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Casenotes: Agency — Duty to Employer —  
Unfair Competition — Employee Does Not  
Breach Fiduciary Duty to Employer by Mere  
Failure to Disclose Details' of Preparatory Plans of  
Future Competition. Maryland Metals, Inc. U.  
Metzner, 282 Md. 31, 382 A.2d 564 (1978)

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AGENCY — DUTY TO EMPLOYER — UNFAIR COMPETITION — EMPLOYEE DOES NOT BREACH FIDUCIARY DUTY TO EMPLOYER BY MERE FAILURE TO DISCLOSE DETAILS OF PREPARATORY PLANS OF FUTURE COMPETITION. *MARYLAND METALS, INC. v. METZNER*, 282 Md. 31, 382 A.2d 564 (1978).

## I. INTRODUCTION

The recent case of *Maryland Metals, Inc. v. Metzner*,<sup>1</sup> which involved an employee's privilege to plan and prepare for competition with his employer before terminating his employment, signals a shift in the Maryland court's focus when confronted with employer-employee disputes. The precise question addressed by the Court of Appeals of Maryland was whether two employees breached their common law fiduciary duties<sup>2</sup> to their employer by not revealing details of their preparatory activities in establishing a competitive business.<sup>3</sup> In a unanimous opinion written by the late Judge Irving Levine, the court held that the employees' failure to disclose details of preliminary arrangements for future competition prior to terminating their employment did not constitute a breach of fiduciary duty because there was no wrongful conduct independent of the nondisclosure that detrimentally affected the employer's business.<sup>4</sup>

Frequently, an employee who desires to leave his employment confronts the dilemma of choosing between his need to commence plans for a change of employment prior to leaving his employer and his possible breach of the duty of loyalty owed to his employer. Although the law in Maryland has recognized an employee's privilege to plan and prepare for future competition with his employer prior to terminating his employment,<sup>5</sup> the courts have not

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1. 282 Md. 31, 382 A.2d 564 (1978).

2. The fiduciary duties of an employee, as well as an agent, may arise from either of two sources: a written contract or common law. An elaborate discussion of an employee's common law duties to his employer is found in *Trice v. Comstock*, 121 F. 620 (8th Cir. 1903). The employees in *Maryland Metals* did not have a written employment contract, therefore, the corporation alleged a breach of common law fiduciary duties.

3. The employees preparatory activities were extensive. Brief for Appellant at 7-15, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978) (seventy-one surreptitious events attributed to the employees while employed by Maryland Metals).

4. 282 Md. at 48, 382 A.2d at 573. The employees in this case were high-level managerial officers of Maryland Metals, Inc. Since the court declared that they had no obligation to disclose details of their preparatory activities, *a fortiori* lower-level employees would not be required to disclose similar activities.

5. *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 572, 217 A.2d 375, 388 (1966); *C-E-I-R, Inc., v. Computer Dynamics Corp.*, 229 Md. 357, 366, 183 A.2d 374, 379 (1962); *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 604-06, 119 A.2d 392, 398 (1956). *Accord*, *United Aircraft Corp. v. Boreen*, 413 F.2d 694, 700 (3d Cir. 1969); *Keiser v. Walsh*, 118 F.2d 13, 14 (D.C. Cir. 1941); *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 346, 411 P.2d 921, 935, 49 Cal. Rptr. 825, 839 (1966).

been successful in resolving this dilemma due to their imprecision in defining the scope of the employee's privilege.<sup>6</sup> *Maryland Metals* provides some assistance by delineating permissible and impermissible employee conduct in preparing to compete with an employer prior to terminating employment.

## II. THE MARYLAND METALS SETTING

The *Maryland Metals* controversy developed as a result of rapid technological advances in the design and manufacture of machinery in the scrap metal business.<sup>7</sup> In 1966, Maryland Metals, Inc., a processor of scrap metal, purchased a guillotine shear<sup>8</sup> in order to scrap junked automobiles. During the next seven years, the corporation directed Sidney Metzner, the executive vice president,<sup>9</sup> to tour the country and evaluate a newer and more sophisticated machine known as a shredder.<sup>10</sup> Metzner fully apprised the corporation of the shredder's superior capabilities and continually recommended its acquisition.

In September of 1970, Harry Kerstein, president of Maryland Metals,<sup>11</sup> was authorized by the board of directors to purchase a shredder from a leading manufacturer.<sup>12</sup> Subsequently, Maryland Metals entered into a cancelable contract with the manufacturer and procured an option to buy land suitable for a shredding operation.

6. See, e.g., *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 183 A.2d 374 (1962). Judge Sybert, in *C-E-I-R*, indicated that "[t]here would appear to be no precise line between acts by an employee which constitute mere preparation and those which amount to solicitation. However indefinite that line may be, we feel that the appellees crossed over the line into the area of solicitation forbidden to the loyal employee." *Id.* at 367, 183 A.2d at 379. See generally Comment, *Permissible Employee Disloyalty and the Duane Jones Case*, 22 U. CHI. L. REV. 278 (1954). See also *Geller v. Transamerica Corp.*, 53 F. Supp. 625, 629 (D. Del. 1943), *aff'd per curiam*, 151 F.2d 534 (3d Cir. 1945) (court acknowledged that "[t]he doctrine of the fiduciary relation is one of the most confused and entangled subjects in corporation law").
7. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 34, 382 A.2d 564, 566 (1978) (court indicated that these developments "contributed significantly to the genesis" of the case).
8. The guillotine shear was purchased for \$400,000.00. The shear produced a No. 2 grade scrap metal by shearing automobile hulks into slabs containing metal and non-metal objects. *Id.* at 34 n.1, 382 A.2d at 566 n.1.
9. Metzner was appointed executive vice-president after twenty-three years of service. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 34, 382 A.2d 564, 566 (1978).
10. A shredder produces a No. 1, or premium, grade of scrap metal. Its output is a purified scrap product because the machine is capable of segregating non-steel from steel and non-metal from metal. *Id.* at 34 n.2, 382 A.2d at 566 n.2. Furthermore, a shredder produces twice as much scrap tonnage per day as the guillotine shear. Brief for Appellant at 5, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).
11. Harry Kerstein founded the business and upon incorporation in 1955 became the first president of the company and sole stockholder. *Id.* at 33, 382 A.2d at 566.
12. *Id.* at 35, 382 A.2d at 566.

Because of unforeseen economic conditions and growing skepticism concerning the efficiency of the shredder, the contract was rescinded and the option was not exercised.<sup>13</sup>

Harry Kerstein died in June 1973 and his son, Robert Kerstein, succeeded him as president of Maryland Metals. Metzner, assisted by a fellow executive, George Sellers,<sup>14</sup> was told again to investigate the economic feasibility of acquiring a shredder. Based on their comprehensive study, Metzner and Sellers recommended to Kerstein that Maryland Metals expand its business operations by purchasing a shredder. When the corporation failed to take action, both employees indicated an unwillingness to remain in the company's employment as salaried employees.<sup>15</sup>

In November 1973, Metzner met with Kerstein and demanded that he be allowed to own equity in the corporation. After Kerstein denied the request,<sup>16</sup> Metzner suggested that he, Sellers and Kerstein form a new corporation with each individual owning a one-third interest in the shredding operation.<sup>17</sup> Kerstein rejected the plan and Metzner informed Kerstein that he and Sellers would purchase a shredder and operate a business without his participation.<sup>18</sup>

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13. *Id.* at 35, 382 A.2d at 567.

14. Sellers was employed upon Metzner's recommendation in 1970. By 1974, Sellers was vice-president in charge of operations. *Id.* at 34, 382 A.2d at 566.

15. Maryland Metals, Inc. v. Conservit, Inc., No. 29, 472 Equity, slip op. at 3-4 (Wash. Co. Cir. Ct. Dec. 10, 1976), *aff'd*, 282 Md. 31, 382 A.2d 564 (1978); Brief for Appellees at 23, Maryland Metals, Inc. v. Metzner, 282 Md. 31, 382 A.2d 564 (1978).

16. When Harry Kerstein died, he left all the Maryland Metals stock in a testamentary trust. 282 Md. at 36, 382 A.2d at 567. See MD. EST. & TRUSTS CODE ANN. § 4-412 (1974) (legacy to testamentary trust). Since the stock was tied up in the trust, Robert Kerstein was unable to distribute any of it.

17. 282 Md. at 36, 382 A.2d at 567.

18. *Id.* There was conflicting testimony as to whether Metzner informed Kerstein that he and Sellers would set up an operation to compete with Maryland Metals. The Chancellor, Judge Rutledge, sitting in the Circuit Court for Washington County without a jury, found that the employees had notified Kerstein that if he or Maryland Metals was not willing to participate in the proposed shredding operation, they would enter into business for themselves with or without Kerstein. *Id.* at 41, 382 A.2d at 570. Maryland Metals, however, denied receiving such notification. *Id.* at 42 n.4, 382 A.2d at 570 n.4. The court of appeals considered the evidence in a light most favorable to Metzner and Sellers, and declined to disturb the Chancellor's findings because they were not clearly erroneous under Md. Rule 886 (1978) (appellate review by court of appeals of action tried by lower court without jury). *Id.* at 41, 382 A.2d at 570.

A major factor in the lower court's decision was the credibility of the employees, whose fidelity, loyalty and honesty were in question. The Chancellor, however, did not have the opportunity of observing and hearing an examination of Sellers at trial because large portions of his deposition were read into evidence, despite the fact that Sellers was present in the courtroom. Brief for Appellant at 44, Maryland Metals, Inc. v. Metzner, 282 Md. 31, 382 A.2d 564 (1978). An important procedural ruling made by the Court of Appeals of Maryland was that Md. Rule 413(a)(4) (1978) allows the trial judge broad discretion in deciding when and for what purpose a deposition may be read into evidence after a portion of the deposition has been introduced by an adverse party. 282 Md. at 49, 382 A.2d at 574.

Thereafter, Metzner and Sellers commenced a series of activities that led to the establishment of an independent shredding operation.<sup>19</sup> The new operation opened for business in March of 1975, nine months after Metzner and Sellers had terminated their employment with Maryland Metals.<sup>20</sup> From the time the employees first disclosed their general plans to form an independent business until termination of their employment, they continued to work long hours and devote considerable efforts on behalf of Maryland Metals.<sup>21</sup>

Shortly after Metzner and Sellers's new shredding business opened, Maryland Metals sought to enjoin the operation of the rival scrap metal business and claimed damages against Metzner and Sellers for breach of fiduciary duties.<sup>22</sup> The trial court denied relief, ruling that the employees' preparatory activities did not constitute wrongful behavior.<sup>23</sup> Maryland Metals appealed and the court of appeals granted certiorari.<sup>24</sup>

### III. DISCUSSION AND ANALYSIS OF THE COURT'S HOLDING

The court of appeals affirmed the lower court's ruling that Maryland law does not require an employee to disclose in detail his preparatory activities to enter into competition with his employer unless some other act, beyond mere nondisclosure, is inimical to the employer's business.

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19. A chronological summary of the employees' activities is as follows:

December 1973 — Employees formed Delaware corporation, which qualified to do business in Maryland, and contacted the electric company regarding power requirements for the shredding operation.

January 1974 — Employees applied for loan to purchase shredder. This loan was consummated in August 1974.

February 1974 — Employees obtained an option on land and executed a sales agreement for the shredder.

May 1974 — Sellers was discharged by Maryland Metals and Metzner resigned, but continued working until June 1974.

July 1974 — Employees formed new Maryland corporation for the shredder business.

March 1975 — Competitive shredder business opened.

*Id.* at 42-43, 382 A.2d at 570-71.

20. There is no doubt that if the employees had opened their competitive business before they terminated their employment with Maryland Metals, they would have been found in breach of their fiduciary duties. *See, e.g., Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 602 A.2d 392, 397 (1956). *See also Aero Drapery of Ky., Inc. v. Engdahl*, 507 S.W.2d 166, 169 (Ky. 1974).

21. The fiscal year ending in 1974, the last year Metzner and Sellers worked for Maryland Metals, was the best year in the corporation's history. Brief for Appellees at 9-10, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).

22. 282 Md. at 33, 382 A.2d at 566.

23. *Id.*

24. *Id.* The court of appeals granted certiorari in advance of oral arguments in the court of special appeals pursuant to Md. CTS. & JUD. PROC. CODE ANN. §12-203 (1974).

The court was mindful of two important public policies in this area of the law.<sup>25</sup> On the one hand, courts have required undivided employee loyalty in order to protect an employer's proprietary interest in his business from unfair competition.<sup>26</sup> There is also an equally strong policy that favors "free and vigorous competition in the economic sphere."<sup>27</sup> An important aspect of vigorous competition is the legal right of an individual to choose his own employment.<sup>28</sup> Since every person has a right to improve his own socio-economic status, his "spirit of enterprise [should not be] unduly hampered."<sup>29</sup> Employees are not precluded, by virtue of their employment relationship, from exercising their legal right to enter into competition against a former employer provided the employee's

25. The court indicated that in balancing an employee's right to enter into competition with his employer against the countervailing right of an employer to restrain his agent's competitive endeavors, the law seeks to harmonize two important policies. The first is that "commercial competition must be conducted according to basic rules of honesty and fair dealing. . . . The second policy recognized by the courts is that of safeguarding society's interest in fostering free and vigorous competition in the economic sphere." 282 Md. at 37-38, 382 A.2d at 568.

26. *Id.* See *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 575, 217 A.2d 375, 389 (1966); Comment, *The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339, 351 (1962).

27. 282 Md. at 37-38, 382 A.2d at 568.

28. *Id.* at 39, 382 A.2d at 569; *Travenol Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 691-92, 228 S.E.2d 478, 483 (1976); *Wexler v. Greenberg*, 399 Pa. 569, 578, 160 A.2d 430, 434 (1960).

The Supreme Court has not decided whether an individual has a constitutional right to work. *Cf. Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (when faced with a constitutional challenge of a state statute that excluded Medicaid payments for certain abortions by two licensed physicians, Court declined to decide whether the doctors had a constitutional right to practice medicine). In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), however, Justice Stevens quoted with approval the language of *Truax v. Raich*, 239 U.S. 33 (1915): "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. . . ." 426 U.S. at 102-03 n.23. See also *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (Douglas, J., dissenting):

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

*Id.* at 472.

29. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 39, 382 A.2d 564, 568-69 (1978) (quoting *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 575, 217 A.2d 375, 389 (1966)).

conduct does not constitute an unfair competitive practice.<sup>30</sup> Furthermore, the right of an employee to economic advancement includes a legal privilege to plan and prepare to compete with an employer prior to terminating employment.<sup>31</sup> The law has recognized that an employee "need not wait until he is on the street before he looks for other work. He may plan and prepare, during the agency, to engage in a business after it ceases."<sup>32</sup>

In *Maryland Metals*, the court used a balancing test to reconcile and harmonize the two competing policies. The court began its reasoning by acknowledging that an employee owes a duty of loyalty and fidelity to his employer,<sup>33</sup> balanced with the legal privilege of an employee to plan and prepare to compete with his employer prior to ending his employment.<sup>34</sup> It noted, however, that the privilege is not absolute and can be extinguished by serious misconduct.<sup>35</sup> The court reasoned that to require an employee to disclose the precise nature of competitive plans to his employer before terminating his employment would have a chilling effect upon the employee's right to compete and thereby stifle free enterprise.<sup>36</sup> Thus, the court declared, if the privilege is to have any effect, it must be capable of exercise without the necessity of revealing the details of preparatory plans to the employer.<sup>37</sup> An employee's liability for breach of fiduciary duty is not predicated on mere failure to disclose

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30. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 39, 382 A.2d 564, 569 (1978). See *Group Ass'n Plans, Inc. v. Colquhoun*, 466 F.2d 469 (D.C. Cir. 1972). The "duty to a former employer, and the doctrine of freedom to compete absent contractual duties to the contrary, are not mutually inconsistent." *Id.* at 474.
31. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 39, 382 A.2d 564, 569 (1978); *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 572, 217 A.2d 375, 388 (1966); *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 366, 183 A.2d 374, 379 (1962); *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 602, 119 A.2d 392, 396-97 (1956).
32. *Keiser v. Walsh*, 118 F.2d 13, 14 (D.C. Cir. 1941). See *Meyers v. Roger J. Sullivan Co.*, 166 Mich. 193, 131 N.W. 521 (1911). "A servant may not, while engaged in the service of his master, 'injure his trade, or undermine his business; but every one has a right if he can to better his situation in the world, and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum absque injuria*.'" *Id.* at 195, 131 N.W. at 523.
33. *E.g.*, *De Crette v. Mohler*, 147 Md. 108, 115, 127 A. 639, 642 (1925); *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 581, 605 (1875); *Meinhard v. Salmon*, 249 N.Y. 458, 464-65, 164 N.E. 545, 546 (1928). Public policy demands that corporate officers and directors scrupulously observe their fiduciary duties of diligence, obedience, fidelity and honesty. See H. HENN, *LAW OF CORPORATIONS* § 235 (2d ed. 1970). The standard of care required of directors is statutorily set forth under Maryland law. MD. CORP. & ASS'NS CODE ANN. § 2-405.1 (1976). See also Miller, *The Fiduciary Duties of a Corporate Director*, 4 U. BALT. L. REV. 259 (1975).
34. 282 Md. 31, 39, 382 A.2d 564, 569 (1978).
35. *Id.* at 40, 382 A.2d at 569.
36. *Id.* at 47-48, 382 A.2d at 573.
37. *Id. Accord*, *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 26-27 (Mo. 1966); see *Midland-Ross Corp. v. Yokana*, 293 F.2d 411, 413 (3d Cir. 1961).

such preparatory acts, but rather upon some particular circumstance that renders nondisclosure injurious to the employer's business.<sup>38</sup>

The leading Maryland case illustrating unreasonable conduct and unfair competition is *C-E-I-R, Inc. v. Computer Dynamics Corp.*<sup>39</sup> In that case, C-E-I-R sought injunctive relief and monetary damages against former loyal employees and a competing business formed by them. The evidence revealed that the employees engaged in unfair competition and breached their fiduciary duties by soliciting the employer's customers, luring key personnel to the new competitor, diverting corporate opportunities to themselves, and acquiring information of a unique nature in violation of their written agreements.<sup>40</sup> Under these circumstances, the court of appeals held that the employees breached their fiduciary duties because the activities were detrimental to the employer's business.<sup>41</sup>

Relying on *C-E-I-R*, the main contention of Maryland Metals was that the failure of its high-echelon employees to disclose their numerous surreptitious acts<sup>42</sup> constituted a breach of their fiduciary

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38. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 42 n.4, 382 A.2d 564, 570 n.4 (1978); *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 346-47, 411 P.2d 921, 935-36, 49 Cal. Rptr. 825, 839-40 (1966).

While no precise line between proper and improper conduct of an employee regarding preparation for future competition has been established in Maryland, certain limits of proper and improper conduct have been recognized. Instances of proper conduct include: (1) purchase of a rival business, *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 366, 183 A.2d 374, 379 (1962); RESTATEMENT (SECOND) OF AGENCY, § 393, Comment e (1958); (2) immediate competition upon termination of employment, *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 602, 119 A.2d 392, 397 (1956); (3) advising customers of proposed termination of employment, *Id.* at 600, 119 A.2d at 396; and (4) making arrangements to compete after termination. *Id.* at 602, 119 A.2d at 397.

Examples of improper conduct include: (1) appropriation of trade secrets, *Space Aero Products Co. v. R.E. Darling Co.*, 238 Md. 93, 113-14, 208 A.2d 74, 84, cert. denied, 382 U.S. 843 (1965); (2) use of confidential information, *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 368, 183 A.2d 374, 380 (1962); (3) conspiracy to injure the employer's business, *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954); (4) solicitation of employer's customers prior to cessation of employment, *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 217 A.2d 375 (1966); *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 183 A.2d 374 (1962); (5) usurpation of employer's business opportunities, *Standard Brands, Inc. v. United States Partition & Packaging Corp.*, 199 F. Supp. 161 (E.D. Wis. 1961); Comment, *The Obligation of a High-Level Employee to his Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339 (1962); and (6) solicitation of employer's key employees, *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 183 A.2d 374 (1962).

39. 229 Md. 357, 183 A.2d 374 (1962).

40. *Id.* at 365, 183 A.2d at 378-79. In *C-E-I-R*, unlike *Maryland Metals*, confidential information was used by the employees, and more importantly the employees breached a written employment agreement not to reveal such information. *Id.* at 368, 183 A.2d at 380.

41. *Id.* at 367-68, 183 A.2d at 379-80.

42. See notes 3 & 9 *supra*.



duties of loyalty and fidelity.<sup>43</sup> Maryland Metals claimed that Metzner and Sellers began preparations for the establishment of a competing business while still employed by Maryland Metals and that they failed to communicate their detailed activities to the corporation as required by law.<sup>44</sup> When faced with such a contention, other courts have examined "the point of separation from the corporation in relation to the spectrum from fiduciary duties on the one end to active competition on the other."<sup>45</sup> Similarly, courts will investigate the employee's behavior in relationship with the employer to determine whether it is reasonable and fair under the circumstances.<sup>46</sup>

The task of the court of appeals in *Maryland Metals* was to scrutinize the particular circumstances of the employees' preparatory arrangements to determine whether they were injurious and detrimental to the corporation. Unlike the employees in *C-E-I-R*, Metzner and Sellers did not misuse unique and confidential information regarding their employer's business.<sup>47</sup> Since information readily available to the public or individuals in the industry may be utilized by a former employee,<sup>48</sup> the mere fact that Metzner and Sellers learned about the shredder's value and its availability while acting in a fiduciary capacity to the corporation did not preclude them from acquiring the shredder for themselves.<sup>49</sup>

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43. *Maryland Metals, Inc. v. Conservit, Inc.*, No. 29, 472 Equity, slip op. at 1 (Wash. Co. Cir. Ct. Dec. 10, 1976), *aff'd*, 282 Md. 31, 382 A.2d 564 (1978); Brief for Appellant at 20, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).
  44. *Maryland Metals, Inc. v. Conservit, Inc.*, No. 29, 472 Equity, slip op. at 1-2 (Wash. Co. Cir. Ct. Dec. 10, 1976), *aff'd*, 282 Md. 31, 382 A.2d 564 (1978); Brief for Appellees at 13, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).
  45. Jacobs, *Business Ethics and the Law: Obligations of a Corporate Executive*, 28 THE BUSINESS LAWYER 1063, 1076-77 (1973).
  46. See Comment, *The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case*, 29 U. CHI. L. REV. 339, 350 (1962).
  47. Although the trial court found that Metzner and Sellers did not appropriate confidential information from Maryland Metals, the corporation suggested in its brief that the employees engaged in innumerable meetings and had numerous items of correspondence, much of it on company time and at company expense, and were "feathering their nests" by setting up their business while drawing large salaries from the company. Brief for Appellant at 28, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978). Metzner and Sellers, however, contended that all information acquired by them regarding the scrap processing business was readily available to the general public in trade and government publications. *Maryland Metals, Inc. v. Conservit, Inc.*, No. 29, 472 Equity, slip op. at 4 (Wash. Co. Cir. Ct. Dec. 10, 1976), *aff'd*, 282 Md. 31, 382 A.2d 564 (1978); Brief for Appellees at 16, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).
  48. See, e.g., *National Starch Prods., Inc. v. Polyner Indus., Inc.*, 273 App. Div. 732, 737-38, 79 N.Y.S.2d 357, 362 (1948).
  49. See, e.g., *Colorado & Utah Coal Co. v. Harris*, 97 Colo. 309, 313-14, 49 P.2d 429, 431 (1935).

The case is further distinguishable from *C-E-I-R* in that Metzner and Sellers's actions in acquiring land and purchasing a shredder did not deprive their former employer of any corporate opportunity.<sup>50</sup> The corporation consistently rejected Metzner and Sellers's recommendations that Maryland Metals acquire a shredder.<sup>51</sup> The rejection of a corporate opportunity by a disinterested majority of the directors bars any challenge to subsequent exploitation of the situation by the fiduciary,<sup>52</sup> for "where the principal repudiates the transaction, the agent is free to act for himself."<sup>53</sup> Nor did Metzner and Sellers appropriate trade secrets,<sup>54</sup> solicit customers,<sup>55</sup> or recruit

50. Whether an employee has usurped a corporate opportunity depends upon which of the three tests the court uses in its deliberations: "expectancy," "line of business," or the "fairness" test. The "expectancy" test relies on whether the corporation realistically expects to seize and develop the opportunity. If the expectation is tangible, the corporate fiduciary may not appropriate it and thereby frustrate the corporate purpose. *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967); *Abbott Redmont Thinlite Corp., v. Redmont*, 324 F. Supp. 965 (S.D.N.Y. 1971), *aff'd in part, rev'd in part*, 475 F.2d 85 (2d Cir. 1973); *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199 (1900); *American Window Cleaning Co. v. Cohen*, 343 Mass. 195, 178 N.E.2d 5 (1961); *Lincoln Stores, Inc., v. Grant*, 309 Mass. 417, 34 N.E.2d 704 (1941); *Washer v. Seager*, 272 App. Div. 297, 71 N.Y.S.2d 46 (1947), *aff'd*, 297 N.Y. 918, 79 N.E.2d 745 (1948). See also Comment, *The Corporate Opportunity Doctrine*, 18 Sw. L. J. 96 (1964).

The "line of business" test focuses on whether the opportunity the employee develops is materially related to an existing or prospective activity of the corporation. It is narrower than the "expectancy" test, and only requires a cursory examination of the context in which the opportunity arises. *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (1939); *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71 (1974); Note, *Corporate Opportunity*, 74 HARV. L. REV. 765 (1961).

The "fairness" test is an application of ethical principals to the situation. The court will look at all relevant facts and circumstances existing at the time the opportunity is appropriated. This test is least concerned with stated corporate purposes, emphasizing instead the concept of competitive fairness. *Raines v. Toney*, 228 Ark. 1170, 313 S.W.2d 802 (1958); *Litwin v. Allen*, 25 N.Y.S.2d 667 (Sup. Ct. 1940). See generally Comment, *Liability of Directors and Other Officers for Usurpation of Corporate Opportunities*, 26 FORDHAM L. REV. 528 (1957).

51. 282 Md. 31, 35, 382 A.2d 564, 566-67 (1978).

52. Note, *Corporate Opportunity*, 74 HARV. L. REV. 765, 774 (1961).

53. Note, *Fiduciary Duty of Officers and Directors Not to Compete with the Corporation*, 54 HARV. L. REV. 1191, 1192 (1941) (footnote omitted). "If a corporation has actually determined not to engage in the line of business involved in the opportunity, [or has previously rejected the opportunity,] a director or officer may take advantage of its availability to him." W. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* §3.03, at 54 (2d ed. 1973) (footnote omitted).

54. "A trade secret consists of any valuable formula, pattern, device, process or other information that is used in one's business and gives the possessor a competitive advantage over those who do not know or use the information." *Kubik, Inc. v. Hull*, 56 Mich. App. 335, 347, 224 N.W.2d 80, 87 (1974). Cf. *Space Aero Products Co. v. R.E. Darling Co.*, 238 Md. 93, 208 A.2d 74, *cert. denied*, 382 U.S. 843 (1965) (court of appeals held plaintiff's "know how" in the manufacture of oxygen breathing hoses was a trade secret).

55. Solicitation would clearly be a violation of fiduciary duty in Maryland. *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 119 A.2d 392 (1956). In *Ritterpusch*, the court of appeals upheld a lower-court's jury instruction which it

other key employees<sup>56</sup> prior to terminating their employment. Rather, Metzner and Sellers displayed good faith and fidelity to Maryland Metals during the full term of their employment.<sup>57</sup> The employees' recommendation to expand the business by buying a new shredder was designed to benefit the company. Indeed, even after submitting his resignation, Metzner negotiated a very profitable contract for the benefit of Maryland Metals.<sup>58</sup>

After closely scrutinizing Metzner and Sellers's activities, the court was unable to find any breach of fiduciary duties.<sup>59</sup> In sum, the corporation failed to prove that the employees engaged in any conduct, beyond the mere failure to disclose details, which detrimentally affected Maryland Metals's business.<sup>60</sup>

#### IV. EVOLUTION OF LAW: AN EMPLOYEE'S PRIVILEGE TO MAKE PLANS FOR COMPETITION BEFORE TERMINATING HIS EMPLOYMENT

The result declared in *Maryland Metals* represents a stage in the gradual evolution away from traditional agency law, which severely curtailed an employee's independence, toward more practical rules in light of the realities of the modern employment relationship.<sup>61</sup>

characterized as stating that an employee "may not go as far as to solicit the business or customers of his employer before the termination of his employment." *Id.* at 595, 119 A.2d at 393.

56. See *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 183 A.2d 374 (1962); *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954).
57. It is important to note that in March of 1974, only three months prior to his resignation, the Board of Directors passed a resolution awarding Metzner a bonus of \$40,000.00 in recognition of his dedicated and skillful work. Brief for Appellees at 11, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978). See also note 21 and accompanying text *supra*.
58. 282 Md. 31, 44, 382 A.2d 564, 571 (1978).
59. *Id.* at 48, 382 A.2d at 573.
60. *Id.* Unlike the present case, a majority of past cases involving employment disputes have held in favor of the employer on grounds of the employee's abuse of his fiduciary duty. See, e.g., *Red Top Cab Co. v. Hanchett*, 48 F.2d 236 (N.D. Cal. 1931) (operating competing company while president of plaintiff corporation); *Hall v. Dekker*, 45 Cal. App. 2d 783, 115 P.2d 15 (1941) (organizing competing business while secretary-treasurer of plaintiff); *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 183 A.2d 374 (1962); *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 119 A.2d 392 (1956); *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954). But see, e.g., *Computer Sciences Corp. v. Ferguson*, 74 Cal. Rptr. 86 (Ct. App. 1968) (court found employee's preparatory arrangements did not injure employer since employee did not solicit other employees or customers of his employer, nor disclose trade secrets or use confidential information).
61. See *Hawes & Sherrard, Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 VA. L. REV. 1 (1976). "[T]he rigid standard of undivided loyalty has given way to a more flexible norm, as courts have come to take a more pragmatic view of business practices." *Id.* at 51 (citing *United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971); *Shlensky v. South Parkway Bldg. Corp.*, 19 Ill. 2d 268, 166 N.E.2d 793 (1960); *Case v. New York Cent. R.R.*, 15 N.Y.2d 150, 204 N.E.2d 643, 256 N.Y.S.2d 607 (1965)).

The employee-employer relationship has been governed in the past by strict agency principles.<sup>62</sup> Traditionally, an employee has been required to avoid placing himself in a position where his interests might conflict with those of his employer<sup>63</sup> and has been held liable for the slightest deviation from his fiduciary duties.<sup>64</sup> In every employment contract, whether written or oral, courts have found an implied obligation on the part of the employee to serve his employer diligently and faithfully,<sup>65</sup> to perform the employment duties honestly,<sup>66</sup> to use his best efforts for the benefit of the

62. Historically, the conflicts between an employer and a former employee who has become a competitor can be traced back to the sixteenth century when employment was carried on chiefly through the guild system, in which the apprentice, following a long period of training, was free to practice his trade even in competition with the master who had instructed him. As apprentices' terms of service expired, masters tried to require that apprentices could not carry out their occupation as "freemen" without their master's consent. Thus, the Act for Avoiding of Exactions Taken Upon Apprentices was passed in 1536. 28 Hen. 8, ch. 5. That statute prohibited masters from compelling apprentices to take an oath not to set up or keep any shop nor receive money "for or concerning his or their freedom or occupation. . . ." Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 634 (1960).

Long before the rise of the corporation as a dominant form of modern business, the law imposed upon the employee a duty of loyalty.

The duty of loyalty, as applied to business activities engaged in by one in the position of employee, is the duty of so disciplining one's acquisitive impulses that they will operate vicariously so as to increase to the maximum extent possible not one's own acquisitions but those of one's employer.

Dodd, *Is Effective Enforcement of The Fiduciary Duties of Corporate Managers Practicable?* 2 U. CHI. L. REV. 194, 195 (1935).

63. *E.g.*, Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939) (corporate officer); De Crette v. Mohler, 147 Md. 108, 115, 127 A. 639, 642 (1925) (agent); Meinhard v. Salmon, 249 N.Y. 458, 463-65, 164 N.E. 545, 546-47 (1928) (joint venturer).
64. Disputes of this nature are heard in equity and the remedies may be any or all of the following. An injunction or restraining order may be issued when such judicial action may prevent employer injury. *See, e.g.*, United Board & Carton Corp. v. Britting, 63 N.J. Super. 517, 164 A.2d 824 (1959), *aff'd per curiam*, 61 N.J. Super. 340, 160 A.2d 660, *cert. denied*, 33 N.J. 326, 164 A.2d 379 (1960) (court restrained salesmen who used employer's confidential price list from competing for two years). Damages may be awarded by the equity court's ancillary jurisdiction for subsequent injuries resulting from a breach of fiduciary duty. Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954) (plaintiff granted \$300,000 damages for loss of clients caused by improper employee solicitation). An accounting may be ordered to compensate employer for losses suffered. Nagel v. Todd, 185 Md. 512, 45 A.2d 326 (1946) (agent negotiated lower purchase price and kept the difference). A court may impose a constructive trust with the corporation as the beneficiary of all earnings. Red Top Cab Co. v. Hanchett, 48 F.2d 236 (N.D. Cal. 1931) (director of the plaintiff corporation required to submit to an accounting for profits earned by a competing cab company incorporated by the director while serving as plaintiff's director).
65. Maryland Metals, Inc. v. Metzner, 282 Md. 31, 38, 382 A.2d 564, 568 (1978). *See also* Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939).
66. *See* Stuber v. Taylor, 200 N.W.2d 276, 280 (N.D. 1972) (agent has duty to "deal fairly with the principal in all transactions between them."); *cf.* Maryland Credit v. Hagerty, 216 Md. 83, 90, 139 A.2d 230, 233 (1958) (employee has duty to refrain from deception).

employer,<sup>67</sup> and to refrain from any acts injurious to his employer's interests.<sup>68</sup> The common law maxim, "no man can serve two masters," has been articulated by numerous courts.<sup>69</sup> Moreover, many courts have recognized Justice Cardozo's classic statement in *Meinhard v. Salmon*:<sup>70</sup>

Many forms of conduct permissible in a workaday world for those acting at arm's length, (sic) are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd.<sup>71</sup>

The first Maryland case to discuss an employee's privilege to plan to compete before terminating his employment was *Ritterpusch v. Lithographic Plate Service, Inc.*<sup>72</sup> The court stated in dicta that an employee has a legal right, while still employed, to make preparations to compete with his employer before terminating his employment.<sup>73</sup> The employees in *Ritterpusch*, however, were held to be in violation of their fiduciary duties because their actions of soliciting employer's customers before terminating their employment went beyond the scope of the privilege.<sup>74</sup>

*C-E-I-R*<sup>75</sup> was the next Maryland case to acknowledge the employee's privilege. The court again ruled in favor of the employer's vested property interests and held that the employees' solicitation went beyond the scope of the privilege.<sup>76</sup> Ambiguous overtones

67. *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 366, 183 A.2d 374, 379 (1962).

68. *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 600, 119 A.2d 392, 395-96 (1956).

69. *E.g.*, *Aero Drapery of Ky., Inc. v. Engdahl*, 507 S.W.2d 166, 169 (Ky. 1974); *De Crette v. Mohler*, 147 Md. 108, 115, 127 A. 639, 642 (1925). A borrowed employee, however, may become the servant of the transferee. *Compare Charles v. Barrett*, 233 N.Y. 127, 135 N.E. 199 (1922) (so long as the employee is furthering his employer's business, there is no change of masters), *with Gordon v. S.M. Byers Motor Car Co.*, 309 Pa. 453, 164 A. 334 (1932) (borrowed servant found to be promoting the interests of two masters).

70. 249 N.Y. 458, 164 N.E. 545 (1928).

71. *Id.* at 464, 164 N.E. at 546.

72. 208 Md. 592, 119 A.2d 392 (1956).

73. *Id.* at 602, 119 A.2d at 397.

74. *Id.* at 595, 119 A.2d at 393.

75. 229 Md. 357, 183 A.2d 374 (1962).

76. *Id.* at 367, 183 A.2d at 379.

regarding disclosure were made by the court in an effort to safeguard proprietary interests of an employer against the employee's privilege. The court declared in seemingly contradictory dicta:

We do not intimate that in all cases an employee must tell his employer of his future plans to become a competitor. However, the rule is well established that an agent is under a duty to disclose to his employer any information concerning the agency which the employer would be likely to want to know.<sup>77</sup>

It was not until sixteen years later in *Maryland Metals* that the court clarified and refined the *C-E-I-R* dicta by declaring that to require disclosure of preparatory details would negate the employee's privilege.<sup>78</sup> *Maryland Metals* is the first Maryland case to hold in favor of the employee's privilege when confronted with the dilemma of an employee competing against a former employer.<sup>79</sup> Thus, the present state of the law in Maryland is that an employee's failure to disclose details of his preparation for competition is not a breach of fiduciary duties unless some other conduct, apart from nondisclosure, is injurious to the employer's business.<sup>80</sup>

An overwhelming majority of jurisdictions are in general accord with Maryland's view that an employee has a legal privilege to commence preparatory activities for future competition against his employer before terminating his employment.<sup>81</sup> There has been

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77. *Id.* at 367, 183 A.2d at 379-80.

78. 282 Md. 31, 47, 382 A.2d 564, 573 (1978).

79. *Maryland Metals* is significant because it is the first Maryland case in which employees prevailed in an employment dispute on the basis of their privilege to prepare to compete prior to ending their employment. In an earlier Maryland case, *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 217 A.2d 375 (1966), employees prevailed in an employment dispute but not on the basis of their privilege. In *Operations Research*, former employees and a corporation organized by them after terminating their employment were sued by the former corporate employer for breach of duties. *Operations Research, Inc.* alleged that two employees breached their duties by wrongfully recruiting key employees, using confidential information in the nature of trade secrets and diverting corporate opportunities after they resigned. The court of appeals affirmed the trial court's dismissal on the bill of complaint on the basis that the corporation failed to prove that the employees breached their duties before resigning. Although the court acknowledged that an employee has a privilege before terminating employment to make arrangements to compete, the employee's privilege was not the basis of the court's decision because the record failed to show any preparatory arrangements by the employees before leaving their employment. *Id.* at 572, 217 A.2d at 388.

80. 282 Md. at 42 n.4, 382 A.2d at 570 n.4.

81. *See, e.g., Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 411 P.2d 921, 49 Cal. Rptr. 825 (1966). The court, in *Bancroft*, focused on a corporate officer's conduct and found that he had breached his fiduciary duty of loyalty to his employer by aiding a competitor in the solicitation of corporate employees. The court enunciated the principle that an employee is not required to disclose his preparatory arrangements in every situation but only when the preparations

disagreement, however, on the extent of disclosure required by an employee concerning his competitive plans while employed. Several courts have required full disclosure of preparatory activities,<sup>82</sup> while others have declared that there is no requirement to disclose any plans or preparations.<sup>83</sup>

In *Maryland Metals*, the court of appeals was bound by the lower court's finding of fact that the employees informed Maryland Metals of their general intention to compete.<sup>84</sup> Therefore, the court neglected to address expressly the question of whether disclosure of a general intention to compete, as distinguished from disclosure of specific acts of preparation, is required by law. If the court were confronted with the issue in the near future, it would most likely favor the employee's privilege and declare that an employee need not disclose his intentions to compete. This conclusion is supported by dicta in *Maryland Metals*, in which the court indicated that even a complete failure to disclose an intention to compete would not have constituted a breach of the employees' fiduciary duty.<sup>85</sup> Consequently, the court of appeals seems to have joined, by way of dicta, the growing minority of jurisdictions that do not require an employee to disclose any intention to compete because such a requirement inhibits an employee's privilege to prepare.

- render nondisclosure harmful to the employer. *Accord*, *Cudahy Co. v. American Laboratories, Inc.*, 313 F. Supp. 1339 (D. Neb. 1970); *Colonell v. Goodman*, 78 F. Supp. 845 (E.D. Pa.), *aff'd per curiam*, 169 F.2d 275 (3d Cir.), *cert. denied*, 335 U.S. 870 (1948); *United Board & Carton Corp. v. Britting*, 63 N.J. Super. 517, 164 A.2d 824 (1959), *aff'd per curiam*, 61 N.J. Super. 340, 160 A.2d 660, *cert. denied*, 33 N.J. 326, 164 A.2d 379 (1960).
82. *E.g.*, *Central Ry. Signal Co. v. Longden*, 194 F.2d 310 (7th Cir. 1952); *Standard Brands, Inc. v. United States Partition & Packaging Corp.*, 199 F. Supp. 161 (E.D. Wis. 1961); *Shell Petroleum Corp. v. Pratt*, 22 F. Supp. 304 (D. Kan. 1938); *Societa Operaia Di Mutuo Soccorso Villalba v. Di Maria*, 40 N.J. Super. 344, 122 A.2d 897 (1956); *Liberty Title & Trust Co. v. Plews*, 6 N.J. 28, 77 A.2d 210 (1950); *Faultersack v. Clintonville Sales Corp.*, 253 Wis. 432, 34 N.W.2d 682 (1948). RESTATEMENT (SECOND) OF AGENCY, §393 Comment e (1958) supports an employee's right to prepare to compete with his employer before termination, but the RESTATEMENT does not state the employee's corollary right to make such preparations without the necessity of revealing such plans to his employer. Brief for Appellees at 19, *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).
83. *See* *Metal Lubricants Co. v. Engineered Lubricants Co.*, 411 F.2d 426, 428-30 (8th Cir. 1969); *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*, 366 F. Supp. 1173, 1181-82 (D. Ariz. 1973); *Thau-Nolde, Inc. v. Krause Dental Supply & Gold Co.*, 518 S.W.2d 5, 9-10 (Mo. 1974); *National Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 26 (Mo. 1966).
84. *See* note 18 *supra* and accompanying text.
85. "[*Maryland Metals*] denies that [*Metzner and Sellers*] ever notified it of their *intention* to establish a competing enterprise . . . As we see it, however, the giving of the contested notice in this case is not dispositive of the breach of fiduciary duty question." *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 42 n.4, 382 A.2d 564, 570 n.4 (1978) (emphasis added).

## V. IMPLICATIONS OF MARYLAND METALS

*Maryland Metals* represents a shift in the court's focus when deciding employment disputes. The court initially will consider the individual employee's right to work and privilege to prepare to compete, and then take into account the employer's interests to determine whether the employee's conduct has been injurious to the employer's business. Before *Maryland Metals*, the court first considered the employer's right to protect his business against ambitious employees, and then examined the employee's privilege. Thus, under the pre-*Maryland Metals* approach, courts generally favored an employer's property interests over an employee's privilege to prepare for a change of employment.<sup>86</sup> The court's shift in focus after *Maryland Metals* will likely result, however, in more decisions favoring employees when a court is confronted with employment disputes similar to the one in *Maryland Metals*.<sup>87</sup>

Employers should not interpret *Maryland Metals* as an unwillingness by the court to protect an employer's legitimate proprietary interests,<sup>88</sup> but should recognize it as a signal "employers beware"<sup>89</sup> of competitive employees. While the court of appeals indicated that a covenant not to compete might have avoided the entire problem for the corporation,<sup>90</sup> it is not at all clear whether a post-employment

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86. See *Becker v. Bailey*, 268 Md. 93, 299 A.2d 835 (1973); *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 257, 183 A.2d 374 (1962); *Maryland Credit Fin. Corp. v. Hagerty*, 216 Md. 83, 139 A.2d 230 (1958); *Ritterpusch v. Lithographic Plate Serv., Inc.*, 208 Md. 592, 119 A.2d 392 (1956); *De Crette v. Mohler*, 147 Md. 108, 127 A. 639 (1925); *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598 (1875). *But see* *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 217 A.2d 375 (1966); note 82 *supra*.

87. A trend favoring employees in employment disputes can be discerned by examining cases in jurisdictions other than Maryland. In California, courts have decided in favor of employees on various occasions. *E.g.*, *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 255, 67 Cal. Rptr. 19, 26 (1968) (employer failed to show any evidence that the employees misappropriated trade secrets or used unfair tactics in soliciting the corporation's employees and court deemed employee's interests to be superior to corporation's interests). *Knudsen Corp. v. Ever-Fresh Foods, Inc.*, 336 F. Supp. 241, 245 (C.D. Cal. 1971). The court in *Knudsen* denied an employer's application for preliminary injunction against ex-employees because there was no showing of illegal conduct by them. The court observed that in the absence of wrongful behavior, an employee's right to seek better employment prevails over the business interests of his employer. *Computer Sciences Corp. v. Ferguson*, 74 Cal. Rptr. 86, 93 (Ct. App. 1968) (court ruled in favor of employee since his preparatory conduct resulted in no loss or detriment to his employer).

88. Property rights that the employer may protect include trade secrets, confidential information, corporate opportunities, and contractual relations with others. *See, e.g.*, *Donahue v. Permacel Tape Corp.*, 234 Ind. 398, 410-11, 127 N.E.2d 235, 240 (1955); Newman, *Formation of Competing Enterprise by Corporate Fiduciary*, 3 *Hous. L. Rev.* 221, 230-31 (1965).

89. *Caveat patronus*. D. P. SIMPSON, *CASELL'S NEW LATIN DICTIONARY*, 96, 427 (1960).

90. 282 Md. 31, 48, 382 A.2d 564, 574 (1978).



noncompetition covenant<sup>91</sup> would have changed the result in *Maryland Metals*.<sup>92</sup>

Neither should *Maryland Metals* be misinterpreted by employees who seek to compete with their employers. *Maryland Metals* does not recognize an unfettered right in favor of an employee to commence preparatory activities while employed.<sup>93</sup> The court declared that an employee need not disclose preparatory activities provided there is not some other conduct on the part of the employee that is injurious to the employer's business. Additionally, the well-established categories of improper employee conduct resulting in a breach of fiduciary duty were implicitly affirmed by the court in *Maryland Metals*.<sup>94</sup>

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91. Post-employment, noncompetition covenants should be distinguished from other types of covenants not to compete, such as covenants incidental to the sale of a business. See Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244, 256 (1928). The purpose of a post-employment restraint is to prevent competitive use of information or relationships which pertain peculiarly to the employer and which the employee acquired during the course of his employment, whereas the objective of a covenant not to compete ancillary to the sale of a business is to restrain the seller from recapturing and utilizing the good will of the business which was transferred. See Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960). Courts generally have displayed a stricter attitude toward post-employment covenants than restrictive covenants incidental to the sale of a business due to "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood." See, e.g., *Purchasing Associates, Inc. v. Weitz*, 13 N.Y.2d 267, 271, 196 N.E.2d 245, 247 (1963). Thus, post-employment covenants, which an employee agrees to as a condition of employment, are subject not only to the reasonableness test applicable to other types of covenants not to compete, but are enforceable only to the extent necessary to protect the employer against the use of trade secrets, customer lists, and similar confidential information that the employee has obtained as a result of his employment. *Id.* See generally Kreider, *Trends in the Enforcement of Restrictive Employment Contracts*, 35 U. CIN. L. REV. 16 (1966).
92. While the topic of post-employment, noncompetition covenants is beyond the scope of this casenote, certain generalizations regarding judicial analysis of restrictive covenants can be noted as they are well-established. First, the scope of each covenant will be analyzed on a case by case basis. E.g., *Becker v. Bailey* 268 Md. 93, 299 A.2d 835 (1973). Second, a covenant must be reasonable as to duration, area and scope of activities. E.g., *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 225 A.2d 288 (1967); see also Annot., 41 A.L.R.2d 15 (1955) (duration of restriction); Annot., 43 A.L.R.2d 94 (1955) (geographical restriction). Third, reasonableness of the covenant requires that the restraint be no greater than necessary to protect an employer's interests, the covenant is not unduly harsh and oppressive on the employee, and that the covenant is not injurious to the public. E.g., *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 691-692 (Ct. C.P., Cuyahoga City 1952); see also Note, *Validity and Enforceability of Restrictive Covenants Not to Compete*, 16 W. RES. L. REV. 161, 169 (1964).

The existence of a post-employment noncompetition covenant in *Maryland Metals* might have been struck down by the court as an unreasonable restraint on the employees' employment freedom and economic mobility.

93. See text accompanying notes 35-38 *supra*.

94 282 Md. 31, 40-41, 382 A.2d 564, 569-70 (1978). See note 38 *supra*.

## VI. CONCLUSION

In reaching its decision in *Maryland Metals*, the Court of Appeals of Maryland has extended the swing of the legal pendulum, which recently has favored individual rights over business rights, into the field of employment disputes. The law has taken a dramatic shift in favor of individuals in areas such as landlord-tenant law,<sup>95</sup> contract disputes,<sup>96</sup> strict and products liability,<sup>97</sup> and now employ-

95. For an excellent discussion of the shift in focus in the landlord-tenant relationship away from feudal property concepts to the modern apartment lease relationship and the public policy reasons for the shift, see *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970). See also MD. REAL PROP. CODE ANN. §§ 8-211 (Supp. 1978). Maryland has not yet recognized an implied warranty of habitability in residential leases, but § 8-211 which deals with a landlord's duty to provide habitable premises, includes a rent escrow provision. If "the landlord has failed to cure defects after notice and opportunity to cure, the tenant may bring a rent escrow action" under the statute. Davison, *The Uniform Residential Landlord and Tenant Act and Its Potential Effects Upon Maryland Landlord-Tenant Law*, 5 U. BALT. L. REV. 247, 257 (1976).

96. The emerging law on unconscionable contracts has been applied in numerous contractual transactions cases. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (monthly installment payments on a rotating credit system); *Abbott v. Abbott*, 188 Neb. 61, 195 N.W.2d 204 (1972) (settlement of a will contest); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (home improvement contracts); *Seabrook v. Commuter Housing Co.*, 72 Misc. 2d 6, 338 N.Y.S.2d 67 (Civ. Ct. N.Y. 1972) (apartment lease).

Section 2-302 of the UNIFORM COMMERCIAL CODE provision on unconscionability reads as follows:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Maryland adopted the above U.C.C. provision verbatim in ch. 538, 1963 Md. Laws 802. COM. LAW CODE ANN. § 2-302 (1975). For an interesting extension of the concept into the law on damages, see *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975) (tire "warranty" limiting damages to replacement of tire only held unconscionable).

97. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976), noted in, 6 U. BALT. L. REV. 295 (1977). The Court of Appeals of Maryland joined the vast majority of jurisdictions and adopted a standard of products liability in tort stated in Section 402A of the RESTATEMENT (SECOND) OF TORTS (1965). The court stated that one justification for imposing a strict liability on manufacturers for defective products is "because it shifts the risk of loss to those better able financially to bear the loss." 278 Md. at 343, 363 A.2d at 958. See generally *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975); *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975); *Moran v. Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974). See also *Digges, Product Liability in Maryland Revisited*, 7 U. BALT. L. REV. 1 (1977); *Product Liability Law Symposium*, 5 U. BALT. L. REV. 1-151 (1975).

ment disputes.<sup>98</sup> *Maryland Metals* indicates that an employee's interest in his own economic welfare will be deemed superior to his employer's business interests absent a showing that the employee has committed an injurious act accompanying his change to new employment.<sup>99</sup>

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*J. Michael Dougherty, Jr.*

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98. *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564 (1978).

99. *Id. Accord, Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968).

In *Franzen* the California Court of Appeal observed that:

[The courts should not be concerned] solely with the interests of the competing employers, but also with the employee's interests. The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.

*Id.* at 255, 67 Cal. Rptr. at 26.