolph
June 17 and 28, 2004

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