MARYLAND LAW REGARDING CONSUMER CLASS ACTIONS UNDER THE MARYLAND CONSUMER PROTECTION ACT

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This examination of Maryland law regarding consumer class actions brought under the Maryland Consumer Protection Act is by no means exhaustive and serves only to address specific issues raised in this survey. Other reviews provide insightful guidance and should be consulted as well. *See, e.g.*, A.B.A., Survey of State Class Action Law (2007-08); Charles B. Shafer, Maryland Consumer Law (MICPEL 2006). This review describes the Act and examines class actions brought under it, while providing guidance regarding the parties that may sue and be sued, substantive requirements, damages, preemption and removal, among other related issues.

I. Maryland's Consumer Protection Act

The Maryland Consumer Protection Act ("MCPA" or "the Act") has existed since the first version was "enacted by Chapter 388 of the Acts of 1967 and codified in Maryland Code (1957, 1969 Repl. Vol.) as Article 83, §§ 19 through 27." *Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 710 (Md. 1999). It was enlarged considerably in 1974 when, among other things, a list of prohibited conduct now found in Section 13-301 was added. *Id.* at 711. It arose out of "'mounting concern over the increase of deceptive practices in connection with sales of merchandise, real property, and services and the extension of credit.'" *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 633 (Md. 1995) (quoting Md. Code, Com. Law § 13-102(a)(1) (1975, 1990 Repl. Vol.)). The modern MCPA is found in Title 13 of the Commercial Law Article of the Maryland Code.

The Act "constitutes a group of laws that are quite broad both in conduct prescribed and businesses covered." Shafer, *supra*, § 6.1. It sets forth "certain minimum statewide standards for the protection of consumers across the State . . . ." Md. Code Ann., Com. Law § 13-102(b)(1) (West 2008);[1] *see also id.* § 13-103(a). It establishes a Division of Consumer Protection in the State Attorney General's Office, *id.* § 13-201, and defines the Attorney General's role, *id.* § 13-203.

Various unfair or deceptive trade practices in the offer, sale, lease, rental, loan, or bailment of any consumer goods, realty, or services are prohibited. *Id.* § 13-303(1)-(2). The

[1] All citations to the Maryland code are to West 2008 unless otherwise indicated.

extension of consumer credit and collection of consumer debts are also transactions to which the Act applies. *Id.* § 13-303(3)-(4). The MCPA provides remedies for false or misleading statements, representations, omissions, or advertisements, and bars use of confessed judgment clauses waiving a consumer's right to assert a legal defense and liability limitation clauses in certain consumer realty contracts, among other practices. *Id.* § 13-301. Section 13-301 also includes violations of other provisions of the Maryland Code under the MCPA by incorporating cross-references to various titles within the Code. *Id.* § 13-301(14). Examples include the Maryland Consumer Debt Collection Act, the Automotive Warranty Enforcement Act, the Maryland Telephone Solicitation Act, and certain subtitles within the Real Property Article. *Id.*

Additionally, Title 14 of the Maryland Code's Commercial Law Article, named "Miscellaneous Consumer Provisions," contains approximately 30 miscellaneous consumer protection provisions. Md. Code Ann., Com. Law §§ 14-201–14-3501. These provisions govern specific products, *see, e.g., id.* §§ 14-801–14-802 (used radio and televisions sets); practices, *see, e.g., id.* §§ 14-301–14-306 (door-to-door sales); and businesses, *see, e.g., id.* §§ 14-1001–14-1009 (automotive repair facilities). *See also id.* §§ 14-401–14-410 (Maryland Service Contracts and Consumer Products Guaranty Act); *id.* §§ 14-4A-01–14-4A-14 (Vehicle Protection Products Act); *id.* §§ 14-1301–14-1315 (miscellaneous provisions); *id.* §§ 14-1401–14-1403 (Motor Vehicle Manufacturers' Warranty Adjustment Programs); *id.* §§ 14-3501–14-3508 (Maryland Personal Information Protection Act). "Most of the practices prohibited in Title 14 are explicitly defined as violations of the [M]CPA. However, there are provisions that contain their own penalties." Shafer, *supra*, § 6.1. Other provisions of the Maryland Code can also be construed as consumer protection laws as that term is commonly defined,[2] such as Commercial Law Article, Title 11 provisions regulating trade address false advertising. *See* Md. Code Ann., Com. Law §§ 11-701–11-707. *See also* Md. Code Ann., Fin. Inst. §§ 12-901–12-931 (Maryland Debt Management Services Act).

II. Neither the MCPA Nor Any Other Consumer Protection-Related Statute Expressly Permit or Prohibit Bringing Class Actions; However, Maryland Courts Have Allowed Class Actions to Proceed under the MCPA.

Maryland's Consumer Protection Act is silent regarding class actions. *See* Md. Code Ann., Com. Law § 13-408; *see also* Dee Pridgen & Richard M. Alderman, Consumer Protection and the Law, Appendix 6A (West 2007-08 ed.); Marshall A. Leaffer & Michael H. Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of FTC Jurisprudence, 48 Geo. Wash. L. Rev. 521, 549 n.189, Appendix col. 11 (1980). In the absence of an express grant or prohibition of class actions, plaintiffs must pursue their class action suit under the MCPA subject to Maryland's general rules on class actions. *See* Pridgen & Alderman, *supra*, § 6.29; Leaffer & Lipson, 48 Geo. Wash. L. Rev. at 550. The controlling provision is Maryland Rule of Civil Procedure 2-231. *See also* A.B.A., Survey of State Class Action Law (Maryland section reviewing decisions interpreting Rule 2-231). As one observer noted, "there is a relative dearth of reported cases in which class certification was approved for [M]CPA claims."

[2] Black's Legal Dictionary defines consumer protection law as "statute[s] designed to protect consumers against unfair trade or credit practices involving consumer goods, as well as to protect consumers against faulty and dangerous goods." Black's Law Dictionary 136 (2nd pocket ed. 2001).

David J. Federbush, Rebuttable Presumption of Reliance in Class Actions, 36 Md. Bar J. 52, 52 (2003). Still, there are examples of courts certifying class actions brought under the Act.

In those rare examples of a published opinion involving a class action and the MCPA, it is often unclear if the proposed class was ever certified or challenged, because the courts merely note that the original action was brought or amended as a class action without addressing whether the class was certified or denied. *See, e.g., McDaniel v. Am. Honda Fin. Corp.*, 926 A.2d 757, 760 (Md. 2007) (putative class members alleged violation of MCPA); *Green v. H & R Block, Inc.*, 735 A.2d 1039, 1043, 1057-59 (Md. 1999) (class action on behalf of thousands of Maryland residents who participated in H & R Block's "Rapid Anticipation Loan" program for material omission and misleading disclosure statement in violation of MCPA); *Morris*, 667 A.2d at 635 (class action by homeowners against plywood manufacturers for false and misleading statements or representations); *Crowder v. Master Fin., Inc.*, 933 A.2d 905, 921 (Md. Ct. Spec. App. 2007) (borrowers brought a class action suit against lenders for alleged violations of the MCPA, but their claim was barred by the statute of limitations). There are, however, instances where it is clear. For example, a class was certified in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 233 F.R.D. 229, 230 (D. Mass. 2006), where the Maryland Consumer Protection Act was applied in Class One's claims regarding Medicare co-payments. *See also In re Motor Fuel Temperature Sales Practices Litig.*, 534 F. Supp. 2d 1214, 1215, 1220 (D. Kan. 2008) (putative class action for damages and injunctive relief against motor fuel retailers asserted under Maryland consumer protection statute, among others).

Maryland's circuit courts have certified classes pursuing MCPA claims. For example, on October 17, 2005, the Baltimore County Circuit Court approved a settlement of a class action alleging violations of the MCPA concerning overcharges on home equity loans. *See Adashek v. Wells Fargo Bank*, No. 03-C-03-010367 (Md. Cir. Ct. 2003). A class action was certified in a suit for unfair and deceptive trade practices under the MCPA on April 24, 1996 in Montgomery County, Maryland. *See Sternberger v. Kettler Bros., Inc.*, 718 A.2d 619, 619 (Md. Ct. Spec. App. 1998) (certified class action captioned *Sternberger v. Kettler Brothers, Inc.*, No. 150887V (Md. Cir. Ct. 1996)). Plaintiffs' claims there ultimately failed because they were barred by the statute of limitations, a decision that the Court of Special Appeals affirmed. *Id.* at 620. Another class action was certified in the Circuit Court for Howard County based on causes of action under the MCPA. *See Penn Nat'l. Ins. Co. v. E. Homes, Inc.*, No. RDB-07-672, 2007 WL 4179428, at *1, *8 (D. Md. Nov. 19, 2007) (noting that the related underlying class action suit was certified) (certified class action captioned *Royal v. E. Homes, Inc.*, No. 13-C-04-059581 (Md. Cir. Ct. 2004)). Finally, several class actions were certified against cable television providers that were premised on violations of the MCPA, including *Maisonette v. Jones Intercable*, No. CAL 98-02283, filed February 3, 1998 in Prince Georges County Circuit Court, and *Shubilla v. Prime Communications*, No. 03-03694, filed June 14, 1999 in Montgomery County Circuit Court.

Whether plaintiffs can assert a class action under the MCPA ultimately requires a case-by-case analysis. An important consideration is the predominance of common question issue. *See* Leaffer & Lipson, 48 Geo. Wash. L. Rev. at 550. Courts will not certify classes when determination of liability hinges on resolution of numerous individualized factual issues. *See, e.g., Richardson v. Nationwide Mortgage Corp.*, No. M-84-240, 1985 WL 9133, at *1-*4 (D. Md. Oct. 4, 1985) (plaintiffs' motion for certification of class action brought for violations of the

MCPA by borrowers who transacted inter-only one-year balloon loans denied because alleged misrepresentations and/or omissions needed to be examined individually). Two cases illustrate this principle well and are discussed in turn.

A. Plaintiffs' Primary Barrier to Class Certification Will Likely Be Individual Issues Predominating over Common Issues.

The first case, *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200 (Md. 2000), demonstrates the difficulty potential class members face. There, the Maryland Court of Appeals overturned a lower court's certification of a class action asserting various claims in a mass tort tobacco case, but discussed the MCPA only sparsely. The court held that individual issues overwhelmingly predominated over common issues, which precluded class certification. *See id.* at 239-40.

The court found that the statutory causes of action under the MCPA contributed to tipping the sales of the predominance inquiry against plaintiffs. *Id.* at 234. The court noted that a class action was unsuitable in this case because plaintiffs would have to prove individual reliance on each of the alleged misrepresentations and material omissions. *Id.* at 234-35. Thus, the court concluded that "individual issues overwhelmingly predominate[d] over common issues." *Id.* at 239 (citation omitted).

The court's holding could be interpreted as "indicating that even as to post-liability determinations of entitlement to restitution under the CPA, the huge class size meant those individualized factual showings further contributed to the predominance of individual issues and unmanageability of the case as a whole." Federbush, 36 Md. Bar J. at 53. Thus, the court's observation "as to 'the burden placed on [Plaintiffs] of proving individual reliance' can . . . be viewed as inapplicable to, or at most dictum with respect to, the CPA claim." *Id.* The second case examined herein demonstrates how plaintiffs can overcome the barriers articulated in *Richardson* and *Angeletti*.

1. Plaintiffs Can Avoid the Individual Issues Barrier by Asserting Uniform Allegations.

A MCPA class action suit filed on August 23, 2000 in Baltimore County, Maryland, *Duffy v. Jerry's Chevrolet, Inc.*, No. 03-C-00-008650 (Md. Cir. Ct. 2000), was certified despite alleged individualized issues. Defendant car dealer's argued "that because 'each customer negotiated his or her agreement individually, based on individual circumstances and market conditions,'" the court could not find that there were facts sufficiently common to satisfy the commonality requirement. (Order Certifying Class 3, Aug. 21, 2001.)[3] Defendant averred further that plaintiff car buyers also differed in whether, and to what extent, they read or relied on window stickers, paper disclosures, and other information. (*Id.*)

The court rejected these arguments, noting "that '[t]he threshold issue of commonality is not a high one and is easily met in most cases.'" (*Id.* at 4 (citing *Angeletti*, 752 A.2d at 225) (internal brackets omitted).) The court emphasized that the defendant "used uniform contracts to

[3] A copy of the order is available online. *See* http://www.povertylaw.org/poverty-law-library/case/54500/54555/54555a.pdf (last visited October 14, 2008).

conduct its sales transactions which specifically charged consumers $595 for goods or services that were, according to the complaint, already included in the base price of each vehicle and the cost of which was reimbursed to Jerry's by the manufacturer." (*Id.*) The court held that "[t]hese factual circumstances sufficiently cross the threshold of commonality." (*Id.*) The court found common factual and legal issues in whether Jerry's included the $595 charge knowing they provided little or no benefit to the customer. (*Id.*)

The court also addressed the role of reliance on defendant's representations by the purported class members. The court held that "reliance may be established by inference or presumption from circumstantial evidence" (*id.* at 9 (citing *Amato v. G.M. Corp.*, 463 N.E.2d 625, 629 (Ohio Ct. App. 1982),) and that to hold otherwise would subvert the very intent of class actions and essentially preclude all class action suits based on MCPA violations or any claims requiring proof of reliance. (*Id.*) The court pointed to several examples in other jurisdictions where class certification was appropriate because plaintiffs were subjected to the same deceptive practices and therefore reliance was implied from the circumstances. (*Id.* (citing *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538 (E.D. Va. 2000); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174 (E.D.N.Y. 1999).)[4]

The court then distinguished the facts at issue from those before the court in *Angeletti*, noting that, although the plaintiffs in that case shared in common that their status as smokers, they differed as to the amount of smoking, severity of habit, and how they started smoking. (*Id.*) *Duffy*, by contrast, presented "sufficiently uniform circumstantial evidence to imply reliance." (*Id.* at 10.) "All of the class members purchased their cars from Jerry's under the same contract terms, which included" the $595 charge. (*Id.*) Whether each plaintiff read the disclosure pertaining to the fee was deemed irrelevant. (*See id.*) Thus, "[b]ecause this arguably bogus charge was included on the face of every contract as a component of the total suggested price of each vehicle and the class members completed their purchases with Jerry's, it may be presumed that these customers relied on the legality and validity of their contracts." (*Id.*) In sum, "Ms. Duffy's transaction with Jerry's and the claims arising under that sale . . . are virtually identical to those of the class. It is not necessary to delve into the individual details surrounding each class member's negotiation with the dealership" and the evidence offered to support each individual's claims would be the same. (*Id.* at 11.)

Attorneys considering class action suits under the MPCA, therefore, must be cognizant of the potential barrier of individualized factual issues, such as disparate contract terms and alleged misrepresentations. Some types of unfair and deceptive trade practices may lend themselves to class certification more readily than others. When drafting complaints, counsel should strive to craft homogeneous allegations that demonstrate uniformity of defendant's alleged violative conduct as to the class members. Plaintiffs should also remind courts that the adoption of federal deception and unfairness standards frequently render traditional arguments raised by defendants on the predominance issue irrelevant, including, for example, intent, reliance, and knowledge. *See* Leaffer & Lipson, 48 Geo. Wash. L. Rev. at 550-51; *see also infra* Part III.D (discussing the substantive elements that must be proven under the Act, including variance in scienter requirements among the various MCPA provisions).

[4] One commentator has called for a rebuttable presumption of reliance in MCPA class actions due to the potential difficulty in proof associated with reliance. *See* Federbush, *supra*.

III. Prospective Plaintiffs Face Various Challenges to Bringing Suit under the MCPA.

Potential plaintiffs must navigate the statutory framework to assert a cause of action under the MCPA. This involves consideration of both code provisions and case law to ensure that plaintiffs have standing, come within the Act's covered terms, and that the claims are actionable against the proposed defendants. Cases brought by the State involve additional procedural hurdles. Plaintiffs must also satisfy the substantive requirements. Each of these categories is discussed in turn.

A. Only the State and Consumers Have Standing to Assert Claims under the Act.

The State has standing to bring claims under the MCPA in certain circumstances. A party alleging an unfair or deceptive trade practice can file a complaint with the Attorney General's office. Md. Code Ann., Com. Law § 13-401. "The concept of *parens patriae* . . . gives a state standing to sue when the state seeks to protect a quasi-sovereign interest." *Edmond v. Consumer Prot. Div. (In re Edmond)*, 934 F.2d 1304, 1310 (4th Cir. 1991). "When proceeding under the Act, the Division serves a quasi-sovereign interest, the presence of which confers *parens patriae* standing." *Id.* at 1311.

Individuals can also bring a private cause of action to recover injury or loss sustained as a result of a prohibited practice. Md. Code Ann., Com. Law § 13-408. In such cases, standing is limited by the statutory definitions and enumerated exemptions. Standing and the definition of "consumer" present interrelated challenges under the Act, because Section 13-408(a) provides a private right of action to *any person* and "person" is defined to include corporations. *See id.* § 13-101(h). At the same time, however, the definition of "consumer" excludes businesses. *See id.* § 13-101(c).

A "consumer" under the MCPA is "an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit." Md. Code Ann., Com. Law § 13-101(c)(1). Consumers need not be direct purchasers. *See, e.g., Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 708 A.2d 1047, 1055 (Md. Ct. Spec. App. 1998), *aff'd*, 729 A.2d 981 (Md. 1999) (subsequent purchasers of real estate who can raise MCPA claims despite not being in privity with original builder). "Consumer" also includes sureties or co-obligors for consumers or "[a] licensee or recipient of computer information or computer programs under a consumer contract . . . ." Md. Code Ann., Com. Law § 13-101(c)(2).

The Act covers consumer transactions involving the offer, sale, lease, rental, loan, or bailment of any consumer goods, realty, or services, *id.* § 13-303(1)-(2), and the extension of consumer credit and collection of consumer debts, *id.* § 13-303(3)-(4).[5] It restricts standing, however, by covering only those transactions that are "primarily for personal, household, family or agricultural purposes." *Id.* § 13-101(d). In this way, businesses are excluded.

[5] Shafer cautions that while many of the terms in the Act can lead to overlapping statutory provisions, "these overlapping references should not be subjected to extremely sophisticated analysis and word parsing. Rather, this is an example of a legislature that wanted to be sure that everything that possibly should be covered is covered, and that there are no unintended gaps in the statute." Shafer, *supra*, § 6.21.

Consequently, courts have applied these definitions and transactional limitations to find that parties other than the State and consumers transacting primarily for noncommercial purposes do not have standing to assert claims under the Act in addition to the State. For example, corporate commercial entities do not have standing to assert claims under the Act. *See, e.g.*, *Fare Deals Ltd. v. World Choice Travel.Com, Inc.*, 180 F. Supp. 2d 678, 692, 698 (D. Md. 2001) (citing *Boatel Indus., Inc. v. Hester*, 550 A.2d 389, 398-99 (Md. Ct. Spec. App. 1988)); *Layton v. AAMCO Transmissions, Inc.*, 717 F. Supp. 368, 371 (D. Md. 1989) (franchisees are not consumers and cannot assert MCPA claims). Similarly, a trade association is excluded from the Act's purview because it does not come within the Act's definition of consumer. *See Scotch Whiskey Ass'n v. Majestic Distilling Co., Inc.*, 958 F.2d 594, 597 n.9 (4th Cir. 1992) (citing Md. Code Ann., Com. Law § 13-101(c)). There also "is no competitor standing under the CPA." *Penn-Plax, Inc. v. L. Schultz, Inc.*, 988 F. Supp. 906, 910 (D. Md. 1997). *But see Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077, 1088 (D. Md. 1995) (as discussed by the court in *Penn-Plax, Inc.*, standing seemingly was not raised in *Microsoft Corp.* and although the court granted relief under the MCPA to competitor in that case, defendant failed to attend hearing on plaintiff's motion for summary judgment). In sum, only consumers have standing to bring claims under the Act. *See Penn-Plax, Inc.*, 988 F. Supp. at 909 (citing *Layton*, 717 F. Supp. at 371; *Scotch Whiskey Ass'n*, 958 F.2d at 597 n.9; *Pig Improvement Co. v. Middle States Holding Co.*, 943 F. Supp. 392, 407 (D. Del. 1996). *But see Microsoft Corp.*, 910 F. Supp. at 1088.).

Hence, while the "any person" language found within Section 13-408, the provision providing for a private rights of action, seems broad enough to include businesses, courts have restricted "any person" to "consumers" as defined in Section 13-101(c) by focusing on the nature of the transaction to exclude businesses and prevent expansion of standing under the Act. *See Penn-Plax, Inc.*, 988 F. Supp. at 909 (quoting *Morris*, 667 A.2d at 635) (expressing concern that expanding the class of plaintiffs to businesses "'would serve only to reallocate the risks of loss under their contracts without providing any additional protection to consumers'") (other citation omitted). This is exemplified in *D & G Flooring, LLC v. Home Depot U.S.A., Inc.*, 346 F. Supp. 2d 818 (D. Md. 2004), where plaintiff D & G, a carpet installer, had an alleged agreement with Home Depot whereby D & G would provide installation services to Home Depot customers. *Id.* at 820-21. D & G did not have standing to bring claims under the MCPA because it did not purchase any goods from Home Depot for "personal, household, family, or agricultural purposes." *Id.* at 823.

B. The MCPA Expressly Exempts Certain Classes of Defendants, and Certain Transactions May Shield Some Defendants from Liability.

With the possible exception of Virginia, the MCPA seems to provide the broadest exemptions as compared to any other state. *See* Pridgen & Alderman, *supra*, Appendix 4A. The Act is limited to consumer transactions and exempts regulated industries, media, and professionals. *Id.*

It does not apply to services provided by professionals including, but not limited to, certified public accountants, lawyers, optometrists, and insurance companies authorized to conduct business in Maryland. Md. Code Ann., Com. Law § 13-104(1). People who are not

qualified to provide a particular service, or professionals not providing professional services or not acting in a professional capacity, may be sued under the MCPA. Shafer, *supra*, § 6.22. Nonprofessional aspects of a professional service may be covered by the Act, to the extent they are distinguishable from the professional acts. *Id.*

The Act is also inapplicable to public service companies to the extent their "services and operations are regulated by the Public Service Commission." Md. Code Ann., Com. Law § 13-104(2). Finally, the Act exempts certain media entities. Television or radio stations and publishers or printers of printed advertising that disseminate an ad that violates the Act, unless they commit violative conduct in the sale of their own goods or services or have knowledge that the advertising is in violation of the Act, are exempt. *Id.* § 13-104(3).

Other sections pertaining to specific practices include exceptions. For example, Section 13-305 covers offers of conditional prizes. It includes exceptions for trading stamps and state lottery tickets. *Id.* § 13-305(a). Insurance companies are exempted from the door-to-door sales provisions. *Id.* § 14-301(d)(2)(vi). Other provisions within the Maryland Code might also shield parties from liability. The court in *Jackson v. Dackman Co.*, No. 1080, 2008 WL 4164916 (Md. Ct. Spec. App. Sept. 10, 2008)[6] held that compliance with the Reduction of Lead Risk in Housing Act, which provides an opportunity for limited liability as an incentive for property owners to comply with lead health risk-reduction standards,[7] could bar MCPA claims. *See id.* at *18.

It seems courts have avoided making blanket determinations about whether certain products are consumer goods. Instead, courts have looked at the specific use of the goods in question and the nature of the transaction. Finding exemptions or that claims were asserted against the wrong party, courts have dismissed claims under the MCPA without having to create bright-line rules about specific consumer goods. Several examples demonstrate the contours of where courts have drawn the line regarding this variation of the exemption provisions.

Rather than finding vaccines to be nonconsumer goods, one court looked beyond the product in question and focused on the context of the transaction. In *Agbebaku v. Sigma Aldrich, Inc.*, No. 24-C-02-004175, 2003 WL 24258219 (Md. Cir. Ct. June 24, 2003), plaintiffs asserted that a vaccine was a consumer good. *Id.* at *10. The court noted that Section 13-104 of the MCPA exempts services provided by certain professionals, including "medical or dental practitioners." *Id.* Because "[v]accines are part of the medical services that physicians and other medical personnel recommend and administer to patients[,] . . . . the physicians and other medical personnel who actually select, recommend, and administer the vaccine are exempt from liability should any injuries result." *Id.* at *11. The court held, therefore, that "the manufacturer or distributor of the vaccine, an entity even more attenuated from the injured person than the medical practitioner who selected, recommended, and administered the vaccine, must also be exempt from liability under the CPA." *Id.*

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[6] This case was recently decided and Westlaw notes that "[t]his opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal." It was last checked on October 13, 2008. I suggest checking it before submitting it to see if it has been published officially.

[7] The Act is codified in Title 6, Subtitle 8 of the Environmental Article and the specific provisions discussed here can be found in Sections 6-835 and 6-836.

At first glance, it seems as though dental fillings are not covered by the Act. *See Hogan v. Md. State Dental Ass'n*, 843 A.2d 902, 906 (Md. Ct. Spec. App. 2004). Consumers, however, do not purchase dental fillings; rather, a practitioner selects and uses them as part of a professional service, and such professional services are expressly exempted from the Act. *Id.* The court in *Hogan* noted that the defendant association had not "manufactured, sold, distributed, implanted, or otherwise participated in the sale of dental fillings" and the alleged deceptive trade practice did not occur in the sale or offer for sale to the consumer. *Id.* (citing *Morris*, 667 A.2d at 636) ("the deceptive practice must occur in the sale or offer for sale to consumers"). Therefore, while it may seem the Act is inapplicable to dental fillings, *see id.* at 907, the court's analysis focused on the nature of the transaction, finding an exemption to preclude recovery, rather than insulating a specific product from the Act's authority. As the foregoing illustrates, the line between transactions covered under the Act and those beyond its boundaries is sometimes blurred. *See* Shafer, *supra*, § 1.2 (directing readers to compare *Morris*, 667 A.2d 624 (Md. 1995) ("seller of plywood to be used in home construction not seller of consumer goods") with *Hoffman v. Stamper*, 843 A.2d 153 (Md. Ct. Spec. App. 2004) ("appraisal made to lender was involved in the sale of realty") (*aff'd in part, rev'd in part, and remanded by*, 867 A.2d 276)).

C. The MCPA Does Not Explicitly Require Notice to Pursue Private Rights of Action, but Certain Actions Brought by the Attorney General Require Notice.

Seven days notice is required under the statute before the Attorney General seeks an injunction to prohibit a person presently engaged in or that has engaged in a violation from continuing to engage in the violation. Md. Code Ann., Com. Law § 13-406(a)-(b). The notice need not contain specific allegations and facts, but most outline the relief sought. *Smith v. Attorney Gen. of Md.*, 415 A.2d 651, 659-60 (Md. Ct. Spec. App. 1980)). Notice is not expressly required by the Act for private rights of action. *See* Pridgen & Alderman, *supra*, Appendix 5A.

D. Substantive Elements Required under the Act.

To bring a private cause of action under the Act, plaintiffs must demonstrate that an unfair or deceptive trade practice occurred, establish causation, and show they suffered actual harm. Shafer, *supra*, §§ 6.15-6.18. In construing the phrase "unfair or deceptive trade practices," the decisions of the Federal Trade Commission and federal courts interpreting the Federal Trade Commission Act are given "due consideration and weight" under the Act. Shafer, *supra*, § 6.20 (quoting Md. Code Ann., Com. Law § 13-105). "[A]n actionable cause of action under the CPA does not arise until the plaintiff has sustained injury resulting from the violation." *Berg*, 720 A.2d at 1287.

As discussed *supra* Part I, numerous kinds of conduct are prohibited by the MCPA. *See, e.g.*, Md. Code Ann., Com. Law § 13-301(1)–(14). Some provisions of the MCPA require scienter, while others do not. For example, scienter is required to establish a violation of Section 13-301(9).[8] *Adams v. NVR Homes, Inc.*, 135 F. Supp. 2d 675, 693 (D. Md. 2001) (citations omitted).

[8] Section 13-301(9) lists the following as an unfair or deceptive trade practice:

Plaintiffs pleading a violation under that provision "must produce evidence that the . . . [defendants] knowingly engaged in '[d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that [plaintiffs] rel[ied] on the same in connection with'" the transaction at issue. *Id.* (citation omitted). Under other provisions, proof of intent to deceive or defraud is not required by the Act. *See Golt v. Phillips*, 517 A.2d 328, 332-33 (Md. 1986); *Legg v. Castruccio*, 642 A.2d 906, 912 (Md. Ct. Spec. App. 1994). For example, the court in *Golt* held that Sections 13-301(1), (2), and (3)[9] "do[] not require scienter . . . the subsections require only a false or deceptive statement that has the capacity to mislead the consumer . . . ." 517 A.2d at 333. The requisite mental state can be inferred from the statutory language in other provisions. *See, e.g.*, Md. Code Ann., Com. Law §§ 13-301(5) (lack of intent to sell or supply), 13-301(7) (knowing false statement), or scienter is irrelevant, *see, e.g., id.* §§ 13-301(10) (phone solicitation requirements), 13-301(14) (references to violations of other statutory provisions).

Plaintiffs must identify specific misrepresentations or omissions to support their fraud allegations. *See Llyod v. G.M. Corp.*, 916 A.2d 259, 281-84 (Md. 2007). In *Llyod*, plaintiff automobile owners' pleadings were sufficiently particular where they alleged that defendant manufacturers had long known of the risk of injury associated with defective seatbacks and knowingly concealed the existence of the defect. *Id.* at 282-84. In such circumstances, "'[a] person may not be held liable under the CPA for a failure to state a material fact concerning a defect in the premises, unless the person knows or has reason to know of the defect.'" *Sternberger*, 718 A.2d at 622 (quoting *Hayes v. Hambruch*, 841 F. Supp. 706, 714 (D. Md. 1994)) (internal brackets omitted).

> Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:
> (i) The promotion or sale of any consumer goods, consumer realty, or consumer service;
> (ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or
> (iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental . . . .

[9] Section 13-301(1) pertains to "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." Section 13-301(2) concerns representations that:

> (i) Consumer goods, consumer realty, or consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;
> (ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;
> (iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or
> (iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not . . . .

Finally, Section 13-301(3) addresses material omissions – "[f]ailure to state a material fact if the failure deceives or tends to deceive."

As another illustration, the court in *Green* held that plaintiff sufficiently alleged a material omission. 735 A.2d at 1058. The complaint alleged that defendant failed to disclose material facts in violation of various provisions of the MCPA. *Id.* These material facts were the various ways defendant benefitted from customers' use of the Rapid Anticipation Loan service ("RAL"), and that the finance charge on the loan disclosure statement misled consumers. *Id.*

"An omission is material if a significant number of unsophisticated consumers would find that information important in determining a course of action." *Id.* at 1059 (citing *Luskin's*, 726 a.2d at 713; *Golt*, 517 A.2d at 332; *State v. Cottman Transmissions*, 587 A.2d 1190, 1194 (Md. Ct. Spec. App. 1991)). Materiality alone is insufficient to impose liability. *Adams*, 135 F. Supp. 2d at 696 (citation omitted). An unfair trade practice under Section 13-301(3) "is expressly defined to include both the element of materiality and the element of deception." *Id.*

Materiality is usually a question of fact for the jury, not of law for the court, except where the facts do not allow for a reasonable inference of materiality or immateriality. *Green*, 735 A.2d at 1059 (citation omitted). The court in *Green* could not say as a matter of law whether consumers would have considered the undisclosed benefits defendants received from the RAL to their decision to take out a loan through defendant's program. *Id.* Therefore, the court reversed the lower court's holding that the customer alleged a material omission to support a MCPA claim, and that genuine issues of material fact precluded summary judgment on the MCPA claim. *Id.*

On the issue of causation, a defendant sued under the Act need not be the direct seller. A deceptive trade practice may be committed by a non-seller and "so infect the sale or offer to a consumer that the law would deem the practice to have been committed 'in' the sale or offer for sale," such as a deceptive statement on a manufacturer's packaging that is targeted to consumers. *Morris*, 667 A.2d at 635 (citation omitted). In *Morris*, the court held that "the allegedly deceptive practices occurred entirely during the marketing of the plywood to the builders." *Id.* at 636. In the absence of any allegations that defendants were involved in the selling, offering, or advertising of the townhouses plaintiffs purchased, or that defendants attempted to influence plaintiffs' purchase of the homes containing defendants' brand of plywood, the remote effect of the alleged misrepresentations on the sales of the homes was insufficient and dismissal of the MCPA claims was affirmed. *Id.*

The court has rejected an appraiser's argument that he was not liable under the MCPA because "he did not sell any consumer realty or offer any consumer services to any of the plaintiffs, but merely provided appraisals" to a co-defendant for the co-defendant's benefit. *Hoffman v. Stamper*, 867 A.2d 276, 294 (Md. 2005). The court held that "the evidence more than sufficed to show that Hoffman's erroneous and misleading appraisals directly 'infected' the sales at issue. . . ." *Id.* at 294-95. There would not have been any closings on the home sales without those appraisals, and so defendant "was an integral part of the entire scheme of deceptive trade practices committed in the sale of consumer realty." *Id.* at 295.

Case law also provides insight into requirements for actions brought by the State. In cases brought by the State, consumer claimants' testimony at trial is not a prerequisite to prove a

violation of the Act. *See Consumer Prot. Div. v. Morgan*, 874 A.2d 919, 941 (Md. 2005). The Division also does not have to prove consumer reliance to establish a violation of the statute. *Id.* On the other hand, to order a violator to pay restitution to a particular individual, "the Division must determine that the consumer relied upon the misrepresentation" because Maryland law includes a reliance element in claims for restitution. *Id.* (citation omitted). Alternatively, the Division may "issue a general order of restitution without proving an individual consumer's reliance . . . ." *Id.* at 943.

IV. Corporate Officers Face Personal Liability under the Act and Successors in Interest May Also Be Liable.

Corporate officers may bear personal liability under the Act. *See Maryland v. Kossol*, 771 A.2d 501, 507 (Md. Ct. Spec. App. 2001). In fact, "it is unnecessary to 'pierce the corporate veil' to hold officers of a corporation responsible" for MCPA violations. *Id.* Company officers and agents can be held personally liable where "they personally commit, or . . . 'inspire,' 'participate in,' 'contribute[] to,' or 'help[] to bring about'" the violations. *Id.* (citation omitted). This liability extends to civil fines imposed by the Consumer Protection Division. *See T-Up, Inc. v. Consumer Prot. Div.*, 801 A.2d 173, 199-01 (Md. 2002).

While the case law on successor liability is sparse, plaintiffs sued a successor in interest in at least one case. In *Wells v. Chevy Chase Bank*, 768 A.2d 620, 622 (Md. 2001), plaintiffs sued issuing bank and its successor, First U.S.A., which had purchased the credit card portfolio of Chevy Chase, alleging a violation of the MCPA, among other claims. *Id.* at 622. The court did not address successor liability issues under the MCPA, however, because at issue was an arbitration clause and preemption of said clause by the Federal Arbitration Act. On a related note, as discussed *supra* Part III.A, subsequent purchasers of real estate may raise MCPA claims premised on violations by predecessors in interest. *See Milton Co.*, 708 A.2d at 1055, *aff'd*, 729 A.2d 981.

V. Private Suits under the Act Provide Recovery for Actual Injuries, while Public Suits Do Not Require Allegations of Actual Injury.

An affected "party may pursue a public remedy, by filing a complaint with the Attorney General, a private remedy, by filing a private cause of action, or both." *Lloyd*, 916 A.2d at 280. The difference between the two lies in the necessity of pleading injury or harm. *Id.* When a party files a compliant with the Attorney General and the Attorney General then brings the action, the State is not required to allege that actual injury has occurred. *Id.* at 280 (citing Md. Code Ann., Com. Law § 13-302). Comparatively, "[i]t is manifest from the language employed in § 13-408(a) that the General Assembly intended that a plaintiff, pursuing a private action under the CPA, prove actual 'injury or loss sustained.'" *CitaraManis v. Hallowell*, 613 A.2d 964, 968 (Md. 1992) (quoting *Golt*, 517 A.2d at 333). Thus, a private party suing under the MCPA must establish actual injury or loss. *Id.* at 969; *see also Lloyd*, 916 A.2d at 277; *Morris*, 667 A.2d at 635 n.10; *McGraw v. Loyola Ford, Inc.*, 723 A.2d 502, 512 (Md. Ct. Spec. App. 1999), *cert. denied*, 727 A.2d 382 (Md. 1999).

A private plaintiff's "injury must be objectively identifiable" in that "the consumer must have suffered an identifiable loss, measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers' misrepresentation." *Lloyd*, 916 A.2d at 277 (citations omitted). "[A]ctual physical injury to a person or property or actual product malfunction[, however,] is not required to state a cognizable injury under the Consumer Protection Act." *Id.* at 275. Rather, "to allege a loss under the consumer protection act, the petitioners need only articulate some manifestation of loss." *Id.* at 281.

In *Lloyd*, even though plaintiffs had not yet repaired the defective seatbacks at issue, this was "of no import so long as the petitioners . . . alleged a difference between what was expected and what was received as a result of the respondents' misrepresentation." *Id.* However, as an illustration of insufficient damages, in another case, plaintiffs' failure to include proof of cost of repair damages or sufficient evidence to prove loss in fair market value or loss in use and enjoyment of their homes warranted granting defendant's motion for judgment. *Hall v. Lovell Regency Homes Ltd. P'ship*, 708 A.2d 344, 357 (Md. Ct. Spec. App. 1998). The appellate court affirmed the trial court's decision to grant the motion because the plaintiffs "could not prove they had sustained an actual injury or loss by any legally accepted measure of damages." *Id.*

VI. While Actual and Personal Injury Damages Are Available under the Act, Punitive Damages Are Unavailable Because the Act Provides for Civil Penalties in Actions Brought by the Consumer Protection Division.

The Act expressly provides for recovery of injury or loss any person sustains. Md. Code Ann., Com. Law § 13-408(a). It is silent as to minimum and multiple damages. *See generally id.*; *see also* Pridgen & Alderman, *supra*, § 6.10, Appendix 6A; Leaffer & Lipson, 48 Geo. Wash. L. Rev. at 549 n.189, Appendix col. 11. Plaintiffs may be able to seek personal injury damages, though damages are subject to the caps set forth in the Courts & Judicial Proceedings article. Shafer, *supra*, § 6.14 (citing Md. Code Ann., Cts. & Jud. Proc. § 11-108; *Berg*, 720 A.2d at 1284); *see also Green v. N.B.S., Inc.*, 952 A.2d 364, 373, 377 (Md. Ct. Spec. App. 2008) (holding that the damages cap statute applied to personal injury claims arising under the MCPA).

The Act also provides equitable remedies. *See Boatel Indus., Inc.*, 550 A.2d at 303 (citation omitted). Restitution is available in private actions. *See CitaraManis*, 613 A.2d at 968 (holding tenants could obtain restitution for rent paid for unlicensed premises upon showing actual injury or loss). It is also available in public actions. *See Consumer Prot. Div. v. Outdoor World Corp.*, 603 A.2d 1376, 1384 (Md. Ct. Spec. App. 1992).

Additionally, "[i]n a cease and desist order, the Division may now include a requirement that the defendant must pay 'economic damages.'" Shafer, *supra*, § 6.10 (citing Md. Code Ann. Com. Law § 13-402(b)(1)(iii)). It is unclear whether that includes "the ability to provide for 'general economic damages.'" *Id.* In contrast, economic damages may be unavailable in private actions, because ordinarily "damages for economic loss are not available in a tort action," *Lloyd*, 916 A.2d at 265 (citation omitted), and "violations of the Consumer Protection Act are 'in the nature of a tort action,'" *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 846 (Md. Ct. Spec. App. 2006) (quoting *T-Up, Inc.*, 801 A.2d at 199) (internal quotations omitted); *see also Kossol*, 771 A.2d at 507.

The Act is silent as to punitive damages; however, Section 13-408, which allows any person "to recover for injury or loss sustained by him as the result of a practice prohibited by this title," has been interpreted as permitting only compensatory damages. *See Golt*, 517 A.2d at 333; *Mattingly v. Hughes Electronics Corp.*, 107 F. Supp. 2d 694, 698 (D. Md. 2000). The private remedy under Section 13-408 "is purely compensatory; it contains no punitive component." *Golt*, 517 A.2d at 333. Rather than providing for punitive damages in private actions, "any punitive assessment under the CPA is accomplished by an imposition of a civil penalty recoverable by the State under § 13-410, as well as by criminal penalties imposed under § 13-411." *Id.*

The Act provides statutory fines for civil violations by merchants. Md. Code Ann., Com. Law § 13-410. Fines range from $1,000 to $5,000, and are recoverable by the State. *Id.* § 13-410(a)-(c). Private plaintiffs are not authorized to seek civil penalties on behalf of the State. *Mattingly*, 107 F. Supp. 2d at 698-99.

In sum, in assessing damages, courts "look *only* to [plaintiffs'] actual loss or injury caused by the unfair or deceptive trade practices." *Golt*, 517 A.2d at 333 (emphasis added). This may result in a mix of forms of relief. In *Golt* for example, defendant violated the MCPA by advertising and leasing an unlicensed apartment. *Id.* at 331-32. Golt's actual loss was "comprised of restitutionary and consequential damages," entitling him "to restitution for the three months of rent paid for the unlicensed apartment . . . . [and] consequential damages, such as the cost of moving . . . and the difference in cost between reasonable substitute housing and the rental charged for the remainder of the legal term of his lease . . . ." *Id.* at 334.

VII. Plaintiffs May Recover Attorney's Fees and Usual and Ordinary Court Costs.

"Any person who brings an action to recover for injury or loss" under Section 13-408 (which authorizes private suits) "and who is awarded damages may also seek, and the court may award, reasonable attorney's fees." Md. Code Ann., Com. Law § 13-408(b). Plaintiffs ordinarily need not include a request for attorney's fees because "attorney's fees are considered a collateral matter that may be sought after judgment on the underlying claim." Shafer, *supra*, § 9.2 (citing *Barnes v. Rosenthal Toyota*, 727 A.2d 431 (Md. Ct. Spec. App. 1999); *Mercedes-Benz of N. Am. v. Garten*, 618 A.2d 233 (Md. Ct. Spec. App. 1993)). Usual and ordinary costs are generally recoverable. *Blitz v. Beth Isaac Adas Israel Congregation*, 694 A.2d 107, 115 (Md. Ct. Spec. App. 1997), *rev'd on other grounds*, 720A.2d 912 (Md. 1998). The Attorney General can also recover costs under the Act. Md. Code Ann., Com. Law § 13-409.

This aspect of the MCPA provides plaintiffs with powerful leverage, particularly where a statute has been violated that does not provide for attorney's fees, but the conduct gives rise to a MCPA claim. *See* Shafer, *supra*, § 6.14. The availability of recovering fees cuts both ways, however. Where a court concludes an action was brought in bad faith or is of a frivolous nature, it may order the offending party to pay reasonable attorney's fees to the other party. Md. Code Ann., Com. Law § 13-408(c).

Only a court of law has the authority to award attorney's fees pursuant to the Act; therefore, an arbitrator's award of fees is invalid. *See* Pridgen & Alderman, *supra*, § 6.18 (citing

Curtis G. Testerman Co. v. Buck, 667 A.2d 649, 658 (Md. 1995)). A court approved agreement, however, suffices for recovery of attorney's fees. *See id.* § 6.27 (citing *Blaylok v. Johns Hopkins Fed. Credit Union*, 831 A.2d 1120, 1129 (Md. Ct. Spec. App. 2003)).

VIII. Courts Have Found MCPA Claims to be Preempted and MCPA Cases May be Removed to Federal Courts Based on Federal Question Jurisdiction.

Courts have held that some federal laws preempt MCPA claims. One court found that claims brought under the MCPA were preempted by regulations promulgated by the United States Food and Drug Administration regarding the manufacture and distribution of tampons. *See Murphy v. Playtex Family Prods.*, 176 F. Supp. 2d 473, 483 (D. Md. 2001), *aff'd*, 69 Fed. App'x. 140 (4th Cir. 2003). As another example, the Carmack Amendment, which "provides for liability of carriers under receipts and bills of landing in interstate commerce," preempted MCPA claims stemming from losses associated with the transportation of plaintiffs' goods from Maryland to Florida. *See Richter v. N. Am. Van Lines, Inc.*, 110 F. Supp. 2d 406, 410 (D. Md. 2000).

To a limited degree, courts have also examined removal of MCPA claims to federal courts based on federal question jurisdiction. In one case, the court held that to remove a MCPA case, each of the theories supporting the MCPA claim must independently present a sufficiently substantial federal question. *See Greer v. Crown Title Corp.*, 216 F. Supp. 2d 519, 522 (D. Md. 2002) (citing *Danfelt v. Bd. of County Comm'rs*, 998 F. Supp. 606, 609-10 (D. Md. 1998) (citing *Mulcahey v. Columbia Organic Chems. Co.*, 29 F. 2d 148, 151 (4th Cir. 1994)). So long as a plaintiff states potential non-federal bases for recovery for a defendant's alleged MCPA violations, the case need not be removed pursuant to Section 1331 of the United States Code. *See id.* at 522-23.

In *Greer*, plaintiff's complaint used terms associated with, and cited expressly to, the Real Estate Settlement Procedures Act in alleging MCPA claims. *Id.* The court held that "[t]he fact that the complaint reference[d], or [wa]s in some part based upon, federal law does not mean that th[e] case 'arises under' federal law as contemplated by § 1331." *Id.* at 523 (citation omitted). Plaintiffs must be sure to distinguish their MCPA-based allegations from those based on federal law in their complaints, therefore, if they hope to prevent removal to federal courts.

IX. The MCPA and Associated Case Law Contains Additional Noteworthy Features, Including an Alternative Dispute Resolution Mechanism.

The Act includes an alternative dispute resolution mechanism. Specifically, a conciliation procedure applies when the Consumer Protection Division determines there are reasonable grounds to believe a violation of the Act has occurred. Md. Code Ann., Com. Law § 13-402(a)(1). The Division shall attempt to conciliate matters by conference and persuasion with all interested parties. *Id.* However, when the Division determines violations are ongoing and are causing immediate, substantial, and irreparable harm, "the Attorney General may seek an ex parte or interlocutory injunction without first attempting conciliation." *Id.* § 13-402(a)(2).

A recent case found that a "no-class-action" provision in an arbitration agreement is enforceable. *Walther v. Sovereign Bank*, 872 A.2d 735, 749-50 (Md. 2005). Also, Maryland has

adopted the "class action tolling doctrine." This tolls the statute of limitations for claims of unnamed class action plaintiffs until after judicial denial of motion for a class certification, so long as the complaint provides defendants with notice of the individual plaintiff's claims. *Philip Morris USA, Inc. v. Christensen*, 905 A.2d 340, 342, 360 (Md. 2006).