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# Recent Developments: Ferro v. Lewis: The Maryland Motorcycle Helmet Statute Is Enforceable despite a Lack of Publication of a List of Approved Helmets

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## *Ferro v. Lewis:*

In a case of first impression, the Court of Appeals of Maryland addressed Maryland's motorcycle helmet regulations in *Ferro v. Lewis*, 348 Md. 593, 705 A.2d 311 (1998). The Maryland Motor Vehicle Administration, complying with Federal regulations, did not publish a list of approved headgear, as required by state law. Although the Federal regulation was highly technical and complicated, the court held that the statute was not void for vagueness because there was a way for citizens to determine which helmets were in compliance.

Plaintiff, William Michael Lewis ("Lewis"), a Maryland resident and an avid motorcyclist, had received several citations for not wearing headgear in compliance with section 21-1306 of the Transportation Article of the Annotated Code of Maryland. Lewis sought a declaratory judgment and an injunction prohibiting the enforcement of section 21-1306 against the Administrator of the Motor Vehicle Administration ("MVA"), the Superintendent of the Maryland State Police and the Sheriff of St. Mary's County. Section 21-1306 (b) provides that protective headgear must be worn when riding on or operating a motorcycle. Additionally, section 21-1306 (d) requires the Administrator to publish a list of headgear approved by name and type. Failure to comply with section 21-1306 could result in a misdemeanor conviction and a fine of up to \$500.

The Circuit Court for St. Mary's County ruled for Lewis and granted a declaratory judgment holding section 21-1306 invalid until the

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By Gregory P. Jimeno

Administrator published a list of approved headgear. The circuit court stayed the issuance of the injunction pending appeal. The court of appeals granted certiorari, bypassing the court of special appeals.

The court of appeals began its analysis with the history of motorcycle helmet laws impacting Maryland. *Ferro*, 348 Md. at 596, 705 A.2d at 312-13. In 1966, the United States Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 which contained a federal preemption provision. *Id.* at 596-97, 705 A.2d at 312-13 (citing 49 U.S.C. §§ 30101-69 (1966)). The preemption provision stated that whenever a federal regulation was in effect under this section, it would take precedence over any state standard. *Id.* at 597, 705 A.2d 313. (citing 49 U.S.C. § 30103(b)(1)(1966)). However, when the state standard is dealing with equipment, it may impose a standard stronger than the federal standard. *Id.* In 1973, the Federal Department of Transportation, or "DOT", developed the first Federal Motor Vehicle Safety Standard ("FMVSS") dealing with motorcycle helmets. *Id.* at 601, 705 A.2d at 315. The FMVSS contained

provisions calling for minimum performance for motorcycle helmets, testing procedures and a requirement that all helmets meeting the standard have a Department of Transportation label affixed to them. *Id.*

In 1992, the MVA evaluated its motorcycle helmet regulations and discovered that the FMVSS was now in effect. *Id.* at 602, 705 A.2d at 315. In a memorandum recommending abandoning the publication requirement and adopting the FMVSS, the MVA's Associate Administrator for Field Services, stated, "[c]hanging the regulations to the FMVSS standards may eliminate the need to publish these lists because all helmets must have the DOT label affixed to them." *Id.* at 602, 705 A.2d at 316. In 1993, the MVA adopted the FMVSS and the present, amended form of the MVA regulation states "[t]he Administration shall accept all helmets which comply with FMVSS. . . ." *Id.* at 604, 705 A.2d at 316-17.

Lewis contended that the statute, together with the regulation, was unenforceable and impermissibly vague, since the FMVSS was highly technical and designed for use by manufacturers and that an ordinary layperson could not determine which helmets were in compliance. *Id.* at 605, 705 A.2d at 317. The standard for determining whether a statute is void for vagueness is that the statute must "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.* at 607, 705 A.2d at 318 (quoting *Bowers v. State*, 283 Md. 115, 120, 389 A.2d 341, 345

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(1978)). The MVA argued that a facial challenge to the statute claiming void for vagueness should not be permitted because there was not a constitutional liberty at stake. *Id.* at 607, 705 A.2d at 318. The MVA's argument was based on the rule that, when there is no liberty interest being intruded upon, the void-for-vagueness argument should be determined by the facts of each case and "it will usually be immaterial that the statute is of questionable applicability in foreseeable marginal situations...." *Id.* (quoting *Bowers* 283 Md. at 122, 389 A.2d at 346). The court rejected the MVA's argument, because Lewis' attack of the statute was not based on the substance of the law, but rather whether the way the law was being enforced required compliance. *Id.* at 608, 705 A.2d at 318.

The MVA also argued that Lewis did not have standing to attack the statute because there were instances in which Lewis operated a motorcycle without wearing headgear complying with FMVSS. *Id.* The court found that certain types of headgear worn by Lewis, such as a bandanna, would not have been in compliance with FMVSS. *Id.* at 608-09, 705 A.2d at 319. However, the issue before the court was whether these other types of soft-fabric headgear Lewis wore did comply with FMVSS. *Id.* 608-09, 705 A.2d at 318-19. The court noted the amount of research Lewis conducted in order to ascertain what types of headgear were permissible. *Id.* He received and read a copy of the FMVSS from DOT and sought help in interpreting it from the MVA, the State's Attorney for St. Mary's County and from a "motorcycle rights organization." *Id.* In addition, he traveled to Washington, D.C., to examine

results of motorcycle helmet tests located in the National Highway Traffic Safety Administration library and spent \$54 to purchase copies of the reports. *Id.* The court held that Lewis had gone to great lengths in an attempt to comply with FMVSS, and that he would continue to face criminal charges for not wearing the correct headgear; therefore, Lewis had standing to challenge the statute. *Id.*

The court then analyzed several cases the MVA cited from across the country which addressed the same type of vagueness arguments in similar helmet statutes. *Id.* The test used in those cases was whether there was "a practical way for citizens to ascertain which helmets were lawful for use." *Id.* at 609-10, 705 A.2d at 319. One way used to determine if a helmet was in compliance with FMVSS is if it contained a DOT label. *Id.* Because the standard relied on manufacturers to determine which headgear were in compliance, not every helmet labeled was in fact in compliance with FMVSS. *Id.* at 610, 705 A.2d 319. It was unlikely, however, that anyone would be arrested for wearing a helmet which contained a DOT label which did not actually comply with FMVSS. *Id.* at 614, 705 A.2d at 321.

The court acknowledged that FMVSS was difficult to read, that an average person could not read it to determine what helmets were acceptable, and that the labeling procedures were not always reliable. *Id.* at 610-11, 705 A.2d at 320. However, the court found that there was a way to ascertain which helmets were in compliance with FMVSS. *Id.* In 1994, DOT published a motorcycle helmet brochure titled, "Does Your Helmet

Pass The Test: A Safety Guide, U.S. Department of Transportation." *Id.* The brochure listed by brand and model "all known helmets available on the marketplace" and whether each helmet satisfied the testing procedures. *Id.* at 611-12, 705 A.2d at 320. Additionally, the DOT brochure included a "hotline" number from which information about a helmet not "available on the market" could be obtained. *Id.* at 612 n.9, 705 A.2d at 320 n.9. Because of the inaccuracies of the labeling procedures, those who do not wish to rely solely on the DOT labels could consult the brochure or the hotline. *Id.* at 614, 705 A.2d at 321.

The court also rejected Lewis' argument that, by accepting helmets complying with FMVSS, the MVA was essentially approving certain helmets, and therefore, was required to publish a list of the helmets. *Id.* at 614, 705 A.2d at 321-22. The court held that the Maryland statute and regulation only require publication of headgear approved by the MVA. *Id.* at 614-15, 705 A.2d at 321-22. Because Maryland was not formally approving headgear, there was no statutory duty to publish. *Id.*

The court's decision appears to neglect a primary purpose behind the Maryland statute. The General Assembly originally required the publication of an approved headgear list to inform the public as to which specific types were acceptable. The helmet law has undergone changes through the years, but the publication provision has remained intact since 1968. The effect of this decision will be to place the burden on the citizen to investigate which type of headgear is acceptable, instead of the MVA publishing a list.