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Recent Developments: Mandel v. O'Hara: Governor Enjoys Absolute Immunity Based on Approval or Veto of Legislative Enactments

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section 541(c)(2) did not encompass the restrictions on alienation of plan benefits in 29 U.S.C. §1056(d)(1). Rather, the trustee argued that the term referred “only to plans with transfer restrictions enforceable under state spendthrift trust law.” *Moore*, 907 F.2d at 1477. The court of appeals rejected the trustee’s overly restrictive interpretation of section 541(c)(2) and held that the term was not limited to state spendthrift trust law. *Id.*

First, the court found nothing in the plain language of section 541(c)(2) to suggest that the term “applicable non-bankruptcy law” refers exclusively to state law. The court stated that the language means exactly what it says, thus encompassing all laws, state and federal, under which a restriction on transfer can be enforced. *Id.*

Furthermore, the court found that the identical language in other provisions of the Bankruptcy Code had been determined to apply to federal as well as state law. For example, in *In re Ahead By a Length, Inc.*, 100 B.R. 157 (Bankr., S.D.N.Y. 1989), the bankruptcy court found “applicable nonbankruptcy law” within the provisions of 11 U.S.C. §108(a) to include, inter alia, the Racketeer Influence and Corrupt Organization Act. The court thus concluded that it would be “incongruous to give the same phrase in Section 541(c)(2) a narrower construction than the identical phrase other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute.” *Moore*, 907 F.2d at 1478. The court further concluded that, had Congress intended the term “applicable nonbankruptcy law” to encompass only state law, it would have stated so explicitly, as it had in other sections of the Code. *Id.* (citing 11 U.S.C. §522(b)(1) & (2)).

Acknowledging the trustee’s argument that several circuit courts have determined the term “applicable non-bankruptcy law” in section 541(c)(2) to refer only to state spendthrift trust laws, the court distinguished those decisions as involving self-settled trusts where the settlor was the beneficiary and had powers to amend or terminate the trust without penalty. *Id.* In contrast, the beneficiaries of the Springs Indus-

tries’ plan could not control the trust, could not borrow against it, and could not amend the trust.

The court also rejected the trustee’s appeal to the legislative history of section 541(c)(2), finding such an approach inappropriate, since the language of the statute was clear. *Id.* at 1478-79. Furthermore, the court noted that even if a review of the legislative history were relevant, it would be inconclusive. The court found that Congress’ repeated emphasis on state spendthrift trust law in the legislative reports accompanying section 541(c)(2) indicated merely its intentions to include state spendthrift law within the restrictions of transfer enforceable under “applicable nonbankruptcy law.” *Id.* at 1479. Thus, found the court, Congress was treating interests in plans containing valid spendthrift clauses in the same way as prior to the Bankruptcy Reform Act of 1978, when such interests were not property of the bankrupt’s estate. *Id.* The court reiterated, “[n]othing in the legislative history indicates . . . that Congress meant ‘applicable nonbankruptcy law’ to refer exclusively to state spendthrift trust law.” *Id.*

Having concluded that the term “applicable nonbankruptcy law” may include federal law, the court went on to consider the issue of whether ERISA constitutes “applicable nonbankruptcy law” so that the debtors’ interests in the ERISA-qualified plan were properly excluded from the estates under section 541(c)(2). The court found that the primary purpose of ERISA was to secure employees’ retirement income so that a worker promised a retirement benefit would actually receive it. *Id.* ERISA secures pension benefits primarily by restricting the assignment and alienation of those benefits. *Id.* at 1480. Because these non-alienability provisions deny general creditors, as well as plan participants, access to vested benefits, the court concluded that ERISA “constitutes ‘applicable nonbankruptcy law’ under which restrictions on the transfer of pension interests may be enforced.” *Id.* Thus, the court concluded, “[u]nder the plain and simple language of section 541(c)(2), if the ERISA anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee.” *Id.*

at 1478 (quoting *In re Threewitt*, 24 B.R. 927, 929 (D. Kan. 1982)).

In finding ERISA to constitute applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code, the United States Court of Appeals for the Fourth Circuit ensured that neither the vagaries of state laws, nor the particularities of state spendthrift trust law would continue to threaten the security of employee retirement benefits, thus furthering ERISA’s purpose of uniform treatment of pension benefits across the country.

— *Mary Jo Murphy*

***Mandel v. O'Hara*: GOVERNOR ENJOYS ABSOLUTE IMMUNITY BASED ON APPROVAL OR VETO OF LEGISLATIVE ENACTMENTS.**

In *Mandel v. O'Hara*, 320 Md. 103, 576 A.2d 766 (1990), the Court of Appeals of Maryland held that a governor could not be held liable for damages in tort based upon his veto or approval of legislation. The absolute immunity is of the same type which members of the General Assembly enjoy when voting for or against legislative bills and applies even if corrupt motives underlie the exercise of power.

During 1971, Marlboro racetrack made an agreement to buy eighteen racing days from another track which conducted horse racing with parimutuel betting. The General Assembly approved the transfer which subsequently was vetoed by Governor Mandel. As a result, James F. O'Hara, III and Michael P. O'Hara sold their stock in Marlboro. Thereafter, the General Assembly overrode the veto and Marlboro merged with another entity that conducted horse racing with parimutuel betting.

The O'Haras brought suit against the governor and others, based on a theory of conspiracy. They contended that by vetoing the bill, Governor Mandel planned to depress the value of the Marlboro stock, acquire the stock, then restore its value by inducing the General Assembly to override the veto. At trial, the governor’s motion for summary judgment based on absolute immunity was denied. Governor Mandel appealed to the Court of Special Appeals of Maryland where he was granted a stay. The court of appeals granted certiorari before determination on the merits to determine if a Governor

of Maryland enjoyed absolute immunity when vetoing or approving legislation.

The Court of Appeals of Maryland began its analysis by noting that it was undisputed that some degree of public official immunity applied to the governor when performing gubernatorial duties involving the exercise of discretion. *Mandel*, 320 Md. at 107, 576 A.2d at 768. The question before the court was whether such immunity was absolute or qualified. An absolute immunity from tort liability, the court stated, "stands even if the official acts in bad faith, or with malice or corrupt motives, and protects both judges and legislators, so long as their acts are 'judicial' or legislative in nature." *Id.* (quoting Prosser & Keeton, *The Law of Torts*, §132, at 1056-57 (5th ed. 1984)). Governor Mandel argued that his veto/approval function was a legislative one, and therefore should be protected to the same extent as legislators.

Due to the lack of Maryland precedence regarding gubernatorial immunity specifically, the court based its analysis on cases dealing with 42 U.S.C. §1983, a statute which the court believed to be the driving force in the development of public official immunity. Section 1983 allows suits against public officials who have caused the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." 42 U.S.C. §1983 (1982). The cases, as noted by the court of appeals, took a "functional" approach to immunity law in that "[t]he scope of immunity is determined by function, not office." *Mandel* at 120, 576 A.2d at 774 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 785 (1982) (White, J., dissenting)).

The court of appeals found that when applied to cases dealing with executive immunity, the functional approach produced disparate results. In *Scheuer v. Rhodes*, for example, the Supreme Court suggested that a governor would enjoy qualified immunity for his deployment of National Guard units. The Court analogized such action to possible arrest situations confronted by police officers whose actions are subject to good faith. *Mandel* at 117, 576 A.2d at 772 (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

In contrast, the Court found in *Imbler v. Pachtman*, 424 U.S. 420 (1976) that a state prosecutor's function of initiating

and presenting a case was covered by absolute immunity since the discretion involved was similar to that of a judge. "Thus, '[a]lthough a qualified immunity from damages liability should be the general rule for executive officials[,] . . . there are some officials whose special functions require a full exemption from liability.'" *Mandel*, at 120, 576 A.2d at 774 (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)).

When applying the functional approach to the facts *sub judice*, the court of appeals found that the function of the veto, "as a matter of historical development as well as theory[,] . . . [was] a legislative power." *Id.* at 121-22, 576 A.2d at 775 (quoting E. Mason, *The Veto Power*, 100 (A. Hart. ed. 1967)). As such, the exercise of gubernatorial veto power requires that it is absolutely immune from tort liability. *Id.* The court explained that the act of deliberating on the constitutionality, justice, and public expediency of legislative measures before deciding whether or not to exercise veto power was "plainly the function of a legislator." *Mandel* at 122, 576 A.2d at 775 (quoting *People v. Bowmen*, 21 N.Y. 517, 521-22 (1860)).

In support of its conclusion, the court next cited *Hernandez v. City of Lafayette*, 643 F.2d 1188 (1982), in which the United States Court of Appeals for the Fifth Circuit squarely held that there is absolute legislative immunity under §1983, which encompassed the executive veto function. *Mandel*, at 126-27, 576 A.2d at 777-78. In *Hernandez*, the court of appeals stated that "[t]he mayor's veto, like the veto of the President or a state governor, is undeniably a part of the legislative process." *Id.* (quoting *Hernandez v. City of Lafayette*, 643 F.2d at 1193-94 (1982)).

The court rejected the O'Haras' argument that the governor must be exercising the state's entire legislative power on the subject at issue in order to assert absolute immunity. The court did not accept such language as a condition precedent to absolute immunity, but rather found that it could be asserted for lesser delegations, such as the power to veto.

By equating the governor's veto power to a legislative function, the Court of Appeals of Maryland specifically noted that it was confining its holding to the

point of intersection of executive and legislative powers. Therefore, although a Governor of Maryland is an elected official, he will nonetheless enjoy absolute immunity when exercising his constitutionally mandated power in a legislative capacity.

Mandel represents a significant broadening of the immunity doctrine in an area which had never been considered in regard to the highest executive official of the state. Specifically, a Governor of Maryland enjoys absolute immunity when exercising the official function of vetoing or approving legislation, regardless of the motives that may underlie the function. This is in accord with the absolute immunity which the other branches of government have long enjoyed. By so ruling, the evidentiary problems that would arise if a governor were held accountable for every veto decision he made were avoided. So too was avoided the possible separation of powers problem that may occur if the judiciary was empowered with the ability to judge the acts of the executive when exercising duties which he is constitutionally bound to perform. The court's decision permits such judgment to remain with the governor's constituents, where it belongs.

— Lesley M. Brand

***Taxiera v. Malkus*: AFTER-BORN ILLEGITIMATE CHILDREN HAVE A RIGHT TO ESTABLISH PATERNITY OF THEIR DECEASED PUTATIVE FATHER**

In *Taxiera v. Malkus*, 320 Md. 471, 578 A.2d 761 (1990), the Court of Appeals of Maryland ruled that an illegitimate child born after her alleged father's death has the right to establish the paternity of her putative father. In so holding, the court stated that such an interpretation of Maryland's paternity statutes conforms with the legislature's intentions of promoting the welfare and best interests of children born out of wedlock.

Elaine Taxiera, a Delaware resident, filed suit in the Circuit Court for Dorchester County against Frederick Malkus, the Personal Representative of the Estate of Levi Brown, Jr. *Id.* at 473, 578 A.2d at 762. She sought a declaration under §1-208 of the Estates and Trusts Article that Brown was the father of her