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Recent Developments: Mayor and City Council of Baltimore v. Indianapolis Colts, Inc.: The Demise of the Public Use Doctrine

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death shall be brought within three years after the death of the injured person.

The appellants argued that where the decedent died not knowing that he was a victim of a wrong and that the wrong had caused his demise, the beneficiaries should have up to three years from the time they knew or should have known the cause of death, within which to bring an action for wrongful death. Just such a discovery rule was established in *Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A.2d 299 (1978), a latent disease case.

The *Trimper* court distinguished the *Harig* case from *Trimper*, as the former was brought under MD. CTS. & JUD. PROC. CODE ANN. §5-101 (1984) which is the general statute of limitations and which provides that an action shall be filed within three years from the date of accrual of the cause of action. The court in *Harig* defined "accrual" as when a plaintiff, "ascertains or through the exercise of reasonable care and diligence should have ascertained the nature and cause of his injury." 284 Md. at 83, 394 A.2d at 306. The court's definition of accrual was restricted to latent disease cases.

The *Trimper* court contended that precedent precluded the court from applying a discovery rule to wrongful death actions.

The rule in Maryland is, that since the wrongful death statute created a new liability not existing at common law, compliance with the period of limitations for such actions is a condition precedent to the right to maintain the action. The period of limitations is part of the substantive right of action. 305 Md. at 35, citing *State v. Zitomer*, 275 Md. 534, 542, 341 A.2d 789, 794 (1975), cert. denied, 423 U.S. 1076 (1976), citing *Smith v. Westinghouse Electric Corp.*, 266 Md. 52, 55-56, 291 A.2d 452, 454 (1972); *Dunnigan v. Coburn*, 171 Md. 23, 25-26, 187 A. 881, 884 (1936); and *State v. Parks*, 148 Md. 477, 479-82, 129 A. 793, 795 (1925).

The legislative intent behind the creation of the wrongful death statute is absolutely clear and "there is no room for judicial interpretation." *Trimper*, 305 Md. at 36.

Conversely, the survival statutes do not create a new cause of action unknown to common law, but merely alter the common law under which certain actions may be brought on behalf of decedents. The statute provides that a cause of action at law, except slander, survives the death of either party. MD. CTS. & JUD. PROC. CODE ANN. §6-401(a) (1984). Limitations on survival actions are provided by the general statute of limitations.

Appellants, as personal representatives, relying on *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981), which established discovery as the general test for accrual, argued to the court that the survival claims did not accrue until each woman knew or should have known of the condition between her husband's exposure to asbestos and the resulting diseases suffered by the decedents.

In response to this argument, appellees argued that if no cause of action accrued until it was discovered after the decedents' respective deaths, then the decedents had no cause of action at the time of death and therefore no action may be brought on behalf of the decedents under the survival statutes.

The court distinguished *Poffenberger* from the case at bar in that the former never dealt with an injured person who subsequently died either from the injury complained of or from other causes without having instituted a right of action for the injury. Rather, *Poffenberger* focused upon the injured person who discovered the wrong inflicted upon him while living but after the prescribed three years had expired.

The court also rejected appellees' argument that appellants' claims necessarily fail if a discovery rule is applied. An injured party need not know that he has suffered a legally recognized wrong which has resulted in harm in order to have a complete cause of action. The court further contended that the discovery rule limits the period of time in which an injured plaintiff may bring an action for the wrong committed, "but it does not change the time when a cause of action becomes conceptually complete." *Trimper*, 305 Md. at 42. Accordingly, the court held that the decedents in these cases have a cause of action which survive their deaths. The court then turned to the question of how long the causes of action exist.

Upon considering a series of case law dealing with statutory time bars to wrongful death and survival actions, from which no general principle regarding the same could be drawn, the court held that survival actions must be brought within three years of the discovery of a link between the fatal disease and the exposure to asbestos. The court explicitly limited the application of the discovery rule in survival actions to latent disease cases which are instituted initially as survival actions rather than wrongful death actions. The court supported its decision by referring to the workers compensation statute dealing specifically with latent occupational diseases. The statute contains a provision whereby an action for disability or death from pul-

monary dust disease must be brought within three years from the date of disablement or death or the date on which the employee or his dependent discovered the link between the disablement or death and his employment. MD. ANN. CODE art. 101, §26(a)(4) (1985).

Thus considering the legislative intent of the wrongful death statute, the discovery rule established in *Harig*, and the workers compensation statute, the *Trimper* court concluded that in situations involving the latent development of disease, a cause of action accrues either when a person discovers or reasonably should have discovered the nature and cause of the injury, or at death whichever first occurs. Judgments of the Circuit Court for Baltimore City were affirmed.

—Patricia Dart Brooks

Mayor and City Council of Baltimore v. Indianapolis Colts, Inc.: THE DEMISE OF THE PUBLIC USE DOCTRINE

In 1982, California acknowledged a sovereign's latent power to condemn a professional sports franchise through eminent domain. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 183 Cal. Rptr. 673, 646 P.2d 835 (1982). Recently in *Mayor and City Council of Baltimore v. Indianapolis Colts, Inc.*, 624 F. Supp. 278 (D.Md. 1985), the City of Baltimore sought to test this power in an attempt to enjoin the Colts football franchise from relocating to Indianapolis.

Prompted by ailing negotiations between the City and Colt's owner Robert Irsay, the Maryland Senate on March 27, 1984 passed emergency legislation authorizing the City of Baltimore to condemn the Colt's NFL franchise. In response, Mr. Irsay immediately began shipping all of the team's physical possessions to Indianapolis. Crews worked throughout the night of March 28, and by early morning the loaded Mayflower vans had left Maryland.

On March 30, 1984, the Maryland Legislature finalized Emergency Bill No. 1042, 1984 Md. Laws Ch. 6. Emergency Ordinance No. 32 was thereafter enacted by the city authorizing the condemnation of sport franchises. A condemnation petition was immediately filed in the Circuit Court for Baltimore City seeking to acquire the Colts by eminent domain. On April 2, 1984 the Colts removed the case to the federal district court on the basis of diversity jurisdiction.

The law of eminent domain authorizes a sovereign to take property for public use without the owner's consent upon making just compensation. Nichol's on Eminent Domain (3rd ed. 1980) §1.11 pp. 1-10. The majority of the case law defining the

parameters of this power involve a state's condemnation of tangible property to support traditional and limited public purposes such as the construction and maintenance of streets and highways. It is not disputed, however, that this power extends to encompass property of every kind and character. 26 Am. Jur. 2d Eminent Domain §73 p. 733.

The unique character of this area of the law demands that the power exercised "be exclusive of another state's power to condemn the same property." Nichols on Eminent Domain §2.12. Therefore, acquiring the Colts through eminent domain required that the club be located within Maryland at the time condemnation takes place.

The city's argument was two-fold. First, although the franchise had long since moved to Indianapolis, they contended that the appropriate time to determine the situs of the club was March 30, 1984, the date the condemnation petition was filed. Conceding that the team's physical assets were not in Maryland on that date, the city next asserted that the club's "lingering contacts" with Maryland were enough to give the city the power to condemn. *Colts*, 624 F. Supp. at 282.

Thus two major questions were presented to the court: (1) What is the relevant date to determine the location of the club? and (2) What standard is the appropriate test for determining the situs of intangibles?

The Colts contended that the situs of property is determined by the date compensation is paid for the property. Article III §40 of the Maryland Constitution provides: "The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation. . . . being first paid. . . ." See also MD. REAL PROP. CODE ANN. §12-102(2), 108 (1981). Further support for the Colt's position is found in *Washington Suburban Sanitary Commission v. Nash*, 284 Md. 376, 396 A.2d 538 (1979). In *Nash* the court of appeals held that a condemning authority may not interfere with an owner's right to use and dispose of his property until it has paid for the property. *Id.*

The city urged the court to adopt a variation of the "relations back doctrine" applied in *City of Crystal Lake v. LaSalle National Bank*, 121 Ill. App. 3d 346, 459 N.E. 2d 643 (1984) and *San Bernardino Valley Municipal Water District v. Gage Canal Co.*, 226 Cal. App. 2d 206, 37 Cal. Rptr. 856 (1964). Under this doctrine title does not vest until the condemnor pays just compensation, but when payment is made, the title relates back to the date of the filing of the condemnation petition. Normally,

this rule is applied to tax liens or other rights and obligations which have accrued after filing. These cases, however, extend the doctrine to resolve competing claims for condemnation by adjoining municipalities and determine the rights of the parties from the date of filing.

Noting that the precedents cited do not address the issue of intangible property, the court was nonetheless persuaded that the statutory framework provided by the Maryland Legislature makes clear that "until the condemning authority pays just compensation, no right to possession is obtained." *Colts*, 624 F. Supp. at 283.

Accepting *arguendo*, the application of the "relation back doctrine" to the instant case, the court next addressed the issue of the appropriate standard for determining situs of an intangible, and three standards were offered.

First, as the city urged, the power of eminent domain is co-extensive with personal jurisdiction and therefore the appropriate standard is the "minimum contacts" analysis established by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, such a standard would be unworkable in view of the requirement that a state's power of eminent domain must be exclusive of another state's power.

Highly analogous to condemnation, escheat proceedings often involve determining the situs of intangible property. In such a proceeding, the state takes title to property abandoned by its owner. In the late 1940's, the courts utilized the "minimum contacts" analysis to determine situs.

See *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948); *Standard Oil v. New Jersey*, 341 U.S. 428 (1951). Later cases abandoned this analysis in favor of a variation of the concept of *mobilia sequuntur personam* (moveables follow the person) known as the "last known address" rule. Thus, for escheat purposes, the situs of intangibles is determined by the last known domicile of the owner. This rule however, proves to be unworkable as applied to condemnation proceedings. "Unlike escheat proceedings, where the location of the owner is usually unknown, condemnation simply requires the court to determine where, among two or more possible choices, the property was located on a given date." *Colts*, 624 F. Supp. at 287.

The standard to determine situs in *City of Oakland v. Oakland Raiders*, 183 Cal. Rptr. 673, rested on three factors: the principle place of business; the designated NFL authorized site for the team's home games; and the primary locale for the team's tangible property. *Id.* 183 Cal. Rptr. at 682. Applying a similar analysis to the instant case, the court set out three factors which it had found determinative that the Colts were not in Maryland on March 30, 1984. First, the principle place of business was not in Maryland as no further day-to-day business was conducted in Maryland after March 28. Second, the team's essential tangible property was in Indianapolis by March 30, 1984. Finally, it was Irsay's intention that the Colts would be outside the jurisdiction by the time any eminent domain action was filed. *Colts*, 624 F. Supp. at 289.



Although this analysis provides an unclear framework to be applied in other condemnation proceedings, the court clearly requires the condemning authority to have substantial contacts with the intangible property before that sovereign's territory will be deemed as the situs.

The use of eminent domain is restrained by the requirements of public use and just compensation. The city's failure to pay just compensation at a time when the franchise was located in Maryland obviated the need for the court to test the basic underlying assumption upon which their decision rests. This assumption is that the acquisition of a professional sports franchise constitutes a valid public use.

Maryland has evidenced a clear intent not to limit the public use doctrine to the narrow interpretation that a "public use" means "use by the public." See *Marchant v. Baltimore*, 146 Md. 573, 126 A. 884 (1924); *Prince Georges County v. Collington Crossroads*, 275 Md. 171, 339 A.2d 278 (1975) (For case law supporting the narrow interpretation see *Karesh v. City Council*, 271 S.C. 339, 247 S.E. 2d 342 (1978)). However, acceptance of Emergency Bill No. 1042 and of the views expressed in *City of Oakland v. Oakland Raiders*, 183 Cal. Rptr. 673, constitute an unwarranted and substantial expansion of a sovereign's power to condemn. The court's decision implicitly expands the notion of public use to such an extent that it has become a meaningless restraint upon the application of eminent domain.

What then are the implications of a power so broad as to enable a sovereign to condemn a viable business and justify their taking upon an obscure belief that they are indirectly benefiting the public? Indeed, no one knows where the line is now drawn but such an unprecedented expansion strikes at the very heart of our basic property rights inherent in the United States Constitution. Until the legislature or the judiciary takes responsibility for establishing guidelines and limitations, these rights remain extremely vulnerable.

— Thomas J. Drechsler



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