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Recent Developments: Schochet v. State: Maryland's Unnatural or Perverted Sexual Practices Statute Does Not Apply to Consensual, Noncommercial, Heterosexual Activity between Adults in Private

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Recent Developments

Schochet v. State: MARYLAND'S UNNATURAL OR PERVERTED SEXUAL PRACTICES STATUTE DOES NOT APPLY TO CONSENSUAL, NONCOMMERCIAL, HETEROSEXUAL ACTIVITY BETWEEN ADULTS IN PRIVATE

The Court of Appeals of Maryland recently held that a statute providing criminal penalties for "unnatural or perverted sexual practice[s]," did not encompass consensual, noncommercial, heterosexual activity between adults in private. Md. Ann. Code art 27, §554 (1987 & Supp. 1990). In *Schochet v. State,* 320 Md. 714, 580 A.2d 176 (1990), the court avoided the issue of whether the statute violated the constitutional right of privacy by employing a statutory construction analysis.

Steven Adam Schochet was charged in the Circuit Court for Montgomery County with various sexual offenses arising out of events occurring on October 3, 1986. Dovie Sullivan, the complaining witness, accused the defendant of forcing her, against her will and without consent, to perform various sexual acts with him, including vaginal intercourse, fellatio, and anal intercourse. *Schochet v. State,* 320 Md. at 717-18, 580 A.2d at 177-78 (1990). Schochet denied having anal intercourse with the complaining witness, but admitted to engaging in consensual vaginal intercourse and fellatio. *Id.* at 723, 580 A.2d at 180. The jury, believing Schochet's version of the incident, returned verdicts of not guilty as to the offenses which required lack of consent. Schochet was also found not guilty of sodomy. The jury, however, did find Schochet guilty of fellatio, an unnatural or perverted sexual practice as described in section 554, after being instructed that a lack of consent on the part of the complaining witness was not an element of that offense. *Id.* at 721-22, 580 A.2d at 179-80.

On appeal, Schochet argued that the statute was "unconstitutional as applied to private and noncommercial sexual acts between consenting heterosexual adults." *Id.* at 723, 580 A.2d at 180. Schochet's argument that the statute violated his constitutional right of privacy was unpersuasive. A divided Court of Special Appeals of Maryland affirmed the conviction, finding no "'constitutional protection for sexual activity — orthodox or unorthodox, heterosexual or homosexual — at least outside of marriage.'" *Id.* (quoting *Schochet v. State,* 75 Md. App. 314, 339, 541 A.2d 183, 195 (1988)).

The Court of Appeals of Maryland granted certiorari, reversed Schochet's conviction and held that section 554 did not encompass consensual, noncommercial, heterosexual activity between adults in private. The court, therefore, did not reach the question of whether there was a constitutional right of privacy in this case.

In reaching its conclusion, the court of appeals relied on the principle of statutory construction that if "'a legislative act is susceptible of two reasonable interpretations, one of which would not involve a decision as to the constitutionality of the act while the other would, the construction which avoids the determination of constitutionality is to be preferred.'" *Id.* at 725, 580 A.2d at 181 (quoting *Maryland State Bd. of Barber Examiners v. Kuhn,* 270 Md. 496, 505, 312 A.2d 216, 221 (1973)). Recognizing that section 554 could be interpreted as violating a constitutional right of privacy, the court chose to adopt an interpretation of the statute that would avoid a constitutional determination.

The State disagreed with the application of this principle, and argued that the court could only avoid a decision on the constitutional question if the statute was *reasonably* susceptible to different interpretations. The state asserted that the plain language of section 554 was not susceptible of more than one interpretation. *Id.* at 728-29, 580 A.2d at 183.

The court disagreed, reasoning that the broad, sweeping language of section 554 rendered the statute susceptible to different constructions. *Id.* at 729, 580 A.2d at 183. In support of its conclusion, the court relied on Maryland cases which have given general statutes (such as section 554) narrow constructions so as to avoid any constitutional issues. *Id.* at 729-31, 580 A.2d at 183-84. The court further noted the rulings of other jurisdictions which have interpreted such statutes similarly. *Id.* at 731, 580 A.2d at 184.

Lastly, the court noted that although cases involving prosecutions under section 554 had been previously reviewed, those involved homosexual activity, sexual acts with minors, nonconsensual sexual acts, and sexual activity in public. However, no prior cases involving prosecutions dealing with consensual, noncommercial, heterosexual activity between adults in private had been reviewed. The court relied on this as another indication that such conduct was not meant to be encompassed by the statute. *Id* at 734, 580 A.2d at 185.

In his dissenting opinion, Chief Judge Murphy argued that the plain language of section 554 was not susceptible to more than one reasonable interpretation, and since the type of activity in question was not specifically excluded in the statute, it must be covered by section 554. *Id.* at 736-37, 580 A.2d at 187 (Murphy, C.J., dissenting). The dissent further asserted that the constitu-

tional issue presented should have been considered. He indicated that, had the issue been considered, he would have held that section 554 does not infringe upon the constitutional right of privacy. *Id.* at 737, 580 A.2d at 187.

In *Schochet v. State,* the Court of Appeals of Maryland considerably narrowed the scope of section 554 by excluding from its application consensual, noncommercial, heterosexual activities between adults in private. Although, as the court points out in its opinion, section 554 is still viable as applied to activities not expressly excluded by its opinion, the scope and constitutionality of its application to such activities remains in question. By artfully avoiding the constitutional issue presented in this case, the court avoided the possibility of being reviewed by the United States Supreme Court. However, this has merely postponed a seemingly inevitable ruling which will define the extent of the State's control over the most intimate and personal aspects of the lives of its citizenry.

— *Mark K. Boyer*

Cooter & Gell v. Hartmarx Corporation: VOLUNTARY DISMISSAL OF FRIVOLOUS LAWSUIT WILL NOT PROTECT PLAINTIFF FROM IMPOSITION OF RULE 11 SANCTIONS

In *Cooter & Gell v. Hartmarx Corp.,* 110 S. Ct. 2447 (1990), the Supreme Court resolved a split among the federal circuit courts in their application of Federal Rule of Civil Procedure 11. The Court held that a plaintiff's voluntary dismissal did not destroy the jurisdiction of the federal district court to award Rule 11 sanctions. Additionally, the Court held that the appropriate standard of review on appeal was an abuse of discretion standard. However, the Court ruled that expenses incurred in an appeal of sanctions were not includable in the amount of the monetary award.

Hartmarx Corporation ("Hartmarx") filed a breach of contract action against Danik Incorporated ("Danik"), who, represented by the law firm of Cooter & Gell, filed a counterclaim to that action. The district court found in favor of Hartmarx in both matters. Thereafter, Danik filed two antitrust complaints against Hartmarx, one of which was the subject of the appeal.

The complaint in question alleged, *inter alia*, the existence of a nationwide conspiracy to fix prices and to eliminate competition. Hartmarx moved to dismiss the complaint and for sanctions under Rule 11 based principally on the grounds that the suit had no basis in fact. Danik filed a notice of voluntary dismissal of the antitrust complaint which became effective in June 1984. Thereafter, the court entertained argument on the Rule 11 motion.

In December 1987, the district court granted the Rule 11 motion for sanctions and awarded costs and fees for defense of the action against Danik and Cooter & Gell. The court of appeals affirmed, but additionally ruled that the matter be remanded to the district court where the expenses incurred as a result of the appeal should be assessed against Danik and Cooter & Gell. The Supreme Court granted certiorari.

The Court considered three issues on appeal. First, whether a district court may impose Rule 11 sanctions on a plaintiff who voluntarily dismissed a complaint. Second, what was the appropriate standard of review in the imposition of Rule 11 sanctions. Third, whether awarding attorney fees incurred on appeal of the sanctions was authorized under Rule 11.

The Court first addressed Danik's contention that its voluntary dismissal pursuant to Rule 41(a)(1) automatically deprived the district court of jurisdiction over the Rule 11 motion, and thus, the sanctions and award of attorney fees and costs were improper. *Id.* at 2454-55. In its analysis, the Court considered both the language of and the purposes behind the promulgation of Rule 11 and Rule 41(a)(1).

Rule 11 requires that an attorney or party offering a paper to a court must sign that paper. By signing, the attorney or party certifies that:

> the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> [Fed. R. Civ. P. 11.]

If signed in violation of the rule, the court "shall" impose upon the attorney or his client "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing" of the paper. *Id.* The Court determined that the purpose of Rule 11 is to deter baseless lawsuits and to streamline the judicial process. *Cooter & Gell,* 110 S.Ct. at 2454.

In contrast, the purpose of Rule 41(a)(1) is to limit a plaintiff's ability to dismiss an action without prejudice. Specifically, the provision allows a plaintiff "one free dismissal" without the permission of the adverse party or the court, provided certain procedural requirements are followed. *Id.* at 2456-57. However, the Court stated, Rule 41(a)(1) did not secure the plaintiff's right to file baseless papers. *Id.* at 2457. The Court reasoned that if a litigant could purge his Rule 11 violation merely by taking a dismissal, he would lose all incentive to investigate more carefully before serving and filing papers. *Id.*

The Court rejected the petitioner's argument and found that the language and policies behind Rule 11 were consistent with the district court's position that it had authority to rule on the motion after the dismissal of the action. *Id.* The Court found that the jurisdiction of the district court was invoked when the underlying complaint was filed and was not destroyed by the voluntary dismissal. The Court further found that the Rule 11 motion was a collateral issue, not a judgment on the merits, and therefore, the imposition of sanctions did not deprive the plaintiff of his Rule 41(a)(1) right to voluntarily dismiss without prejudice. Thus, the Court held the award of attorney fees and costs was properly made after the voluntary dismissal of the suit. *Id.*

Similarly, the Court rejected the petitioner's contention that the court of appeals erred in applying an abuse of discretion standard in reviewing the imposition of Rule 11 sanctions. In its analysis, the Court compared the language in the Equal Access to Justice Act