DEPARTMENTS

Letter From the Dean .................................................................2

ARTICLES

Medical Savings Accounts: Efficient and Equitable? Is It Too Soon To Tell?
By Brian Dent ......................................................................................4

RECENT DEVELOPMENTS

City of Frederick v. Shankle ..............................................................12
EEOC v. Waffle House ........................................................................14
In Re Mark M. 2000 ...........................................................................16
Lippert v. Jung ....................................................................................18
Scott v. State .....................................................................................20
State v. Johnson ................................................................................23
Toyota Manufacturing, Ky. v. Williams ............................................25
United States v. Knights ...................................................................27
Dean’s Message

As I come to the close of my first semester as the Dean of the University of Baltimore School of Law, I take great pleasure in sharing some reflections with you. This has been a challenging period in our region, the country and the world. The events of September 11, and the national and international responses have challenged our notions of law, liberty, security, and the rule of reason. We face a new era in which our commitment to the fundamental principles of our country are being tested as they were when the country was founded, before, during and after the Civil War, during the anti-communism activities of the 1950’s and the civil rights movement of the 1960’s. As a country we have not always passed those tests with flying colors. My prayer and hope is that support the fundamental values of America, as we have appropriately supported the victims and heroes of the September 11 attacks.

I wish to congratulate the editors of the University of Baltimore Law Forum for maintaining the tradition of this periodical as an important vehicle for the discussion of the law. I have spent most of the past six months learning about the Law School and meeting our alumni, friends, and supporters. I have frequently been asked to describe my experiences here. My constant response has been that I could not have scripted a better place in terms of its mission, goals, faculty collegiality, student commitment, and alumni accomplishments, than I have found at University of Baltimore School of Law. This is not to say that we do not have our challenges, because we do. But I believe that we have the will and the spirit to meet and overcome whatever challenges may stand in the way of UB Law School being valued and acknowledged within the State of Maryland and receiving national recognition as one of the great law schools in this region.

Many law schools around the country are attempting to create the type of legal education that has been offered at UB Law School from its inception. In 1992, the ABA Task Force on Law Schools and the Profession: Narrowing the Gap issued a report entitled “Legal Education and Professional Development – An Educational Continuum.” That report is commonly known as the McCrate Report. Since the issuance of the McCrate report, law schools have been attempting to add more skills training and practical experience to their curriculum. University of Baltimore School of Law has always had skills training and practical experience as an integral part of its curriculum. UB Law School has also been known for producing graduates who are ahead of the learning curve in the transition from student to attorney. And we are continuing to promote and provide a quality legal education that has a skills orientation as well as strong theoretical and international law programs.

Already this year our Community Development Clinic has made significant contributions to advance the development of Baltimore communities, not-for-profit community organizations, and small businesses. CDC is one of the few transactional clinics in the country and provides students with opportunities to participate in real estate another business transactions as part of their legal education. Our Tax Clinic has garnered dismissal of tax liabilities and refunds for its clients in Tax Court. Funded by a grant from the Internal Revenue Service, the tax Clinic is having an economic impact on people’s lives while teaching students with a strong interest in tax law the enforcement side of a tax law practice. Additionally, the Civil Clinic won a Social Security overpayment case in federal court, and received an award of counsel fees in a settlement with the government on this claim. Moreover, the Center for Families Children and the Courts has issued a major report on Performance Standards and Measures for Maryland’s Family Divisions and the Center For Litigation Skills held a workshop in conjunction with the American College of Trial Lawyers on “Ethics in Discovery.” All of these activities demonstrate how the University of Baltimore continues to provide cutting-edge legal education as had been its tradition.
Additionally, Professor Michael Higginbotham has authored a book entitled “Race Laws” published by Carolina Press. This book which is both a case book and an informational resource has been critically acclaimed. Professor Higginbotham has been participating in book-signings up and down the East Coast. The law school was proud to sponsor one of those book-signing at which Professor gave a stirring lecture to a standing room only crowd in the Moot Court Room. The book-signing was attended by students, alumni, the Chief Judge of the Maryland Court of Appeals and judges representing every state and federal court in Maryland.

The international program is similarly making great strides. I have the privilege of visiting our sister school, Shandong University Law School, in Jinan, China in the fall. One of the possible collaborations that may be coming as a result of the visit is the creation of a summer institute for Chinese law students at UB Law School. This program would allow the Chinese students and opportunity to study American law in the United States, and would allow our students who are unable to travel abroad to have an experience with international students. While there are a few logistics to work out, I am confident that we will have this program operational by Summer 2003. This fall we also added T.C. Beirne School of Law at Queensland University, Brisbane, Australia, to our family of sister schools. This relationship includes faculty and student exchange possibilities, and at least one University of Baltimore law student has indicated a desire to attend Beirne Law School for a semester.

All of these accomplishments create a greater need for resources in the law school. President Turner and I are working with the Board of Regents to have University of Baltimore receive an appropriate level of state support for the excellent program offered by the Law School. Similarly, William Lynerd, Vice-President for Advancement and I are contacting the law school’s alumni and friends to increase the level of private support. Increasing support from all of our funding sources is essential to our maintaining the quality and comprehensive legal education at the University of Baltimore School of Law.

I am looking forward with excitement and anticipation to the remainder of this academic year and the years to follow. I continue to receive enthusiastic welcomes and responses from the UB community – faculty, staff, alumni/ae, central administration, and students, and as a result continue to believe that UB Law School is a dynamic and influential institution. I will be working to complete the initiatives started by my predecessors as well as in the past six months to manifest the Law School’s great potential to become valued and acknowledged as the great legal educational institution that it is.

Sincerely,

Gilbert A. Holmes
Dean and Professor of law
MEDICAL SAVINGS ACCOUNTS: EFFICIENT AND EQUITABLE? IS IT TOO SOON TO TELL?

By Brian Dent

Introduction

The ability of Americans to make decisions regarding their families is a highly valued freedom. Among the most important liberties is the choice of health care. As our society ages, our citizens’ ability to control health care costs and options is reduced. Even though the government has worked to provide security for older Americans, these programs have not kept pace with growing health care costs leading the elderly to be less financially secure. These problems have been exacerbated because many Americans over the years have relied on low deductible health insurance that provides no incentive for the consumer to seek lower cost health care or to seek preventive care. With that in mind, many in Congress sought a plan that would create an incentive for prudent health care purchases that would control health care costs.

One such plan, introduced in the mid-1990s, is the medical savings account (MSA). A medical savings account allows an individual to deposit funds into a tax-exempt trust or custodial account to pay for medical expenses associated with a high deductible health insurance plan. Additionally, the plan permits an individual deduction for the deposited amount. When the account holder eventually uses the funds to pay for the medical expenses, the distribution is not included in the gross income of the individual. At present, only employees of small employers and the self-employed are eligible to participate in medical savings accounts.

Not available until 1997, medical savings accounts are relatively new. In their short life, have medical savings accounts proven an efficient and equitable tax advantaged means of paying unreimbursed qualified health care expenses of the account holders and their families? Will medical savings accounts encourage participants to control their health care costs by making prudent health care purchases? This article will review the medical savings accounts’ legislative history, tax treatment, use by corporations, value relative to another tax advantaged savings vehicle, and acceptance by the tax paying public. Finally, suggested improvements to the plan will be presented.

Legislative History

In the early 1990s, the Clinton administration challenged Congress to pass sweeping reforms in government-supported health care to provide universal health care to all Americans and to slow the growth of health care costs. The health care debate raged for a number of years with a variety of plans offered by liberals and conservatives alike, but it was not until 1994 that Senator Chaffee’s “Health Equity and Access Reform Today Act” brought medical savings accounts to the forefront. The Chaffee bill’s primary objective was to stem the growth of health care costs by reducing fraud, limiting frivolous malpractice suits, reducing regulation, revising antitrust laws to allow joint ventures by health care providers, and establishing medical savings accounts. These accounts not only would allow the individual to make cost effective health care spending choices, but also would reward individuals who spent their health care dollars wisely by allowing them to carry over any leftover money in the account to the following year. The proposed bill also provided that contributions to the medical savings accounts would be deductible within limits.

While there was support for the medical savings accounts, partisan disputes between the liberal and conservative factions within Congress put the plan on hold until 1996. In a speech on the floor of the Senate, Senator Faircloth (R-NC) summed up the conservative position saying:

This real issue behind medical savings accounts is a question of whether health care reform should move toward greater government control of our health care system, as President Clinton advocates,
or whether health care reform should place more decision making authority in the hands of individuals. Once individual Americans have the power to control how their own health care dollars are spent, they will never allow the government to take that power back.19

In opposition, Representative McDermott (D-WA) articulated the liberal viewpoint:

Republicans are obsessed with medical savings accounts. …Republicans in the House want us to believe that [medical savings accounts] are the way to expand patient choice and to control health care costs, when in my opinion nothing could be further from the truth. The only things that are known for sure about MSA’s is that they will provide lavish tax breaks for the healthiest and wealthiest in our society and that this will cause the cost of health care insurance to increase, making it more difficult and less affordable for employers to offer adequate health insurance.20

In March of 1996, the House of Representatives passed H.R. 3103, the Health Insurance Portability and Accountability Act of 1996(P.L. 104-191), containing a provision for medical savings accounts.21 On the other hand, the following month the Senate passed S. 1028, the Kennedy-Kassebaum bill,22 without a provision for medical savings accounts.23 Senator Kennedy was adamantly opposed to the inclusion of medical savings accounts in the final version of the bill,24 and Kennedy led a 94-day filibuster against the plan, thereby delaying any work of the House of Representative and Senate conferees.25 It was not until July 31, 1996, that a House-Senate Conference Committee Report was issued.26 Generally, the conferees’ agreement mirrored the House Bill with several modifications regarding medical savings accounts.27

The House-Senate compromise on the accounts narrowed eligibility,28 placed a limit on participants in a given tax year,29 raised the surtax on non-qualified distributions from ten to fifteen percent,30 included a balance remaining in a decedent’s account in his gross estate,31 set a time limit of December 31, 2000 as the end of the demonstration period for this “pilot project,”32 and finally directed the Department of the Treasury and the General Accounting Office to evaluate the plans.33 The Senate34 and the House35 approved the conference report and President Clinton signed the bill into law August 21, 1996.36 Subsequent amendments were negligible.37

Recent proposed legislation would dramatically expand medical savings accounts. As recently as June 2001, Republicans in the House of Representatives offered a proposal to increase eligibility, remove the limits on participation, reduce minimum deductibles, enable employers and employees to contribute to the accounts, and make the medical savings account permanent.38

Tax Treatment of Medical Savings Accounts

In general, subject to limits and caps on participation, contributions to medical savings accounts are deductible when made by an eligible individual and can be excluded from wages for employment tax purposes if made by an employer for an individual.39 Earnings in and qualified distributions from the accounts are not taxable; non-qualified distributions are taxable with some exceptions.40

Eligibility

To be eligible to participate in a medical savings account, the individual must be employed by a small employer41 and covered by his employer’s high deductible health plan42 or be self-employed and covered by a high deductible health plan.43 In either case, the individual may not be covered by any additional insurance.44 The individual or the employer may make employee contributions; however, a self-employed individual is not eligible to participate if his contractor either contributes or covers the individual under a health plan.45

Limits on Contributions and Caps on Participation

Medical savings accounts have two limits on contributions. There are limits on both insurance
deductibles and total compensation allowable. An individual with a family may contribute up to 75% (65% for singles) of his annual deductible, and to contribute the full amount the person must have the high deductible insurance for a full year. As for compensation limits, employees may not contribute more than their total compensation. The self-employed are limited to their net self-employment income. In addition to limits on contributions, the total number of participants in medical savings account plans is limited to 750,000.

**Distributions**

Distributions from a medical savings account that are used to pay for qualified medical expenses not covered by a high deductible health care plan may be excluded from income. These distributions are only excludable from income in those months that an individual is covered by the high deductible plan. Distributions to pay for non-qualified medical expenses are fully taxable with an additional fifteen percent penalty added. Exceptions are made for distributions after the age of Medicare eligibility or due to death or disability. Specifically, in the event of the death of the account holder, the disposition of any balance remaining in the medical savings account depends on the account holder’s designation of beneficiary. When a spouse is the designated beneficiary, the medical savings account is treated as an account of the spouse with the attendant restrictions on distributions. If the selected beneficiary is not a spouse, the account ceases to be a medical savings account on the date of death and the fair market value of the account is taxable to the beneficiary. If there is no designated beneficiary, the fair market value will be included in the decedent’s final tax return.

**Measuring Effects of the Medical Savings Accounts**

Originally, the medical savings account demonstration was to last from 1997 until 2000. During that period, Congress required the Department of the Treasury to determine levels of participation and the revenue impact of the accounts. When Congress created the medical savings accounts, the expected reduction in revenue was to be $118 million in 1997, $249 million in 1998, $264 million in 1999, $285 million in 2000, $303 million in 2001, $320 million in 2002, $338 million in 2003, $356 million in 2004, $373 million in 2005, and $391 million in 2006.

**Corporate Medical Savings Account**

Even before the passage of the Health Insurance Portability and Accountability Act of 1996 containing the provision for the medical savings account, corporations were using in-house medical savings accounts to reduce health care costs and increase health care choices for employees. Though the Federal tax treatment of the corporate medical savings account was unfavorable, the employers found them to be effective in controlling health care costs, and as an added benefit, the employees strongly embraced the accounts. A number of large employers utilized medical savings accounts, and the successes included Dominion Resources, Golden Rule Insurance Company, and the United Mine Workers Union.

Dominion Resources, the parent corporation of Virginia Power, instituted its program in 1989 with 200 employees. For their employees who chose the high deductible health plan option, there was a savings in premiums that the workers could keep in a medical savings account. Additionally, if its employees’ health care expenses stayed below the deductible, they shared in the company’s health care savings. Rebates for healthy behavior were also available. Both the rebates and the shared portion of the company’s saving could be put into the medical savings accounts. Since the program’s inception, the firm’s health cost rose less than one percent annually, and by 1992, the company was under-spending its health budget; significantly, however, it was popular with the employees who saw it as an opportunity to control their health plan while personally saving money.

Another firm with a successful medical savings account program was the Golden Rule Insurance Company. Initiated in 1993, 80% of the employees chose to be in the program that consisted of the choice between a traditional low deductible health plan and a high deductible health plan with a $1000 credit to the employee’s medical savings account. After only eight months of operation, the plan saved the average worker about $600. The company, as a whole, saved nearly a
half million dollars with the added benefit that the employees were using the money now on hand in their accounts for preventive care.

The United Mineworkers’ Union added medical savings accounts to its contracts with coal producers. Under past contracts, mine workers had no deductible, but that was replaced by a $1000 deductible plan that paid each miner a bonus at the beginning of the year of $1000. The bonus was to be used for health care, but if the miners were careful with their spending of the bonus, any remaining funds could be used for anything they chose.

Comparison to the FSA, Another Tax Advantaged Savings Plan

Another tax advantaged savings program that exists today is the health FSA (flexible spending arrangement) offered under “cafeteria plans.” Under this arrangement, an employee does not include in gross income the contributions made by his employer to the account that will be used to pay for medical expenses outside his health plan. Money contributed to the health FSA that is not spent used during a given calendar year is forfeited.

While both medical savings account and the health FSA have comparable purposes, it is clear that the medical savings account is more valuable. Medical savings accounts offer continued tax-free growth and have the added benefit of continuing from year to year versus the “use it or lose it” aspect of the health FSA. The “use it or lose it” feature promotes health care spending when it may not be necessary, which leads to inefficient use health care dollars resulting potentially in higher medical fees.

Acceptance of Medical Savings Accounts by Taxpayers

When Congress passed the provision for medical savings accounts in the Health Insurance Portability and Accountability Act of 1996, it charged the Department of the Treasury as well as the General Accounting Office with monitoring the effects of the medical savings accounts. The Department of the Treasury reported that the number of returns with the medical savings account deduction were 16,912 in 1997, 42,235 in 1998, and 43,419 in 1999.

The General Accounting Office Report was delivered in December 1998. The report noted that demand for medical savings accounts was lower than many in the insurance industry expected and remained well below the caps imposed by the demonstration program. Providers of medical savings accounts responded to the demonstration program rapidly with more than fifty companies nationwide offering the product, but after one year, the number declined. The decline was attributed to a lack of consumer demand and the design of the demonstration program. Of those insurers offering the plans, only a few were aggressively marketing them to the public, while the remainder was taking a “wait-and-see” approach to the product. The latter group, for the most part, had entered the program as a way of protecting the market share for their other product lines, and when the expectation of low sales of the product gave way to reality, their appetite for marketing medical savings accounts waned even more.

The report noted that the low sales figures could be attributed to the way medical savings accounts had been marketed. Primarily, the major insurance companies sold their product through small local insurance brokers and agents. These insurance companies overestimated the popularity of this new product with its sales force. Sales of the product were disappointing. Three areas were cited as problems for local agents and brokers. First, agents needed more training to address the complex tax effects that accompanied a sale of a medical savings account. Second, when selling the high deductible plans required by the program, commissions to the agents were lower. Third, the time needed to explain the product to the consumer was longer than for other insurance products. With perceived difficulty in selling the product, some information showed that marketing plans shifted away from the tax advantages to the cost savings of the high deductible plans. Finally, the report indicated the future of the medical savings account program was not bright, and it would only improve if the overall medical savings account design were overhauled.

Conclusion
Whether medical savings accounts provide an efficient and equitable tax advantaged means of paying unreimbursed qualified health care expenses for account holders and their families remains to be seen. The number of participants in the program is too small to give a definitive answer. From reading Section 220 of the Internal Revenue Service Code, one may conclude that because of the restrictive eligibility requirements that medical savings accounts will not be equitable. On the other hand, after reading the results of the General Accounting Office Report and realizing that more than one in three of the first year’s accounts were opened by an individual who was previously uninsured, a conclusion may be drawn that medical savings accounts, because of their affordability, are equitable.

With few medical savings accounts opened and because of the complex tax effects of the accounts, one could infer that lower income individuals were not aware of the program. Again, looking at the General Accounting Office Report, one can see that it was, among other things, the lack of profitability to the insurance sales force that caused the product not to be in the forefront of any insurance purchasers consciousness.

The lack of consciousness of the program and the subsequent lack of participation make it difficult to determine if the medical savings account would help individuals control their health care costs by making prudent health care purchases. Looking at the positive medical savings account experiences of Dominion Resources, Golden Rule Insurance Company, and the United Mine Workers’ Union, the medical savings account could do well if offered to workers in the broader context of the entire country.

To be successful, medical savings accounts would need to be promoted and expanded throughout the country, but this expansion will not occur if changes are not made to the program. Specifically, broader eligibility requirements would allow more taxpayers to participate in the program. Accordingly, along with permanence, the cap of 750,000 accounts must be removed to allow all taxpayers to participate. With a larger group participating in the medical savings account program, more data can be gathered to determine the equity and efficiency of the plans, and determine what portion of the plans need further improvement. Essentially, medical savings accounts must move from being a demonstration to a permanent option for health care, because as it stands now uncertainty is holding back participation.

Endnotes

1 Id.
4 Joint Committee on Taxation General Explanation of Tax Legislation Enacted in the 104th Congress (JCS-12-96) 321, 321 (December 18, 1996)(hereinafter-Joint Committee on Taxation).
5 Id.
7 Qualified Medical Expenses are further defined in 26 U. S. C. § 213(d)(2001). As provided in 26 U. S. C. §220(d)(2)(2001), it should be noted that health insurance premiums are not qualified medical expenses with the exception of premiums for continuation coverage, qualified long-term care, and coverage during a period of unemployment.
8 26 U. S. C. § 220 (c)(2)(2001) defines high deductible health plans for individual coverage as plans with deductibles in the range of $1500 to $2250. For family coverage, the range is $3000 to $4500. Out-of-pocket expenses must not exceed $3000 for individuals and $5500 for families. These plans are much like major medical or catastrophic health plans. To compare, comprehensive health plans have a lower deductible and a higher cost in premiums and allow liberal numbers of physician visits with only a small amount of co-payment. The increased use of physicians/health care services raises demand for medical services and the costs of such services rise.
10 26 U. S. C. § 220(f)(2001). Distributions used to pay for non-qualified medical expenses are subject to inclusion in the individual’s gross income for that year as well as to a fifteen percent surtax.
11 26 U. S. C. § 220(c)(4)(A)(2001). A small employer is defined as one who employs fifty or fewer employees on average during either of the last two calendar years. There are special rules for new employers and growing employers.
12 The health FSA (flexible spending arrangement) as provided for in 26 U. S. C. § 125 (2001)(see Treas. Reg. § 1,125-4(i)(6)).
13 Hearing on Health Consumer Choice Health Security
required alternative dispute resolution in order to contain costs. The bill capped damage awards, limited legal fees and antitrust laws. Finally, costly malpractice litigation needed to be through partnering arrangements that would run afoul of the also prevented health care providers from becoming more efficient data to make more informed decisions. The then current laws of health care services would have access to comparative pricing transmission of claims data would be preempted, and consumers would be standardized, state laws preventing the electronic delivery of health care services. Under this proposed law, forms insurance schemes. Excessive regulations prevent an efficient response to the federal government to detect and investigate fraudulent insurance schemes. Excessive regulations prevent an efficient delivery of health care services. Under this proposed law, forms would be standardized, state laws preventing the electronic transmission of claims data would be preempted, and consumers of health care services would have access to comparative pricing data to make more informed decisions. The then current laws also prevented health care providers from becoming more efficient through partnering arrangements that would run afoul of the antitrust laws. Finally, costly malpractice litigation needed to be curbed. The bill capped damage awards, limited legal fees and required alternative dispute resolution in order to contain costs.


Hearing on Health Consumer Choice Health Security Act, House Ways and Means Comm., 103rd Cong. 3-4 (1994)(testimony of William Thomas, Member of Congress from the 21st District of California). Because of fraud, many millions of dollars are lost within the health care industry. The bill gave additional authority to the federal government to detect and investigate fraudulent

insurance schemes. Excessive regulations prevent an efficient delivery of health care services. Under this proposed law, forms would be standardized, state laws preventing the electronic transmission of claims data would be preempted, and consumers of health care services would have access to comparative pricing data to make more informed decisions. The then current laws also prevented health care providers from becoming more efficient through partnering arrangements that would run afoul of the antitrust laws. Finally, costly malpractice litigation needed to be curbed. The bill capped damage awards, limited legal fees and required alternative dispute resolution in order to contain costs.

Id. at 4. (Congressman Thomas argues that consumer involvement in health care decisions is the key to controlling health care costs. This is contrary to past notions that large health insurance companies can efficiently allocate health care dollars. By removing these insurance companies from the equation, a more disciplined approach to health care spending can be attained.


142 Cong. Rec. S9501-01 (daily ed. September 13, 1996)(statement of Senator Faircloth)(conservatives believed that the medical savings accounts would prevent the United States from moving further down the path toward a socialized form of medical care similar to what is found in many European countries).

142 Cong. Rec. H6684-05 (daily ed. June 20, 1996)(statement of Representative McDermott)(liberals feared that the number of people participating in more standardized health care coverage would decline because of medical savings accounts, and that in turn would cause the cost of insurance to rise because the risk would not be spread over a broad segment of the population).

H. R. Rep. 104-496, Pt. 1, 104th Cong., 2d Sess. (March 19, 1996)(House Ways and Means Committee Report outlined provisions of medical savings accounts. Notably, eligibility was broad, distributions for non-qualified medical expenses had a ten percent surtax, no estate tax applied to balances at the death of an account holder, and the plans were effective for all taxable years following December 31, 1996).

Senator Edward Kennedy, D-MS, and Senator Nancy Landon Kassebaum, R-KS, were the primary sponsors of the Senate version of the Health Insurance Portability and Accountability Act of 1996.


Senator Kennedy opposed the medical savings accounts not only because of the reasons stated by Rep. McDermott, but also, because of his perception that the insurance industry would benefit from the medical savings accounts. He pointed to the high volume of campaign contributions to proponents of the accounts by major insurance companies as proof.


Id. at 283.

Id. (employees of small employer’s and the self-employed were the only ones eligible to participate) See also 26 U. S. C. § 220 (c)(4)(A)(2001), supra note 12.

Id. at 287 (a limit of 750,000 taxpayers was determined to be the “threshold level” for participation during the life of the medical savings account provision in the law that was to end on December 31, 2000).

Id. at 286.

Id.

Id. at 292.

Id.

142 Cong. Rec. S9526 (daily ed. August 2,1996)(Senate agreed to the report by a vote of 98-0.).


26 U. S. C. A. § 220 (2001)(there has been one extension of the time the original bill passed and a strong proponent of medical savings accounts).

House Ways and Means Committee at the time the original bill passed and a strong proponent of medical savings accounts).

Health Care: House Republicans and One Democrat Offer Proposal To Expand Tax-Favored MSAs, Daily Tax Report(BNA), 123 DTR G-4(2000)(All individuals with high deductible health insurance plans would be eligible, and the deductible level would be lowered to $1000 for individuals and $2000 for families.)

Joint Committee on Taxation, supra note 5, at 322.

Id.


Joint Committee on Taxation, supra note 5, at 322.

Id. The purpose of medical savings accounts is to reduce

Articles

32.2 U. Balt. L.F. 9
demand on the supply of health care services. Thus, costs decline. To permit other insurance, i.e., a comprehensive health plan to be purchased would defeat the purpose of the medical savings accounts.

45 Id. (self-employment by definition does not permit any income to be derived from an employer-employee relationship).
46 26 U. S. C. § 220(b)(2001)(for all months that an individual did not have the insurance, the amount of contribution is reduced by 1/12).
47 Id.
48 Id. (this number is derived from income minus expenses, including the one-half of the self-employment tax deduction).
52 Id.(this rule was implemented to make certain that medical savings accounts are used in combination with a high deductible plan and not by those covered comprehensive plans, because in so doing, the purpose of the plans is defeated – the reduction of health care costs by lowering demand for health care services. 26 U. S. C. § 220(e)(4)(2001)(For a description of Medicare eligibility see Section 1811 of the Social Security Act and for disability see 26 U. S. C. § 72(m)(7)(2001). Specifically, Medicare coverage is not considered a high deductible plan, and as for the disabled, a high deductible plan would not make sense, as their medical needs are greater.
54 Id.
55 Id.
56 Id. at 9.
57 Joint Committee on Taxation, supra note 5, at 333.
58 Id.
59 Id. at 333-334. 26 U. S. C. § 220(b)(2001) provides for limits on the deductibility of funds deposited in medical savings accounts based on a percentage of the deductible of the insurance plan. These limits in combination with the numerical limits placed on the number of accounts allowable in a given year during the demonstration period (see 26 U. S. C. § 220(j)(2001)) can roughly estimate the potential revenue losses due to deductibility but not for tax-free growth in the accounts.
60 142 Cong. Rec. S9501-01 (daily ed. August 2, 1996)(remarks of Senator Helms that further cites a study by the Rand Corporation that estimates that medical savings accounts could help low income workers reduce health care spending by up to 13 percent).
62 These are examples of firms using medical savings accounts at the time of the passage of the law in 1996. Other companies utilizing the accounts at that time were Quaker Oats, Forbes, and Dupont. Additionally, at that time, a number of states (Arizona, Colorado, Idaho, Illinois, Michigan, Mississippi, and Missouri) had medical savings accounts for their employees, and other states were considering the account for their employees.
63 Id. (Families saved nearly $1100 and individuals saved nearly $500).
64 Id. (in 1992, the firm paid out $800 in savings rebates and $600 in wellness rebates. Nearly eighty percent of the employees were enrolled in the program.)
65 Testimony given at this hearing was provided by Ferrara and a number of other tax or health care specialists. No employees testified before the committee.
66 Id. (health care costs for Virginia companies for the same period were rising at a twenty percent rate annually. Dominion Resources health care budget was down by nearly one-third).
67 Roth, supra note 1, at 156.
68 Id. (the traditional policy had a $500 deductible with a 20% co-payment up to $1000 while the high deductible plan had a $2000 deductible associated with it).
69 Id. (in arguing for medical savings accounts in his testimony, Ferrara says that since the accounts have been accepted by a labor union then the accounts will have a strong appeal with workers).
70 The miners must pay taxes on the full $1000 whether it was used for health expenses or not.
71 Id. (in arguing for medical savings accounts in his testimony, Ferrara says that since the accounts have been accepted by a labor union then the accounts will have a strong appeal with workers).
73 Id. (see Treas. Reg. § 1.125-4(i)(6)).
76 A comparison of medical savings accounts to the FSA in terms of revenue loss would depend on a variety of factors. Not the least of which is the eligibility requirement for medical savings accounts. The requirement reduces the number of accounts, but with positive tax-free investment growth, the lack of accounts could be offset. The FSA, while widespread, is limited in amounts allowable and does not grow. Since spending is required within a calendar year only on medical needs, there is a chance that additional revenues would be realized as the money is put back into the economy.
77 26 U. S. C. § 220(b)(2001)(for all months that an individual did not have the insurance, the amount of contribution is reduced by 1/12).
78 See 48 Cath. L. Rev. 685 at 700.
Joint Committee on Taxation, supra note 5, at 333. (the Department of the Treasury was to monitor reduction in federal revenues and participation in the plans and the General Accounting Office was to hire a group to study the effect of medical savings accounts on the health care industry and make a report by January 1, 1999).


Id. (the amount of the deductions will not reflect the total negative revenue effect of the medical savings account, because the total loss in revenues would reflect the losses from the tax-exempt status of the accounts. However, the expected loss in revenue for 1997, 1998, 1999 was to be $118 million, $249 million, and $264 million, respectively, appear to be out of reach given the deductions taken).


Id. at 5. (complexity both in development of a qualified medical savings account product as well as in marketing the product to the consumer was cited as reasons for limited demand).

Id.

Id.

Id. at 11.

Id. at 15.

Id. (during the first year of the program an estimated 41,668 medical savings accounts were opened compared to the legislated cap of 600,000 allowable during that period).

The explanation of the tax advantages and savings features of the medical savings accounts made sale of the product more complex for both the sales people and the consumer when compared to traditional products.

Id.

Id. at 15-16 (the shift to affordability, may explain why, as reported by the Internal Revenue Service, more than one third of the first year’s sales were to previously uninsured individuals when the original target market was thought to be professionals, partnerships, and the self-employed).

Id. at 17.

Id. at 16.

Generally, higher deductible health plans have a lower commission structure than low deductible plans.
The Court of Appeals of Maryland held that expert testimony denying the presumption that there was a correlation between occupational stress and heart disease in police officers and firefighters is inadmissible pursuant to § 9-503 of the Labor and Employment Article of the Maryland Code. *City of Frederick v. Shankle*, 367 Md. 5, 785 A.2d 749 (2001). However, the court stated an expert is permitted to testify that for a particular individual, job stress was not a contributing factor to heart disease “if there is a sufficient factual basis for the conclusion.” *Id.* at 15, 785 A.2d at 755.

Donald Shankle (“Shankle”) worked as a police officer for the City of Frederick from 1974 to 1996. On April 2, 1996, Shankle filed a workers’ compensation claim asserting the job stress he endured for the past 20 years resulted in heart disease. In May of 1996, Shankle underwent by-pass surgery. The Workers’ Compensation Commission found that he suffered from a compensable occupational heart disease and awarded him benefits for two periods of temporary total disability. The City of Frederick (“City”) sought judicial review of the board’s decision.

Prior to trial in circuit court, the City took the deposition of Dr. Alan Wasserman (“Wasserman”), who would testify as an expert in cardiology. Although he never examined Shankle, Wasserman reviewed Shankle’s medical records and determined that he had at least four of the five risk factors for heart disease. He further testified that the link between stress and the risk of coronary disease is “not accepted in the medical community.” Wasserman rejected the presumption set forth in section 9-503, which states “being a policeman or fireman contributes to the development of the coronary artery disease.”

In response to Wasserman’s testimony, Shankle moved to exclude the doctor’s deposition testimony as it misinterpreted Maryland law by disregarding the presumption established in the statute. The Circuit Court for Frederick County granted the motion, and as Wasserman was the City’s only witness, they were left with no evidence to rebut the statutory presumption of compensability. As such, summary judgment was granted in favor of Shankle. The City appealed and the court of special appeals affirmed the circuit court’s ruling. On writ of certiorari, the court of appeals upheld the lower courts’ rulings.

The Maryland Workers’ Compensation Act (“Act”) “requires employers to pay certain workers’ compensation benefits to covered employees who suffer disability resulting from an occupational disease.” *Id.* at 8, 785 A.2d at 751 (quoting Md. Code Ann., Labor and Employment § 9-502). However, an employer is only liable if the occupational disease that caused the disability is reasonably related to the type of work that the employee performs and the injury was incurred as a result of the employment. *Id.* Section 9-503 of the Act establishes a presumption that there is a correlation between job stress and heart disease with respect to fire fighters and police officers. *Id.* at 12, 785 A.2d at 753.

Past decisions have reaffirmed that the statute is a legislative determination of the correlation. See *Montgomery Co. Fire Bd. v. Fisher*, 298 Md. 245, 468 A.2d 625 (1983) and *Lovellette v. City of Baltimore*, 297 Md. 271, 465 A.2d 1141 (1983). “In furtherance of that determination, the Legislature has created a presumption of compensability when a fire fighter or police officer contracts heart disease.” *Shankle*, 367 Md. at 12, 785 A.2d at 754 (citing *Lovellette* at 284, 465 A.2d at 1148). The court pointed out that the statute has a “Morgan-type” presumption, which is a formidable burden on the party against whom it operates. *Id.* at 12, 785 A.2d at 754. The legislative
Recent Developments

Recent Developments

intent of the statute mandates both the burden of production and the burden of persuasion remain fixed on the employer. *Id.*

However, the statute is not irrefutable in that an employee’s occupation only has to be a factor to have the employee’s disease be compensable. *Id.* at 13, 785 A.2d at 754 (citing Montgomery Co. v. *Pirrone*, 109 Md. App. 201, 674 A.2d 98 (1996)). The court stated that the City’s main argument was based on a misinterpretation of the *Pirrone* case. *Id.* The City’s understanding of *Pirrone* was “in order to rebut the legislative presumption, an employer must establish that the claimant’s occupation as a fire fighter or police officer could not be a factor in causing the disease ....” *Id.* The correct interpretation of *Pirrone* suggests rebutting the legislative presumption requires an employer to offer evidence that the employee’s disease is attributable to another cause outside of his occupation. *Shankle*, 367 Md. at 14-15, 785 A.2d at 755.

The court stressed that the evidence given to rebut a statutory presumption must be specific to the employee. *Id.* at 15, 785 A.2d at 755. For instance, it is permissible for the employer’s expert to state that the employee’s disease did not result from his employment as a police officer “if there is sufficient factual basis for the conclusion.” *Id.* Testimony stating a police officer endured lower stress because he worked in an administrative capacity is admissible as it relates to the amount of job stress. *Id.* Testimony that simply denies the presumption is not admissible pursuant to Maryland Rules of Evidence 5-702 and 5-403. *Id.* at 15, 785 A.2d at 756.

Rule 5-702 allows testimony that “assist[s] the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 15-16, 785 A.2d at 755-756. Rule 5-403 permits the exclusion of relevant evidence if it could confuse or mislead the jury or is unfairly prejudicial. *Shankl*, 367 Md. at 16, 785 A.2d at 756. The court held Wasserman’s testimony did not fulfill the requirements of Rules 5-702 and 5-403 as it could not assist the jury in determining causation. Moreover, such testimony could only confuse or mislead the jury. *Id.* As such, the court upheld the exclusion of Wasserman’s testimony. *Id.*

The decision to exclude Wasserman’s testimony demonstrated the court’s commitment to abide by the legislative intent of the statute. Fire fighters and police officers have extremely stressful and dangerous jobs and many of them retire with lingering health problems. While many people have stress in their jobs, firefighters and police officers risk their lives to serve the public. Section 9-503 ensures public service employees that they will receive benefits for injuries sustained while on the job. In order to maintain a police force or fire squad, a city’s employees must know they will be rewarded for their valor and compensated for their injuries. For this reason, the statute’s rebuttable presumption is necessary.
Recent Developments

EEOC v. Waffle House
Employment Contract to Arbitrate Employment Related Disputes Does Not Bar
The Equal Employment Opportunity Commission From Pursuing Victim-Specific
Judicial Relief, Such As Back Pay, Reinstatement, and Damages in an Enforce-
ment Action For Violation of the Americans with Disabilities Act

By Sean McDonough

The Supreme Court held an arbitration agreement in an employment contract to arbitrate employment related disputes does not bar the Equal Employment Opportunity Commission from pursuing victim-specific judicial relief on behalf of an employee, such as back pay, reinstatement, and damages, in an enforcement action for a violation in both Title VII and Americans with Disabilities Act. EEOC v. Waffle House, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). The Court stated that the Equal Employment Opportunity Commission is not a party to an employment arbitration agreement and has independent statutory authority to bring suit in any federal district court where venue is proper. Id. at 758.

As a condition of his employment, Eric Baker (“Baker”) signed an employment agreement with Waffle House, agreeing that any dispute or claim concerning his employment would be settled by binding arbitration. Baker was a grill operator who suffered a seizure at work and was subsequently discharged. He did not initiate arbitration proceedings. However, he filed a charge of discrimination against Waffle House with the Equal Employment Opportunity Commission (“EEOC”), alleging a violation of the Americans with Disabilities Act (“ADA”).

The EEOC unsuccessfully attempted to conciliate Baker’s claim with Waffle House. As a result, the EEOC filed an enforcement action against Waffle House in the United States District Court for the District of South Carolina that alleged Waffle House’s violation of the ADA was “intentional and done with malice or reckless indifference to Baker’s federally protected rights.” The EEOC sought victim-specific relief such as back pay, reinstatement, compensatory, and punitive damages for malicious and reckless conduct.

Waffle House petitioned to stay the EEOC’s suit and to compel arbitration under the Federal Arbitration Act (“FAA”) or to dismiss the claim. The District Court denied the motion based on a factual determination that Baker’s employment contract had not included the arbitration provision. The Fourth Circuit Court of Appeals granted an interlocutory appeal, and found an enforceable arbitration clause between Baker and Waffle House did exist but was not binding on EEOC. However, the court of appeals held the EEOC was barred from seeking victim specific relief, because policy goals of the FAA required giving some effect to Baker’s arbitration agreement. The United States Supreme Court granted certiorari to determine whether the EEOC had the authority to pursue victim specific relief, including reinstatement, back-pay, compensatory and punitive damages, under Title VII of the Civil Rights Act of 1964.

The Supreme Court stated that 1972 Congressional amendments to Title VII authorized the EEOC to bring enforcement actions to enjoin employers from engaging in unlawful employment practices that may include reinstatement with or without back pay. Id. at 760. In 1991, Congress again amended Title VII to allow recovery of compensatory and punitive damages by a complaining party. Id. (citing 42 U.S.C. § 1981(a)(1)(1994 ed.)). More importantly, the amendment included both private plaintiffs and the EEOC, § 1981a(d)(1)(A), and applied to ADA claims, § 1981a(a)(2), (d)(1)(B). Id. The Court found no language in the statute suggesting that an arbitration agreement, between private parties affects the EEOC’s statutory function or the remedies that are available. Id.
Recent Developments

In evaluating the policy considerations implemented by the ADA and FAA, the Court relied on *Gilmer v. Interstate/Johnson Lane Corp.*, holding that the FAA’s purpose was to place arbitration agreements on the same footing as other contracts. *Id. (citing Gilmer, 500 U.S. 20, 24 (1991)).* Moreover, the Court found no ambiguity in the language of the FAA that granted the same relief for breach of an arbitration agreement as exists at law or in equity for the revocation of a contract. *Id.; 9 U.S.C. § 2.* However, following the precedent set in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court recognized absent ambiguity in an arbitration agreement, the language of the agreement defined the scope of the disputes and the parties involved. *Id. at 762 (citing Mastrobuono, 514 U.S. at 52).* The Court found EEOC was not a party to Baker’s employment agreement. *Id.* Therefore, the EEOC had independent statutory authority to vindicate Baker’s interest. *Id.*

The Court stated that to limit the EEOC’s recovery in an ADA action, to injunctive relief, would contravene the statutory goals. The effect of this rule was to allow the EEOC to protect the public’s interest prohibiting discriminatory employment practices. The Court also stated that an arbitration agreement, between an employer and employee, had no binding affect on any party other than those to the contract. In addition, the Court clarified the EEOC’s authority to bring an action for victim specific relief, on behalf of an employee, who is bound by a valid arbitration agreement with their employer. Further, the Court expatiated upon the EEOC’s avenues of recovery that include victim specific relief such as back pay, reinstatement, compensatory and punitive damages for a violation of the ADA.

Currently there are issues surfacing nationwide concerning arbitration agreements which are deterring employees from asserting employment-related disputes. This problem stems from some arbitration agreements placing the financial burden of the arbitral proceedings on an employee in the event their claim is unsuccessful. In addition, some arbitration agreements in employment contracts contain a fee splitting provision which would require the employee to pay thousands of dollars to bring a claim. This case will allow the EEOC to vindicate a persons statutory rights in a judicial system when that person is bound by an arbitration agreement. Therefore, ensuring that an employee’s fundamental rights under both Title VII and the Americans with Disabilities Act will not be trampled due to a lack a financial resources. More importantly, promoting a deterrent to employers who violate individual’s rights without fear of backlash from the judicial system.
Recent Developments

In Re: Mark M. 2000
A Trial Court May Not Delegate Its Judicial Authority to a Non-Judicial Agency or Person to Determine the Visitation Rights of a Parent

By Amanda Sprehn

The Court of Appeals of Maryland held that when determining the visitation rights of parents under Md. Code Ann., Fam. Law. § 9-101 (1999), a trial court may not delegate its judicial authority to a non-judicial agency or person. In re: Mark M. 2000, 365 Md. 687, 782 A.2d 332 (2001). Additionally, the court held, a parent can make a motion to compel a physical or mental examination of a child pursuant to Maryland Rule 11-105 and Md. Code Ann., Fam. Law. § 3-818, when there is demonstrated good cause for the examination and a showing that the exam will not be harmful to the child. Id. at 717, 718, 782 A.2d at 350.

On July 5, 1994, Helen M. ("Helen") gave birth to her son Mark M. ("Mark"). Mark lived with Helen and Donald M., the father of Mark’s sister Mary M. ("Mary"), in their Montgomery County, Maryland, home. On March 21, 1995, the Montgomery County Department of Social Services ("DSS") filed a petition, asserting that Mark and Mary should be declared children in need of assistance ("CINA"). The petition alleged that physical abuse, neglect, and substance abuse occurred in the children’s home. Shortly thereafter, during the Spring of 1995, the Juvenile Court found Mark to be a child in need of assistance and committed him to foster care. However, Helen fled the state with Mark, which delayed Mark’s foster placement with his paternal grandmother until June of 1998.

On June 16, 1999, Helen filed two motions in the district court. The first was a Motion for Order to Enforce Visitation, asserting her attempts to visit with Mark were denied unless she consulted with Mark’s therapist, and the second Motion asked that Mark be evaluated by an independent therapist of her choosing. The district court denied both motions and held that visitation was to occur only when Mark’s therapist recommended it. Helen appealed to the Court of Special Appeals of Maryland, which affirmed the district court’s decision regarding both motions. On November 27, 2000, Helen filed a Petition for a Writ of Certiorari with the Court of Appeals of Maryland. The court granted her petition to determine whether it was improper for a juvenile judge to order that visitation between Helen and Mark be withheld until Mark’s therapist recommended it. Id. at 705, 782 A.2d at 342. The court noted that a parent’s interest in raising a child is a fundamental right, recognized by the United States Supreme Court in Troxel v. Granville, 530 U.S. 57 (2000). Id. at 705, 782 A.2d at 342-43. However, the State also has an interest in caring for children, who cannot care for themselves, pursuant to the doctrine of parens patriae. Id. at 705, 782 A.2d at 343. Therefore, a parent’s otherwise acknowledged right may be denied where evidence of abuse exists; because, “courts are required by statute to deny custody or unsupervised visitation unless the court makes a specific finding that there is no likelihood of further child abuse or neglect.” Id. at 706, 782 A.2d at 343.

In reaching this conclusion, the court relied on its interpretation of Section 9-101, which sets forth guidelines for juvenile courts to follow when determining parental visitation rights in CINA proceedings. Id. at 707, 782 A.2d at 344. Section 9-101 of the Family Law Article states:

(a) Determination by the court- In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child is has been abused or neglected by a party to the proceeding, the court shall determine whether abuse
or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) Specific finding required—Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child. \textit{Id.} at 708, 782 A.2d at 344.

Therefore, “when a court has reasonable grounds to believe that abuse has occurred, as did the juvenile court in this case, visitation must be denied unless the court specifically finds that there is no likelihood of further abuse or neglect.” \textit{Id.} at 708, 782 A.2d at 344.

In the present case, the court of appeals found that the juvenile court had properly exercised its discretion by denying Mark’s parents visitation after he was found to be a child in need of assistance. \textit{Id.} However, when the district court declared that visitation was not to occur until Mark’s therapist recommended it, the district court improperly delegated its authority and committed error. \textit{Id.} at 708, 782 A.2d at 344. According to the court of appeals, a proper interpretation of section 9-101(b) dictates that once a denial of visitation is deemed appropriate, the only method of supplying the child’s parents with visitation is through a subsequent court proceeding. \textit{Id.} at 709, 782 A.2d at 345. Therefore, “the court must not permit another agency or person to perform the very task for which the court has been so entrusted”. \textit{Id.} at 710, 782 A.2d at 345.

The next issue the court addressed was whether the juvenile court abused its discretion by denying Helen her request to have Mark examined by a clinical child psychologist of her choosing pursuant to Rule 11-105 and Section 3-818. \textit{Id.} at 710, 782 A.2d at 346. Both Rule 11-105 and Section 3-818 are silent with regard to independent medical examinations, unless they are made by the state at the direction of the court, or by the court’s order \textit{sua sponte}. \textit{Id.} at 713, 782 A.2d at 347. Thus, the court turned to statutory interpretation to ascertain the scope and breadth of examinations contemplated by the Maryland legislature. \textit{Id.} at 710, 782 A.2d at 346.

The court found, that the legislative intent of Rule 11-105 and Section 3-818 was to protect the best interests of a child during a proceeding. \textit{Id.} Therefore, it would be in the best interests of a child to allow any party, including a parent, to a CINA proceeding to submit a motion for an independent medical evaluation. \textit{Id.} at 717, 782 A.2d at 350. However, the party making the motion must demonstrate good cause for the examination, and be able to show that the proposed examination will not be harmful to the child. \textit{Id.}

In reaching this conclusion, the court emphasized that subjecting a child to numerous examinations could be harmful and have a very damaging effect on the rest of child’s life, clearly this would be against his or her best interests. \textit{Id.} at 718, 782 A.2d at 350. Therefore, the court of appeals held the district court did not abuse its discretion by denying Helen’s motion for an independent medical evaluation of Mark, because she failed to demonstrate the absence of harm such an evaluation could have on him. \textit{Id.} at 719, 782 A.2d at 351.

The Maryland Court of Appeals holding in Mark M. 2000, establishes the bright line rule that trial courts can never delegate their judicial authority regarding visitation determinations, between a parent and child, in CINA proceedings. In addition, Mark M. 2000 establishes that a parent may request an independent medical evaluation of their child during a CINA proceeding, when the exam will not be harmful to the child and is supported with good cause. By doing so, the court emphasized the importance of adhering to the best interests of the child when making decisions during CINA proceedings.
The Court of Appeals of Maryland held the statutory period of twenty years necessary to claim title to land by adverse possession does not survive a tax sale and properly conducted right of redemption foreclosure proceedings. *Lippert v. Jung*, 366 Md. 221, 783 A.2d 206 (2001). In so holding, the court determined that land acquired properly through tax sales and foreclosure proceedings has a free and clear title granted by the sovereign. *Id.* at 230, 783 A.2d at 211.

The Lipperts bought land in Baltimore County, Maryland in the mid-1970s. The Lipperts believed the land they purchased included two additional land plots and began making improvements upon them. In May 1991, the two lots were sold at a tax sale. In February 1992, a judgment of foreclosure of all rights of redemption was properly entered. The Lipperts were unaware of both proceedings. In May 1998, more than six years after the foreclosure judgment was entered, Mr. Jung, the successor in interest to the tax sale purchaser and appellee, asked the Lipperts to remove improvements from the two lots. The statutory period in which adverse possession would have given the Lipperts clear title ended on July 11, 1993, eighteen months after the judgment foreclosing all rights of redemption.

The Lipperts sought to quiet title to the two lots based on adverse possession. Mr. Jung filed, and the trial court granted, a motion for summary judgment. The trial court, relying on the laws of jurisdictions outside of Maryland, held that the tax sale and foreclosure judgment terminated the statutory adverse possession period. The trial court stated the Lipperts needed to come forward at the tax sale but did not have claim to title by adverse possession at that time, and therefore, Mr. Jung was entitled to the property by law. The Lipperts appealed to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland, by writ, brought the case before itself.

The Lipperts first argued that the trial court incorrectly followed the majority rule. *Id.* at 228, 783 A.2d at 210. The minority view, the Lipperts contended, is “a purchaser at a properly conducted tax sale acquires only the interest of the defaulting taxpayer/property owner, and that the interest acquired through the tax sale is thus subject to any inchoate interests then being perfected, such as inchoate interests of an adverse possessor.” *Id.* The Appellee argued the trial court was correct in its application of the majority view to the facts and circumstances of this case. *Id.*

The Lipperts further argued there was no case law directly on point with the facts of the present case. *Id.* The Appellee agreed. *Lippert*, 366 Md. at 228, 783 A.2d at 209. The Court of Appeals of Maryland acknowledged there were no adverse possession cases in which title to land passed through a tax sale. *Id.* However, the court pointed out there were cases that have “defined the scope of title interests acquired through a proper tax sale and foreclosure of right of redemption...”
Recent Developments

proceedings,” which support the decision set forth by the trial court. *Id.* at 228, 783 A.2d at 210.

In the present case, the court held that a tax proceeding, when properly held, grants the purchaser a new, clear title in the land “which bars or extinguishes all prior titles, interests, and encumbrances of private persons, and all equities arising out of the same.” *Id.* at 229, 783 A.2d at 210.

After a review of cases in Maryland and other jurisdictions, the court stated “a valid tax sale and proper foreclosure of the equities of redemption terminates the prior title, and creates a new title granted by the sovereign. Accordingly, the new title cannot be adversely possessed until the statutory period runs from the time of the creation of the new title ....” *Id.* at 230, 783 A.2d at 211.

In support of this holding, the court recognized public policy dictated that “the public interest in marketable titles ... purchased at tax sales outweighs considerations of individual hardship in every case.” *Id.* The court, however, did note one exception to this general rule - fraud in conducting the foreclosure. *Lippert*, 366 Md. at 235, 783 A.2d at 214.

The court further stated that tax sales, if properly conducted, are not concerned with the rights of possessors of the land but are concerned with actual title to the land. *Id.* at 231, 783 A.2d at 211.

The court noted that the Appellants, in essence, were asking the court to ignore tax sales and subsequent foreclosure proceedings and the indefeasible titles that such proceedings produce. *Id.* At 232, 783 A.2d at 212. The court further stated the Lipperts were essentially arguing that obtaining title to land through adverse possession is superior and tantamount to other means of creating clear title, even if the statutory period necessary has not yet run at the time of the requisite proceeding. *Id.* The court gave no credence to this argument, and noted that easements and vested remainder interests do not survive valid tax sales and right of redemption foreclosure proceedings. *Id.* at 234, 783 A.2d at 213.

The Court of Appeals of Maryland concluded that the Appellee held a completely new title since 1992. *Id.* at 235, 783 A.2d at 214. The court further stated “in order for the inchoate adverse possession to ripen into actual title by adverse possession, the period of twenty years must run from the creation of the new title.” *Id.*

By holding that adverse possession that has not yet ripened does not survive a proper tax sale and foreclosure proceeding, the Court of Appeals of Maryland brought the law of adverse possession in Maryland in line with the majority view “that properly acquired tax titles are new grants of title by the sovereign entity.” *Id.* at 245, 783 A.2d at 220.

In this case, the Court of Appeals of Maryland has clarified the law of adverse possession in Maryland. However, this decision has repercussions for every Maryland land owner and anyone dealing in real estate. This case provides actual notice to all land title holders to double check their title and make sure it is free and clear of any adverse possession claims.

In this case, Maryland follows the majority rule that a proper tax sale and foreclosure terminates the prior title and creates a new one. Therefore, any adverse possession claims in prior title are destroyed and must begin anew in new title. Ultimately, the Maryland courts will uphold the rights of the property title holder.

**JUDGE BASIL A. THOMAS INTERNATIONAL LAW LIBRARY**

A fund honoring Judge Basil A. Thomas has been created to support an International Law Library in the University of Baltimore Law Library. Your contributions to assist in the establishment of this library are most welcome.

Please make checks payable to: University of Baltimore Educational Fund

Please send to:

Judge Basil A. Thomas Law Library
University of Baltimore Educational Fund
1304 St. Paul Street
Baltimore, Maryland 21202-2789

32.2 U. Balt. L.F. 19
Recent Developments

Scott v. State:
The Police “Knock and Talk” Procedure Is Valid When the Consent to Search Is Voluntary

By Havalah Neboschick

In a case of first impression, the Court of Appeals of Maryland upheld the validity of a motel room search pursuant to a police procedure termed “knock and talk” during which police officers randomly knock on motel room doors in hopes that the occupants will allow the police to enter and consent to a search. Scott v. State, 366 Md. 123, 782 A.2d 862 (2001). In so holding, the court determined that the knock and talk procedure does not violate the Fourth Amendment to the U.S. Constitution when an occupant is not unlawfully seized, yet voluntarily consents to a search. Id.

On May 19, 2000, Aaron Scott (“Scott”) rented a room at the Regal Inn Motel in Baltimore County. Shortly after 11:30 p.m., a Baltimore County detective, accompanied by five or six other police officers, visited the motel without a warrant. Although the officers did not have reasonable, articulable suspicion or probable cause to believe illegal activity was occurring at the motel, the police had previously received complaints concerning prostitution, drug use, and drug distribution in the area.

Pursuant to the knock and talk procedure, plain-clothed police officers with their police badges displayed and holstered handguns visible, knocked on Scott’s motel room door. After Scott opened the door, the officers informed him of the problems plaguing the area and asked if they could enter the room in order to talk to him. Scott invited the officers into his room. Detective Schwanke (“Schwanke”) noticed the odor of burning marijuana upon entering the room; however, he first questioned Scott as to whether Scott had any knowledge of illegal activity in the area and whether Scott possessed any illegal narcotics. Schwanke requested permission to search the room and Scott voluntarily consented. The police recovered marijuana, crack cocaine, cocaine, and drug paraphernalia, indicating an intent to distribute.

At the pre-trial conference, Scott sought to suppress evidence obtained from the knock and talk, arguing that the search and seizure was unlawful and there was no valid consent. The Circuit Court for Baltimore County, finding the procedure did not violate the U.S. Constitution, refused to suppress evidence based on Scott’s voluntary consent to the search. Scott was convicted of possession with intent to distribute cocaine. Scott, a repeat offender, was sentenced to a prison term of ten years without parole.

Two issues were before the court of appeals. First, was whether the knock and talk procedure violates the Fourth Amendment to the U.S. Constitution and Article 26 of the Maryland Declaration of Rights, which are read in pari materia, when carried out in absence of reasonable, articulable suspicion or probable cause. Id. at 124, 782 A.2d at 864. The second issue was whether Scott voluntarily consented to the search of his motel room.

The court began its constitutional analysis by examining whether the procedure constitutes a seizure. “A ‘seizure’ occurs when a person is restrained by the police, and that must be judged from the interaction between the individual and the police, not by the level of suspicion, if any, in the officer’s mind.” Id. at 132, 782 A.2d at 869. Moreover, “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” Scott, 366 Md. at 132, 782 A.2d at 869 (quoting Fla. v. Bostick, 501 U.S. 429, 434 (1991)).

Courts examine several supplementary factors, including where and when a knock and talk investigation occurs, to determine the totality of the circumstances. Id. at 137, 782 A.2d at 871-72. It is well established that, “absent a clear expression by the owner to the contrary, police officers, in the course of official business, are permitted to approach one’s dwelling and seek
permission to question an occupant.” *Id.* at 130, 782 A.2d at 867-868. The legitimate official business requirement is a low threshold and does not require a particular level of incriminating information. *Id.* at 131, 782 A.2d at 868. The court determined that Schwanke and his fellow police officers, while monitoring prospective criminal activity as well as seeking information regarding illegal activity, were on official police business at the Regal Motel. *Id.* at 133, 782 A.2d at 869.

Many courts have given great weight to the time of day a knock and talk occurs. *Id.* While some courts have found late night encounters at a person’s residence troubling, none have found a seizure based on this factor alone. *Scott*, 366 Md. at 133, 782 A.2d at 869. Here, the knock and talk took place at 11:30 p.m. at a motel room while Scott was still awake. Even though late night encounters with police in individual’s homes should be limited as a matter of public policy, it is more likely that a motel room will not be occupied until the evening. *Id.* at 139, 782 A.2d at 872.

Based on the totality of the circumstances, the court determined that there was no Fourth Amendment seizure in this case. The court stated, “[w]hile the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.” *Id.* at 141-42, 782 A.2d at 874 (quoting *Schneckloth v. Bustamonte*, 412 U.S. at 248-49). Thus, the trial court did not commit any error of law or fact in deciding that Scott consented to the search of his motel room and that his consent was voluntary. *Id.* at 143, 782 A.2d at 875.

In recent years, the knock and talk procedure has become increasingly popular with law enforcement agencies across the country, creating several constitutional issues for the judiciary and the legislature to explore. Overall, courts have upheld the procedure by applying well-established case law to a new technique.

Nonetheless, the implementation of the procedure raises public policy concerns. While a majority of states, including Maryland, do not require police officers to advise a person in advance of the right to refuse or limit consent, some state legislatures have enacted statutes requiring notice in order to vindicate individual rights. More often than not, suspects with contraband, even those who are considered experienced criminals, consent to searches out of fear that refusal would give police probable cause to then obtain a search warrant anyway. Perhaps requiring police officers to provide limited information on refusal may alleviate some of the confusion occupants have regarding searches. It is not clear whether such notice lessens the seemingly coercive nature of the procedure, yet the right to refuse remains a factor used to determine whether consent is voluntary regardless of a notice requirement.

Various courts have suggested that non-emergency knock and talk encounters, especially late-night intrusions into people’s homes, should
be tightly controlled or limited as a matter of public policy. While knock and talk encounters occur at homes as well as hotels and motels, hotels and motels are typically not occupied until the evening. On the other hand, per se rules for knock and talk encounters are ineffective and contrary to established case law that demands a case-by-case analysis taking into account the totality of the circumstances. As more knock and talk encounters are challenged, state legislatures are beginning to weigh competing policy considerations in order to protect constitutional rights in addition to combat crime.

UNIVERSITY OF BALTIMORE LAW ALUMNI RESOURCE DIRECTORY

Please check any area of interest and complete the form below. Send completed form to:
University of Baltimore Alumni Services
Attn: Law Resources Directory
1304 St. Paul Street
Baltimore, Maryland 21202
fax: (410) 837-6175
e-mail: ksennett@ubmail.ubalt.edu

☐ Mentor first year law students;
☐ Speak to a class of students about your practice speciality;
☐ Judge a trial and/or appellate advocacy program;
☐ Participate in the EXPLOR Program;
☐ Serve on the Alumni Association’s Law Liaison Committee;
☐ Serve on reunion committee; and/or
☐ Assist in fund raising activities for the School of Law.

NAME: ______________________________________________________
POSITION: ___________________________________________________
EMPLOYER: _________________________________________________
EMPLOYER’S ADDRESS: ______________________________
WORK PHONE: ____________________________________________
HOME ADDRESS: ___________________________________________
CITY, STATE, ZIP: __________________________________________
HOME PHONE: _____________________________________________
YEAR OF GRADUATION: _________________________________
PRACTICE SPECIALITY AREAS: ___________________________
E-MAIL ADDRESS: ____________________________
State v. Johnson:
Conviction for Conspiracy Will Stand Despite the Acquittal of all of Co-conspirators in Prior Trial. The Rule of Consistency is Inapplicable in Separate Trials

By Virginia Pizza

The Court of Appeals of Maryland held that the rule of consistency is inapplicable to verdicts issued in separate trials. State v. Johnson, 367 Md. 418, 788 A.2d 628 (2002). In a case of first impression, the court clarified the scope of the rule of consistency and held that a defendant’s subsequent conviction for conspiracy must stand, despite the acquittal of co-conspirators in a prior separate trial. Id.

In June 1998, six men assaulted Keisha Robinson (“Robinson”). Robinson left the scene and returned later to find her boyfriend, Jerome Tyler (“Tyler”), with a cut on his face, and Gary Hawkins (“Hawkins”) unconscious. Hawkins later died from his injuries. Witnesses observed a group of men drag Hawkins into an alley and beat him unconscious. Robinson and the witnesses identified Donnell Johnson (“Johnson”), the respondent, and four other persons as suspects. The State charged the suspects, along with unknown and unnamed co-conspirators, with first-degree murder and conspiracy to commit murder. Before trial, the court severed Johnson’s case from that of the four co-conspirators. A jury acquitted all four co-conspirators of second-degree murder and second-degree assault and convicted the remaining co-conspirator of second-degree murder.

Subsequently, Johnson was tried in the Circuit Court for Baltimore City and was convicted of second-degree assault and conspiracy to commit murder. Johnson filed a Motion for New Trial/Motion for Judgment of Acquittal Notwithstanding the Verdict before sentencing, arguing that the rule of consistency required the acquittal of a co-conspirator tried after other co-conspirators were acquitted. The circuit court denied the motion, stating that the rule of consistency did not apply because Johnson’s indictment included unknown and unnamed co-conspirators.

The Court of Special Appeals of Maryland reversed the circuit court, holding that the prior acquittal of a co-conspirator prevented the conviction of a subsequently tried conspirator. The court defined conspiracy as, “the agreement between two or more people to achieve some unlawful purpose or to employ unlawful means in achieving a lawful purpose.” Id. at 424, 788 A.2d at 631. First, the court reviewed the scope and proper application of the rule of consistency. Id. at 425, 788 A.2d at 632. Previously in Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979), the court held that the rule of consistency does not apply to the separate trial of co-conspirators. Id. However, the court in Gardner specifically addressed the issue of application of the rule when the sole co-conspirator was acquitted in a subsequent trial. Id. Before the case at bar, the court had not addressed the specific issue of whether a prior acquittal of co-conspirators prevented the conviction of a subsequently tried conspirator. Id. The court noted that the Gardner court had explained that the rule of
consistency primarily developed in reference to joint trials of co-conspirators. *Id.*

The court discussed the issue of the application of the rule of consistency to verdicts reached in separate trials. *Id.* The court noted that inconsistent verdicts in separate trials occurred for a variety of reasons, i.e., the strength and quality of the evidence, how it is presented, the availability of witnesses, the defenses presented, and the composition of the jury varies from trial to trial. *Id.* The court referred to other jurisdictions that held the rule of consistency to be inapplicable to separate trials of co-conspirators. *Id.* at 425-26, 788 A.2d at 632-33. The court found that California, Pennsylvania, Colorado, Arkansas, Georgia, Massachusetts, Michigan, Nebraska, New Jersey, and Washington courts support the postulate that the rule of consistency is only applicable in joint trials. *Id.* at 426, 788 A.2d at 633. The court also found that most federal courts concurred with this interpretation. *Id.*

The court acknowledged that the aforementioned jurisdictions found support for their holdings in two United States Supreme Court decisions, *Standefer v. United States*, 447 U.S. 10, 100 S. Ct. 1999 (1980) and *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471 (1984). *Id.* at 427, 788 A.2d at 633. In *Standefer* and *Powell*, the Court supported its determination to uphold facially inconsistent verdicts in separate trials based on the fact that inconsistent jury verdicts are often the result of jury lenity. *Id.* In *Standefer*, the Court found that juries often acquit criminal defendants out of compassion or compromise. *Id.* In *Powell*, the Court suggested that inconsistent verdicts should not be reviewable because the inconsistency may be the result of jury lenity. *Id.* at 428, 788 A.2d at 634.

Relying on *Gardner*, the Court of Appeals of Maryland reiterated that symmetry of verdicts is not absolutely necessary to ensure justice. *Id.* at 429, 788 A.2d at 634. The court suggested that valid reasons for not applying the rule of inconsistency to the separate trials of co-conspirators are that the acquittal of one conspirator could result from the absence of a state witness, the incompetence of a confession of a convicted conspirator in the second trial, or the incompetence of a guilty plea by a convicted conspirator. *Id.* The court stated that an acquittal at trial is not equivalent to a determination of innocence. *Id.* at 429, 788 A.2d at 635.

The court held that the rule of inconsistency is inapplicable to verdicts issued in separate trials. *Id.* The court extended the previous holding in *Gardner*, holding that the rule of inconsistency does not apply to verdicts in separate trials, even when all of the co-conspirators have been acquitted in a previous trial. *Id.* The court reversed the decision of the court of special appeals and remanded the case with instructions to affirm the original judgment of the circuit court. *Id.*

This case limits the scope of the rule of consistency and its applicability to the crime of conspiracy. The court appeared to rely heavily on the fact that inconsistent verdicts in separate jury trials are often the result of juror lenity and the different composition of the juries. This rationale raises the ever-present question of the efficiency and reliability of jurors.
Recent Developments

Toyota Motor Manufacturing, Ky., Inc. v. Williams:
Americans With Disabilities Act Requires Individual to be Substantially Limited in Completing Daily Tasks to Receive Benefits

By Brandy Carter

In a unanimous decision, the United States Supreme Court in Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S. Ct. 681 (2002), held an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s lives, in order to receive benefits under the Americans with Disabilities Act of 1990. The Court so held despite its finding that the plaintiff was impaired in performing tasks that were necessary for her position working on an engine fabrication assembly line. In reaching its decision, the Court interpreted the meaning of the term “substantially limited in performing manual tasks” within the ADA.

In August of 1990, Ella Williams (“Williams”) began working at Toyota’s manufacturing plant in Georgetown, Kentucky (“Toyota”). Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S. Ct. 681 (2002). Williams began her career at Toyota on an engine fabrication assembly line working with pneumatic tools. Id. Williams began experiencing pain in her hands, wrists, and arms and sought treatment from the company’s in-house medical services. Williams was diagnosed with bilateral carpal tunnel syndrome and bilateral tendonitis. Id. Williams consulted a second doctor who told her to refrain from lifting more than twenty pounds, from performing overhead work, using vibrating tools, or engaging in tasks requiring repetitive flexing or extension of her wrists or elbows. Id.

For the next two years she was assigned to modified tasks. Id. Williams filed a claim under the Kentucky Workers’ Compensation Act, which was settled. Williams returned to work, but became dissatisfied with Toyota’s efforts to accommodate her. Williams filed suit in the United States District Court for the Eastern District of Kentucky alleging violations of the ADA. Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S.Ct. at 686. The case subsequently settled and she returned to work. Id. Upon her return, Williams was placed on the Quality Control Inspection team performing tasks, which only required the visual inspection of the paint job on vehicles that were on the assembly line. Id. at 687.

In the fall of 1996, the nature of the position changed and required all quality control workers to spread highlighter oil on cars with a sponge in order to observe imperfections in the paint job. Id. Williams’ symptoms returned and she was ordered by her physician not to perform work of any kind. Id. Toyota then fired Williams citing her record of poor attendance. Id. Williams filed this action in the United States District Court for the Eastern District of Kentucky. Id. The district court granted Toyota’s motion for summary judgment. Id. Williams appealed to the court of appeals for the sixth circuit, which reversed the lower court’s decision. Id. Toyota appealed to the United States Supreme Court. Id. at 689.

In its analysis, the Court first stated that the court of appeals was incorrect in granting partial summary judgment to Toyota on the issue of whether Williams was substantially limited in performing manual tasks at the time she requested the company to accommodate her disability. Toyota Motor Mfg., Ky., Inc.,112 S. Ct. at 689. The Court then analyzed the legislative intent behind the ADA in light of previous decisions by the Court. Id. at 691. In Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999), the Court stated, “because more than 100 million people need corrective lenses to see properly, had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number than 43 million disabled persons in the findings.” Id. at 487. In Albertson’s Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999), the Court stated that individuals cannot prove disability status under this test merely by submitting evidence of a medical impairment. The ADA requires
Recent Developments

persons claiming the Act’s protection to prove a disability by offering evidence that the extent of the limitation caused by their impairment is substantial. *Id.* at 567.

In response to the court of appeals’ interpretation that a disability effecting only job specific tasks fell within the ADA, the Court stated that there was no foundation for such a standard in previous decisions or within the ADA itself. *Id.* at 693.

The Court next considered the record as to the Petitioner’s ability to function after her condition worsened. *Toyota Motor Mfg. Ky. Inc.*, 122 S.Ct. at 694. The Supreme Court wholly rejected the court of appeals’ finding that petitioner was substantially limited in performing manual tasks because she could no longer sweep, dance, garden or drive long distances, as these were not tasks central to most people’s daily lives. *Id.* at 694. The Court relied, in part, on 42 U.S.C. § 12102(2)(A)(1994 ed.), which states that, “to qualify as disabled, a claimant must further show that the limitation on the major life activity is ‘substantial.’” *Id.* at 690. The Court maintained that the language of the ADA should be narrowly interpreted so that frivolous disability claims will not take benefits away from those truly in need. *Id.* at 691.

The United States Supreme Court in *Toyota Mfg., Ky., Inc.*, v. *Williams*, held that an award of disability benefits under the ADA should only be awarded to those individuals unable to tend to daily life tasks such as personal hygiene or household chores. This case is an example of the Court’s current tendency to narrowly interpret the ADA and acts of Congress to fit individual cases as opposed to broadly granting benefits to those who are mildly disabled.

THE LAURENCE M.
KATZ COMMERCIAL
LAW COLLECTION

A fund honoring Dean Katz has been created to support a permanent Commercial Law Collection in the University of Baltimore Law Library. Your contributions to assist in the establishment of this $10,000 Endowment Fund are most welcome.

Please make checks payable to:

University of Baltimore
Educational Foundation

Please send to:

Laurence M. Katz Commercial
Law Collection
University of Baltimore
Educational Foundation
1304 St. Paul Street
Baltimore, Maryland
21202-2789

*Gifts to the Laurence M. Katz Commercial Law Collection are tax deductible as allowed by law.*
United States v. Knights:
Warrantless Search of a Defendant, Authorized by a Condition of Probation and Supported by Reasonable Suspicion, Satisfied Fourth Amendment Requirements

By Kristen Hitchner

The United States Supreme Court held that a search pursuant to a probation condition and supported by reasonable suspicion, satisfied requirements of the Fourth Amendment. United States v. Knights, 534 U.S. 112, 151 L. Ed. 2d 497 (2001). In so holding, the Court determined that one’s status as a probationer diminishes the reasonable expectation of privacy enjoyed by other citizens. Id.

Mark James Knights (“Knights”) was sentenced by a California court to probation for a drug offense. The probation order specified that Knights submit to a “search at anytime, with or without a search or arrest warrant or reasonable cause, by any probation or law enforcement officer.” The probation order, which Knights signed, stated immediately above his signature that “I have received a copy, read and understand the above terms and conditions of probation and agree to abide by same.”

Soon after Knights was placed on probation, a local power transformer and telecommunications vault were pried open and set on fire. Police suspicion for these and thirty prior acts of vandalism suggested involvement by Knights and his friend, Steven Simoneau. The incidents began soon after the power company filed a theft-of-services complaint against Knights and discontinued his electrical service for non-payment. A local sheriff’s detective, Todd Hancock (“Hancock”), noticed that the vandalism coincided with Knight’s court appearances concerning the theft. Based upon these observations, Hancock decided to search Knights’ apartment. Hancock did not obtain a warrant for the search because he “was aware of the search condition in Knight’s probation order and, thus, believed that a warrant was not necessary.” Subsequent to the search, Knights was arrested.

A federal grand jury indicted Knights for conspiracy to commit arson, possession of an unregistered destructive device, and being a felon in possession of ammunition. Knights moved to suppress the evidence discovered as a result of the search. Knights contended that a warrantless search of a probationer satisfies the Fourth Amendment only if it is exactly like the search at issue in Griffin v. Wisconsin, 483 U.S. 868, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987). Id. at 590. In Griffin, the Court upheld the search of a probationer conducted pursuant to a regulation permitting a warrantless search of a probationer’s home, on the conditions that there be ‘reasonable ground’ to believe that contraband is present and that the probation officer’s supervisor has given approval for the search. Id. (quoting Griffin v. Wisconsin, 483 U.S. 868, 97 L. Ed. 2d 709, 107 S.
Recent Developments

Ct. 3164 (1987)). The regulation, at issue in Griffin, “was not an express part of Griffin’s probation.” Id. The Court held that a “state’s operation of its probation system presented a ‘special need’ for the ‘exercise of supervision to assure that probation restrictions are in fact observed.’” Id. The special need justified Wisconsin’s regulation and, therefore, the search pursuant to it was reasonable. Id.

Additionally, the Court held that “probation diminishes a probationer’s reasonable expectation of privacy — so that a probation officer may, consistent with the Fourth Amendment, search a probationer’s home without a warrant and with only ‘reasonable grounds’ (not probable cause) to believe that contraband is present.” Id. at 591. The Court went further to state that, by upholding the constitutionality of the search in Griffin, it was not implicitly holding that any search not like it is unconstitutional. Id. Because the Court found that the search of Knights’ home was reasonable under a totality of the circumstances analysis, it was unnecessary to address whether Knights’ acceptance of the search condition constituted consent in the sense of a waiver of his Fourth Amendment rights. Id. at 591.

The Court, in analyzing the Fourth Amendment, expressed that reasonableness is the “touchstone of the Fourth Amendment” and “is determined by ‘assessing, on one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” Id. (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). Knights, as a probationer, was touched by both sides of the balancing test for reasonableness. Id. Because probation is a criminal sanction imposed by the court upon an offender, it is inherent that probationers will not, and do not, enjoy the absolute liberties to which other citizens are entitled. Id. The Court explained that any court granting probation may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. Id. “The probation order clearly expressed the search condition and Knights was unambiguously informed of it.” Id. at 592. Therefore, the condition significantly diminished Knight’s reasonable expectation of privacy. Id.

In assessing the government’s interests, the Court observed that there are two concerns: rehabilitation and preventing recidivism. Id. If the Court of Appeals for the Ninth Circuit was correct in its holding, the government would be forced to focus only on the first concern while ignoring the latter concern. Id. The Court’s holding, however, justifies the government’s focus on probationers in ways not constitutionally permitted for the ordinary citizen. Id.

Finally, the Court held that although the Fourth Amendment ordinarily requires probable cause, the balancing of the competing considerations requires no more than reasonable suspicion to conduct a search of a probationer’s house. Id. A lesser degree of probability satisfies the Constitution when balancing the interests of the government against those of private citizens. Id. The Court held that the same circumstances that led it to find that “reasonable suspicion is constitutionally sufficient [for a search] also render a warrant requirement unnecessary.” Id.

The holding in United States v. Knights is a reflection of the “tough on crime” attitude now prevalent in the United States. The holding allows law enforcement to target convicted criminals on probation without observing the same procedural safeguards, as they would have to with other citizens. In the instant case, the Court affirms the erosion of the expectation of privacy for certain classes of people, specifically probationers, because the government’s interests in protecting citizens and reducing crime outweigh those of probationers.