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# NEWS



# BUSINESS LAW

## LETTER

### MSBA SECTION OF BUSINESS LAW

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## Chair's Report

By Jack Orrick  
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Greetings to all members of the Business Law Section.

The Business Law Section has been very active of late. In September the Section launched the Maryland Business Law Blog focused exclusively on judicial developments in Maryland business law. The Blog includes timely notice, a summary, and a link to important judicial opinions relevant to business law in the State. The blog covers both trial and appellate courts, including opinions that may not otherwise be published. The Blog can be accessed at [www.marylandbusinessdevelopments.com](http://www.marylandbusinessdevelopments.com). You can subscribe to have RSS feeds of posts from the blog containing recent case summaries sent to your e-mail address and thereby keep up to date on recent developments.

In March the Business Law Section sponsored with the Taxation Section a joint social and educational program on business trusts. Over one hundred members of the two sections met at the Ellicott Mills Brewing Company to learn about the advantages of using business trusts in Maryland and to discuss new developments in the area. Keep a look out on the Section website as we hope to soon have a video link to the presentation as well as materials distributed by the panelists.

On April 27, 2010 the Section sponsored the Sixth Annual Business Law Institute, with 8 continuing education panels on various topics of interest to business lawyers, a speaker, Dr. Anirbar Basu of the Sage Policy Group, discussing the Climate of Business in Maryland and a reception following.

We have two programs planned for the June MSBA Annual Meeting in Ocean City at the Clarion Resort Fontainebleau Hotel. Both programs will be held on Friday, June 11. The first is a program on *Workplace Fraud - How to Detect it and Deal with it*, which will run from 8:00 am to 10:30 am,

and the second program which will be held in concert with the ADR and Litigation Sections is on *Bargaining with the Devil* dealing with negotiation strategies. Professor Robert Mnookin, Chair of the Harvard Law School Program on Negotiation will be discussing his new book of the same name, which deals with the dilemma of how to decide whether to negotiate with evil and when to fight it. This program will run from 11:30 am to 1:30 pm and will include a light lunch. I hope that you will plan to join us.

We have continued our normal work with a very active legislative agenda in Annapolis, our regular committee meetings and programs, and our listserv which provides a forum for timely exchange of information on business law topics of all sorts. Please let me know if you have any interest in getting more involved with our work!

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# To Use or Not to Use: The Delaware Series LLC

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The series LLC is a creature of statutory law whereby a limited liability company (LLC) is carved into separate asset pools called series, each with the ability to have its own members and liabilities. These entities are separate and distinct from LLCs that issue different classes of membership interests. In that case, the classes may share differently in profits, losses and distributions, but they all share from the same pool.

The series LLC has been touted as a way to simplify structure and reduce costs. By using one entity, owners can be rid of one layer in a holding company structure. They do not have to separately organize new entities as projects arise. In addition, these owners can avoid some of the fees associated with organizing and maintaining many separate entities. Where a holding company structure is employed instead, the states can levy filing and franchise fees on each entity within a holding company structure. For holding companies with a large number of LLC subsidiaries, the holding company structure can become costly both at the time of formation and with the franchise fees due annually.

Delaware was the first state to permit the use of series LLCs, adding a provision regarding series LLCs to the Delaware Limited Liability Company Act in 1996. (Del. Code Ann. tit. 6 § 18-201 et seq.) Since then seven other states – Illinois (805 Ill. Comp. Stat. Ann. § 180/37-40), Iowa (Iowa Code § 490A.305), Nevada (Nev. Rev. Stat. Ann. § 86.296), Oklahoma (Okla. Stat. tit. 18 § 2054.4), Tennessee (Tenn. Code Ann. § 48-249-309), Utah (Utah Code Ann. § 48-2c-606) and most recently, Texas (Tex. Bus. Orgs. Code 101.601) – have followed suit. With the exception of Illinois (which has more extensive procedural requirements and, more importantly, explicitly imparts separate legal status to each series of the entity), the other states' statutes closely resemble that of Delaware.

Section 18-215 of the Delaware Limited Liability Company Act permits an LLC to establish one or more series of members, managers, LLC interests or assets and provides that any such series may have separate rights, powers or duties with respect to specified property or obligations of the LLC or profits and losses associated with the specified property or obligations. Each series can even have a separate business purpose or investment object. The statutory provision further provides that the

debts, liabilities and expenses existing with respect to a particular series are enforceable only against the assets of such series and not against the assets of the LLC generally or any other series of the LLC. The same holds true with respect to the debts, liabilities and expenses existing with respect to the LLC generally as it relates to the company's individual series.

Maryland law does not provide for series LLCs. Maryland is not alone in this regard. As mentioned, there are seven states that have adopted series LLC provisions, but that leaves 43 states that have not. Further, the drafters of the Revised Uniform Limited Liability Company Act (RULLCA) have declined to include a series LLC provision in RULLCA.

As with corporations, Maryland businesses are free to organize under Delaware law and take advantage of this relatively new entity form. However, a practitioner should be wary; there are risks and uncertainties associated with this strategy.

One of the primary risks rests in the very fact the Maryland Limited Liability Company Act (See Md. Code Ann., Corps. & Ass'ns § 4A-101 et seq.) does not include a series LLC provision. As with the early days of the LLC when not all states had adopted LLC Acts, there was some question as to whether a state without an LLC Act would recognize the entity type and thus enforce the limited liability shield of an LLC. With the series LLC, the question becomes: will Maryland courts recognize the internal limited liability shield both between the separate series and between the series and the LLC as a whole? The answer is important as it relates to the ability of creditors to proceed against the assets of another series or of the LLC as a whole. It also has bankruptcy law implications – can one series go through bankruptcy without affecting the company itself or the other series?

One could quickly point to the internal affairs doctrine – the legal concept that courts will apply the law of the state of formation as to the internal affairs of the entity Restatement (Second) of Conflict of Laws § 302(1) (1971). But what of those actors who are not part of the internal structure of the entity? With respect to series LLCs, some have argued that the internal affairs doctrine applies just as its name

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implies – internally. In other words, courts will apply the law of the state of formation when it comes to issues arising with respect to the relationship among the entity itself and its officers, directors and stockholders/members but not necessarily to an entity's relationship with parties outside the organization, such as creditors. However, some state statutes require a statement in the articles of organization that liabilities of a series are limited to the assets of that series, putting creditors on notice as to the limited liability of a series. Thus, the questions remain, and it is those questions, as well as uncertainty as to the federal and tax treatment of the series LLC, that cause some practitioners to eschew the series LLC and continue to opt for a LLC holding company structure.

As in other cases where uncertainties in law exist, one looks to analogous forms that may shed some light. Although Maryland has not adopted a provision providing for the series structure for LLCs, there is some precedent for this configuration. Open-end investment companies, or mutual funds, organized under the Maryland General Corporation Law have long employed a similar organization. In the case of mutual funds, a master fund is incorporated under Maryland law. The authorized capital stock of the corporation is then classified into one or more series, generally designated as portfolios or funds, which can be further divided into different classes of stock. At the series level, assets (and the income, earnings and

profits thereon) and liabilities attributable to such assets are held separately by the separate series. Dividends and distributions on the assets belonging to a class are distributed only to the holders of shares of that particular series. Similarly, upon liquidation of a portfolio, the proceeds are again distributed only to the holders of the series. To the extent that assets or liabilities are not readily identifiable as an asset or liability belonging to a series, the charters of these master funds authorize the Board of Directors to allocate such assets and liabilities among any one or more of any series in such manner as the Board of Directors deems appropriate. This would seem to be a good starting point from which to work through Maryland's treatment of a foreign series LLC. Unfortunately, the efficacy of this series structure as it relates to mutual funds has also never been tested in the Maryland courts or elsewhere, so the uncertainties still remain.

Series LLCs are an interesting development and can be a useful and economical tool to segregate different projects or assets within one entity. However, before venturing into this area, one must be cognizant of the risks inherent in relying on this relatively new development in business law. Further, if not currently interested in using a series LLC, one should continue to follow the progress of the law regarding series LLC. If the uncertainties that surround the entity are eventually resolved, the series LLC may be the next "it" entity.

## SECTION OF BUSINESS LAW NEWSLETTER

*Maryland State Bar Association*

*Submissions, questions, comments?*

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# A Roadmap Through Maryland's Consumer Credit Laws

by Marjorie A. Corwin

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Consumer credit is an everyday occurrence. Every time an individual gets a loan, finances a sale, or makes a simple credit card purchase, one or more credit laws govern the transaction. Even so, many lawyers have no idea what law governs a particular credit transaction. This is true, in part, because the laws applicable to credit extensions in Maryland are confusing.

This article presents a basic road map through credit laws as they apply to transactions by Maryland consumers. A better understanding of applicable credit laws should lead to greater control over consumer credit transactions. This article is merely the beginning of the journey. It is intended to afford readers the ability to identify more quickly the credit laws that might govern a particular transaction which, in turn, can lead to a more efficient review of applicable credit terms or, at least, to better questions for the creditor.

This credit laws road map is based on a few simple rules. First, except for very limited types of credit sales, all credit extended in Maryland is subject to one – and perhaps more than one – credit law. Second, in most circumstances, the creditor is in the driver's seat and decides which credit law governs the transaction. Third, to determine which law governs a specific consumer credit transaction, look to the details and circumstances of the credit.

As with any map, key definitions help to guide the way. "Maryland Credit Laws" refers to seven different Subtitles of Title 12 of Maryland's Commercial Law Article ("CL") that set permissible rates of interest, charges, and fees, as well as impose restrictions on credit and obligations on creditors. "Consumers" refer to individuals who live in Maryland and who are obtaining credit for personal, family, or household purposes. "Open-end" (also known as "revolving") credit results when the creditor agrees to extend credit from time to time up to a maximum amount and the consumer has a right to repay the debt and obtain credit again under the terms of a written agreement, often called a "plan." Credit card debt is a common example of open-end credit. "Closed-end" credit is a more traditional form of credit and arises when the creditor extends the full amount of the credit at one time without any intention for repeat credit extensions and the consumer repays the credit as provided in the promissory note or other evidence of the debt. Personal installment loans or automobile financing are examples of closed-end credit.

**Rule #1: All credit extended in Maryland is subject to one – and perhaps more than one – credit law**

**Maryland's Credit Laws.** A guide through Maryland's laws governing consumer credit begins with Title 12 of the Commercial Law Article. Maryland's Credit Laws, in numerical order, are identified as follows:

**Interest and Usury**, CL §§ 12-101 *et seq.* ("I&U"): I&U dates back to 1845 when the Maryland legislature enacted a penalty provision for usury, which is defined as a rate of interest that exceeds legal limits. I&U covers both open-end and closed-end credit. I&U governs credit extensions that are not clearly subject to other Maryland credit laws. I&U has various permissible interest rates – from 6% per year to unlimited interest – depending upon the type of collateral and certain terms of the credit transaction.

**Consumer Loans-Credit Provisions**, CL §§ 12-301 *et seq.* ("Consumer Loan Law"): The Consumer Loan Law applies to certain loans of \$6,000 or less. It is modeled on a traditional small loan law that allows high interest rates, but imposes many restrictions on other loan terms. The Consumer Loan Law is most frequently used by traditional consumer finance companies that make loans in very small amounts and want to charge the highest interest rate – 2.75% per month – permitted by Maryland law.

**Secondary Mortgage Loans-Credit Provisions**, CL §§ 12-401 *et seq.* ("SMLL"): SMLL governs loans secured in whole or in part by second or more junior liens on 1-to-4 family residential real property. SMLL also governs deferred purchase price financing if the financed purchase price is secured by a secondary lien on residential real property. It allows interest up to 24% per year. Because this law

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contains significant ambiguities and does not accommodate recent innovations in mortgage lending, it should be used infrequently. However, SMLL will govern secondary lien loans on residential real property unless clearly subject to another credit law.

**Retail Credit Accounts**, CL §§ 12-501 *et seq.* (“RCAL”): RCAL governs the retail sale of goods or services except for those that are financed under RISA (as defined below) or another credit law. RCAL is intended primarily to cover open-end credit, but also applies to closed-end credit. It allows finance charge of up to 24% per year. Because it does not include recent innovations in open-end financing, RCAL should be and is used infrequently.

**Retail Installment Sales**, CL §§ 12-601 *et seq.* (“RISA”): RISA governs closed-end financing of the retail sale of consumer goods valued at \$25,000 or less (or any value if the goods are motor vehicles) if the seller takes a security interest in the goods or takes other collateral as security. It imposes some unique disclosure obligations and restrictions on creditors and, for these reasons, has become less favored in recent years except by sellers of used motor vehicles who want to charge the highest finance charge – 27% per year – permitted by Maryland law.

**Credit Grantor Revolving Credit Provisions**, CL §§ 12-901 *et seq.* (“Subtitle 9”): Enacted in 1983 to modernize Maryland’s Credit Laws, Subtitle 9 covers open-end direct loans and credit sales. It is the most flexible Maryland law available for open-end consumer credit and allows interest up to 24% per year.

**Credit Grantor Closed End Credit Provisions**, CL §§ 12-1001 *et seq.* (“Subtitle 10”): Enacted in 1983 to modernize Maryland’s Credit Laws, Subtitle 10 covers closed-end direct loans and credit sales. It is a flexible Maryland law and is purposely selected by creditors for many types of

closed-end credit. It allows interest up to 24% per year.

**Other Maryland Laws.** There are a few unique situations when a credit transaction will not be governed by any one of Maryland’s seven Credit Laws even though Maryland law governs the transaction. Maryland recognizes the common law time-price sale doctrine. *See Rothman v. Silver*, 245 Md. 292, 226 A.2d 308 (1967). Thus, credit sales not covered by RCAL, RISA, or Subtitle 9 or 10 may be made as unregulated time-price sales. Installment sales of real property may be governed by the Land Installment Contracts Law. Md. Code Ann., Real Prop. §§ 10-101 *et seq.* Credit for insurance premium financing is governed by Maryland’s insurance law. Md Code Ann., Ins. §§ 23-101 *et seq.* True leasing is not subject to Maryland’s Credit Laws. *See, e.g., Keeling v. Ford Motor Credit Corp.*, 314 Md. 311, 550 A.2d 932 (1988). *But see* CL §§ 14-2001 *et seq.* (Consumer Motor Vehicle Leasing Contracts). Rent to own arrangements that comply with a specific statute also are not subject to Maryland’s Credit Laws. *See* CL §§ 12-1101 *et seq.* (Rental-Purchase Agreement Act).

**Other States’ Credit Laws.** Even when a Maryland consumer is involved, it may be that Maryland Credit Laws will not govern the credit transaction. Maryland courts rely on a standard conflicts of law analysis. *See Kronovet v. Lipchin*, 288 Md. 30, 415 A.2d 1096 (1980). If the contract for credit identifies another state’s law as governing and there is a substantial relationship with that other state regarding the credit transaction, then unless there is a fundamental public policy requiring Maryland law to govern the transaction, the selection of another state’s law is likely to be upheld. I&U expresses a public policy that loans made to Maryland residents secured by property located in Maryland will be governed by Maryland law. *See* CL § 12-114(c). The Consumer Loan Law makes its penalty provisions applicable to loans covered by that law if made to residents of Maryland and if the application for the loan originated in Maryland. *See* CL § 12-314(c). SMLL defines “secondary mortgage loan” to mean a loan secured by real property in Maryland and imposes restrictions on those loans, which implies a public policy that credit secured by a junior lien on residential real property located in Maryland will be governed by Maryland law. *See* CL § 12-401(i). The other Maryland Credit Laws express no public policy that they should control a Maryland consumer credit transaction.

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**Federal Law.** Finally, whether Maryland or another state's law governs a credit transaction may not end the inquiry of which law governs a consumer credit transaction. Various federal laws, some specific to the type of creditor and others specific to the type of credit, preempt state laws as they relate to consumer credit. For example, depository institutions located outside of Maryland may, under federal law, choose to have the law of the place where the institution is located govern the credit transaction. *See* 12 U.S.C. § 85 (national bank authority for exporting interest rates); 12 U.S.C. § 1831d (state bank authority for exportation); 12 U.S.C. § 1463 (federal thrift authority for exportation); 12 U.S.C. § 1757(5) (federal credit unions). In the mortgage lending arena, depository and non-depository creditors alike may rely on assorted federal laws that preempt interest rates, fees, and similar restrictions imposed by otherwise applicable state law. *See, e.g.,* 12 U.S.C. § 1735f-7a (interest rates and points on first mortgage loans preempted under the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA")); 12 U.S.C. §§ 3801 *et seq.* (preemption for alternative mortgage transactions under the Alternative Mortgage Transactions Parity Act); 12 U.S.C. § 1701j-3 (preemption of due on sale restrictions). Maryland has not overridden any federal law applicable to mortgage lending. *See* 82 Opin. Att'y Gen. 77 (August 19, 1997) (concerning federal Alternative Mortgage Transactions Parity Act); 75 Opin. Att'y Gen. 218 (1990) (concerning interest on mortgage loan escrow accounts by federal thrifts); 73 Opin. Att'y Gen. 144 (1988) (concerning interest on first mortgage loans subject to DIDMCA).

### Rule #2: The creditor decides which credit law governs a credit transaction

For many types of credit, alternative credit laws are available and, with very few exceptions, creditors have the ability to select the credit law that will govern a consumer credit transaction. This is particularly true in Maryland since the enactment of Subtitles 9 and 10 in 1983. For example, assuming Maryland Credit Laws will govern the terms for financing automobile sales, that financing may be governed by either RISA or Subtitle 10. First mortgage financing may be governed by either I&U or Subtitle 9 or 10, and second mortgage financing may be governed by either SMLL or Subtitle 9 or 10.

Many different factors drive a creditor's decision as to which law should govern certain types of consumer credit. Some factors are so influential and universal that there is little choice for creditors; other factors are more subjective and creditors reasonably may choose different credit laws to govern similar transactions based on business objectives. For

example, at this time lenders who make secondary mortgage loans secured by Maryland residential real property should expressly select Subtitle 9 or 10 as the governing credit law. SMLL, which will apply to consumer secondary mortgage loans unless there is an express selection of another governing credit law, does not contain any provisions that would be more beneficial for the creditor than the provisions in Subtitle 9 or 10. Instead, SMLL is fraught with ambiguities and limitations that are difficult for creditors to address. *See, e.g.,* CL § 12-406 (restricts payment of commissions, finder's fees, and points). Unlike secondary mortgage lenders, lenders who make first mortgage loans can make a reasoned business decision among alternative Maryland Credit Laws. For example, I&U allows an unlimited interest rate on first lien residential mortgage loans and, for most first mortgage lenders, flexible fees. *See* CL §§ 12-103(b), -105; *B.F. Saul Co. v. West End Park N., Inc.*, 250 Md. 707, 246 A.2d 591 (1968). I&U also, for the most part, only imposes a penalty for collecting interest and fees greater than authorized by that statute and the penalty amounts only to three times the overcharges. *See* CL § 12-114. However, for those mortgage lenders who cannot take advantage of the DIDMCA federal preemption mentioned in Rule #1, I&U prohibits the collection of points. *See* CL § 12-108. In contrast, Subtitles 9 and 10 allow first mortgage lenders to charge interest at 24% per year, which is less than the unlimited rate permitted by I&U. *See* CL § 12-1003. However, unlike I&U, Subtitles 9 and 10 allow all first mortgage lenders to charge any amount in points. *See* CL § 12-1005. The greater concern under Subtitles 9 and 10 are potential penalties, which apply to a violation of any applicable provision and could result in a forfeiture of all interest, costs, fees, or other charges imposed in connection with the credit along with treble damages for overcharges. *See* CL § 12-1018.

In addition to choosing among Maryland's Credit Laws, some creditors for some types of credit may consider selecting another state's law. As described in Rule #1, the potential of another state's law governing a Maryland resident's credit arises both based on a conflicts of law analysis and on federal law preemptions available to out-of-state depository institutions.

Some factors that creditors should consider when selecting applicable credit law include: convenience of administration (*e.g.,* the flexibility of Subtitle 10's provisions allow all types of closed-end credit offered by a lender to be subject to the same credit law); permissible interest rates (*e.g.,* while most of Maryland's Credit Laws allow interest up to 24% per year, the Consumer Loan Law allows interest up to 2.75% per

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month on small loan amounts, RISA allows finance charge up to 27% per year on some used motor vehicle financing, and I&U allows unlimited interest on first lien residential mortgage loans); flexibility of fees and charges (*Compare* I&U which, as interpreted by common law, allows most creditor fees as long as they are treated as interest on the loan *with* Subtitle 10 which limits many charges to actual and verifiable third party fees for specified activities); lesser potential penalties for compliance errors (*Compare* I&U which, for the most part, imposes a penalty only for usury *with* Subtitles 9 and 10, RISA, RCAL, and SMLL which impose penalties for any violation of the law and Consumer Loan Law which, under certain circumstances, has a penalty that makes the loan unenforceable). Because creditors have different business objectives and constituencies, there is no one overriding factor, and each creditor needs to make its own determination as to which credit law is best for the circumstances.

### **Rule #3: To determine which law governs a specific consumer credit transaction, look to the details and circumstances of the credit**

Even though creditors have the ability to select which credit law governs a particular transaction, there still are times when it is unclear what law governs the transaction. If the creditor has stated expressly in the credit documents which credit law governs the transaction, the only issue is whether the selected credit law can govern the transaction. If there is no express election of governing credit law, then the details and circumstances of the credit itself must reveal what law governs the credit.

**Express Election.** Except as discussed in the immediately following paragraph, no Maryland Credit Law nor any applicable federal law requires an express election of governing law in order for a particular law to govern. That being said, creditors should consider expressly describing the credit law that governs the transaction. With an express election, there should be no questions as to which credit law applies.

The exception concerning express election of governing law arises for Subtitles 9 and 10. For extensions of credit made on or after October 1, 1993, Subtitles 9 and 10 govern credit only if the creditor makes a written election of Subtitle 9 or 10 in the credit agreement. *See* CL §§ 12-913.1, -1013.1. If either Subtitle 9 or 10 is selected in writing, no other Maryland Credit Laws apply to that credit. For extensions of credit made on or after October 1, 1993, if the parties have not selected in writing in the credit agreement to have either Subtitle 9 or 10 as the governing law, neither Subtitle 9 nor 10 will apply, and the details of the credit agreement will

establish which other credit law applies. *Id.*

The selection of either Subtitle 9 or 10 as governing law was not required to be in writing prior to October 1, 1993, and for credit extended prior to that date (but after July 1, 1983, when the law took effect) with no express election of governing law, the details and circumstances of the credit may well reveal that Subtitle 9 or 10 governs the credit. *See* CL § 12-1013. However, if an open-end credit plan was established before October 1, 1993, advances under the plan made on or after that date are not governed by Subtitle 9 unless the parties have made a written election in the plan agreement.

**Financed Sale v. Direct Loan.** One detail of the transaction that will help determine the governing credit law is whether the transaction is a financed sale (*i.e.*, the seller is the original creditor) or is a direct loan (*i.e.*, a lender is the original creditor). If the transaction is a financed sale and Maryland Credit Laws apply, then the credit may be governed by Subtitles 9 or 10, RISA, RCAL, or SMLL, or will be an unregulated time-price sale. If the credit is a direct loan, the Maryland Credit Laws that may apply are Subtitles 9 or 10, the Consumer Loan Law, SMLL, or I&U. As discussed in Rule #2, Subtitles 9 or 10 will apply only if there is an express written election of one of those laws in the credit agreement. I&U controls if, based on details of a credit transaction, no other more specific Maryland Credit Law clearly governs.

**Type of Collateral.** Identifying the collateral for the credit can make the path to determining governing credit law a much easier road. For example, if residential real property will secure the credit, then RISA and RCAL can be eliminated from consideration, even if the transaction is a financed sale. If the lien being created in connection with the credit will be junior to existing liens on the residential real property, then the possible Maryland Credit Laws are limited to Subtitles 9 or 10, the Consumer Loan Law, or SMLL. Because the Consumer Loan Law will only apply if the credit is \$6,000 or less, it frequently is not available in connection with real property lending (where the credit is normally greater than \$6,000). If the credit is open-end, then a loan secured by a junior lien on residential real property will be governed by Subtitle 9 if there is an express election of that law. Otherwise, it will be governed by SMLL. Alternatively, if the credit is closed-end, then a loan secured by a junior lien on residential real property will be governed by Subtitle 10 if there is an express election of that law. Otherwise, it will be governed by SMLL.

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As another example, if a motor vehicle will be collateral for a financed sale to a consumer, Subtitle 9, Subtitle 10, or RISA could apply. Because RISA applies to financed sales of motor vehicles to consumers regardless of the original cash price, the transaction cannot be an unregulated time-price sale. Assuming the credit is not open-end, we can eliminate Subtitle 9 from consideration. Thus, this financed sale will be governed by Subtitle 10 if there is an express election of that law in the installment sale contract. Otherwise, it will be governed by RISA.

**Type of Creditor.** Identifying the type of lender and where the lender is located also can help focus the determination of which credit law applies. On the one hand, if the lender is a depository institution not located in Maryland, there is a likelihood that the law of a state where the lender has at least one branch governs the transaction. A governing law provision in the credit documents should reveal which state's

law has been selected. On the other hand, if the lender is a non-depository institution and is unaffiliated with a depository institution, there is a likelihood that Maryland Credit Law will control. Again, a governing law provision may be helpful in making this determination.

\* \* \*

After reviewing this road map through consumer credit laws, consumers and lawyers should be on the right track for determining which credit law governs a particular transaction in Maryland. Granted, there is substantially more information about credit terms, conditions, restrictions, limitations, disclosures, and other regulatory issues that goes into determining compliance with applicable law. However, this brief map provides a head start into a confusing but ultimately decipherable area of law that affects consumer credit.

# Mark Your Calendars!

*Maryland State Bar Association*

*2010 Annual Meeting*

June 9-12, 2010

MSBA's Annual Meeting offers an opportunity to exchange ideas with colleagues and sharpen your skills through instructional sessions and presentations by prominent members of your profession.

As well as relaxation in the sun.

## Sea. You. There.

For more information, visit [www.msbaannualmeeting.org](http://www.msbaannualmeeting.org) or call Wanda Claiborne of the MSBA at 410-685-7878.



# Ten Tips for the Non-Franchise Attorney When Reviewing a Franchise Agreement

By Raymond T. McKenzie  
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The practice of franchise law is a niche area when it comes to the representation of franchisors. Franchise attorneys draft complicated, tedious Franchise Disclosure Documents that must comply with the Federal Trade Commission Revised Rule as well as certain state disclosure law. It is the Franchise Disclosure Document (“FDD”), which includes the franchise agreement that will eventually be executed by the franchisor and franchisee, that is disseminated by franchisors to prospective franchisees for review prior to the offer of sale of a franchised business in this country. It is the drafting and filing of the FDD in franchise registration states across the country that relies upon the expertise of a franchise attorney.

There is no reason, however, for a competent business attorney familiar with basic contract law to feel overwhelmed by the idea of reviewing a franchise agreement and advising a prospective franchisee. You will hear many business owners say they have reviewed a franchise agreement and feel like they have a “pretty good idea” about what is contained there. However, attorneys have spent a lifetime being taught that the difference between having a “pretty good idea” and being absolutely, legally, sure, can be quite costly. It is therefore up to the attorney to advise the client as to exactly what the franchise agreement states, which will allow the client to make a fully informed decision. With that in mind, here are ten tips for the non-franchise attorney to keep in mind when reviewing a franchise agreement.

1. **Term.** The term of a franchise agreement varies, as it depends almost entirely on a business judgment made by the franchisor when drafting the FDD and franchise agreement. Some franchisors prefer shorter terms, so that franchisees are asked to execute new franchise agreements every few years. Other franchisors prefer the stability of having their franchisees committed to longer franchise agreements. Franchisees’ preference as to the length of a franchise agreement varies as well, with some franchisees preferring to enter into a short-term agreement in case the business does poorly or the franchisee is simply not sure that the business is one that he wants to be involved in long term. Just as many franchisees, however, especially where a large capital investment is required, prefer the security and predictability of a longer term. This allows the franchisee to focus on growing the business without the underlying concern of franchise agreement renewal and expiration issues. Bearing in mind the client’s stated business objectives and the franchise’s possible pitfalls,

it is up to the attorney to advise the client as to what length of term best suits the client’s goals and needs, and to negotiate such term into the franchise agreement.

2. **Fees.** Many franchise agreements require the payment of an initial franchise fee. This fee is an up-front fee due at the time the prospect purchases the franchise. Some franchisors will offer to finance this fee over a period of time, while others require the lump sum payment to be made without making any financing available. In addition to an initial franchise fee, franchisors usually require in the franchise agreement that the franchisee pay ongoing royalty and advertising fees to the franchisor during the term of the agreement. Royalty and advertising fees are usually paid monthly, and can be a percentage of the business’s gross revenue, a flat fee, or a combination of the two. One of the issues to watch for with regard to ongoing fees is whether the franchisor requires the franchisee to pay a minimum royalty fee either monthly or annually, without regard to the amount of actual revenue the franchisee generates. Think of it as an alternative minimum tax for franchisees. At the end of a month or year, a franchisee may have to write the franchisor a check to cover the minimum franchise fee if the royalty fee paid by the franchisee, based on a percentage of the franchisee’s revenue, fell short of the minimum royalty fee called for in the franchise agreement. This is unquestionably an issue that an attorney must make sure to bring to the attention of a franchisee prior to executing a franchise agreement.

3. **Renewals/Subsequent Agreements.** Pay careful attention to the language regarding renewals and subsequent agreements. The term “renewal” is a misnomer, since technically most franchisors do not allow the franchisee to simply renew the existing agreement as-is. Rather, most franchisors grant existing franchisees the opportunity to enter into a “then-current” franchise agreement, provided the franchisee is in good standing. The “then-current” agreement will naturally contain terms differing, in some respects materially, from the previous agreement offered by the franchisor. This is the franchisor’s way of making sure that it does not get stuck with a stale agreement, whether it be in the fee structure or numerous other areas that the franchisor may wish to change over time. Some items to pay specific attention to when reviewing subsequent agreements include: whether

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a renewal fee is called for; whether the right to execute subsequent agreements goes on indefinitely, or instead if only a set number of renewals are allowed; whether the agreement calls for execution of the franchisor's then-current franchise agreement, which may include terms materially different from the existing agreement; whether there is a cap on how much the franchisor can raise fees in subsequent agreements; what is the term of the subsequent agreement; and, what, if any, improvements, changes, renovations, and upgrades are required of the franchisee prior to a subsequent agreement being offered by the franchisor.

4. Termination by Franchisor. The standard franchise agreement includes several breaches that, if committed by the franchisee, allow the franchisor the right to terminate the agreement. When reviewing the sections dealing with termination, make sure to identify which defaults allow for a cure period, that is, a time by which the franchisee may correct the default and thus avoid termination, and which breaches permit the franchisor to terminate the franchise agreement without providing the franchisee an opportunity to cure. A franchisee is unable to cure some breaches as a matter of course, such as abandonment of the franchised business, unauthorized transfer of the franchised business, and repeated breaches of the franchise agreement, and thus in these situations automatic termination is appropriate. However, there are many common breaches found in franchise agreements where it is possible for a franchisee to cure, yet the franchise agreement nonetheless allows the franchisor to terminate the agreement at its discretion. It is in the attorney's best interest therefore to notify the client of the different classes of breaches, and if warranted, negotiate with the franchisor to move some breaches from the automatic termination section to the termination-after-cure section. Finally, on the subject of termination, an attorney reviewing a franchise agreement should also pay close attention to the length of time granted to cure a breach, and attempt to lengthen the cure period where possible.

5. Termination by Franchisee. Some, but not all, franchise agreements allow for the franchisee to terminate the agreement by providing a certain amount of notice to the franchisor. This can arguably be the most important right granted to a franchisee, since a franchisee that has the right to terminate an agreement if the business gets into trouble can simply cut its losses, notify the franchisor of its desire to terminate the agreement, take the franchisor's signs down, and cease running the business. Many times, this will allow a distressed

franchisee to avoid the fees and other obligations owed to the franchisor before disaster strikes. Otherwise, a franchisee that abandons the franchised business prior to the agreement's natural expiration could be exposed to a claim by the franchisor for breach of contract combined with a claim for "future royalties."

"Future royalties" is a still-emerging theory of franchise law that holds that a franchisee that unilaterally ceases operation of its franchise prior to expiration can be held liable to the franchisor for the royalties and other fees the franchisee would have paid during the entire term remaining on the franchise agreement. While this legal theory is complex and depends on a thorough review of the facts of each case, it is certainly an issue for attorneys to think about when reviewing a franchise agreement. What is clear is that a franchise agreement that allows a franchisee to unilaterally walk away from the franchise can negate this cause of action from being raised and in the end potentially save a distressed franchisee from a costly fight. For an excellent discussion of the future royalties issue by the Texas Court of Appeals applying Georgia law, see *Progressive Child Care Systems v. Kids 'R' Kids International, Inc. and Vinson*, 2008 Tex. App. LEXIS 8416; see also *Choice Hotels International, Inc. v. Okeechobee Motel Joint Ventures, et al.*, Civil Action No. AQ-95-2862 (D. Md. 1998); *Burger King Corp. v. Barnes*, 1 F. Supp. 2d 1367 (S.D. Fla. 1998) *Sparks Tune-Up Centers, Inc. v. Addison*, Civ. Action No. 89-1355 (E.D. Pa. 1989).

6. Post-Termination Non-Competition Covenant. In many states, including Maryland, a court will hold valid and enforceable a non-competition covenant that is "reasonable" in the activity it restricts, as well as in its geographic scope and duration, absent extenuating circumstances. According to Maryland case law, a "reasonable" post-termination covenant not-to-compete will restrict a franchisee from competing for one or two years, within a reasonable geographic scope, in the business that is identical or similar to the franchised system. *Naturalawn of America, Inc. v. West Group, LLC et al.*, 484 F. Supp. 2d 392 (D. Md. 2007); see also *Merry Maids, L.P. v. Kamara*, 33 F. Supp. 2d 443 (D. Md. 1998).

The opinion of most franchisors is that a franchise system cannot remain viable if a franchisee is allowed to compete against the franchisor after termination of a franchise

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agreement. Therefore many franchisors view the inclusion of a post-term covenant not-to-compete in a franchise agreement as non-negotiable. An exception to this stance may exist where a prospective franchisee has had prior experience owning the business before approaching the franchisor. In some instances it may be possible to negotiate the non-compete out of the agreement, since the main objectives of the non-compete (i.e. to protect the franchisor's system for operating the business along with the goodwill built up using the franchisor's marks) are somewhat diminished when a prospective franchisee has operated a competitive business prior to purchasing the franchise. The argument goes that the inclusion of a non-compete would fail to put the parties in the positions they occupied before entering into the franchise agreement.

A second scenario to look for when reviewing non-compete language is whether the non-compete covenant applies upon natural expiration of the agreement. The court in the *Naturalawn of America* case cited above indicates that a non-compete will be enforced against a franchisee upon expiration of the agreement simply because, in the court's opinion, "'expiration' of an agreement is a more specific type of 'termination.'" *Naturalawn of America, Inc.*, 484 F. Supp. at 401. The enforcement of a non-compete upon the natural expiration of a franchise agreement could have enormous consequences on an uninformed franchise client who suddenly finds himself prohibited from continuing in business as an independent owner, despite the fact that the owner, while a franchisee, was a model franchisee during the life of the franchise agreement and exited the system in good standing with the franchisor. Negotiating a change, or at minimum advising the client of the post-expiration covenant prior to signing, is therefore essential to providing the necessary information to allow the client to make informed decisions as to whether to purchase the franchise.

7. Assignment; Sales of Assets to Third Party; Franchisor right of refusal. Franchisors uniformly reserve the right to approve an assignment of the franchise agreement by a franchisee to a third party, or a sale of the franchisee's assets to a third party, and to prohibit such transfers and sales that the franchisor does not ultimately approve of. These rights are rarely negotiable, since franchisors take extremely seriously the approval of the persons and companies that will be holding the franchisor's trade name and marks out to the public. One exception where negotiation is possible, however, is the form of the franchisor's right of first refusal. Basically, many franchisors retain

an option to either purchase the assets of the franchised business, purchase the franchise itself, or both, on the same terms and conditions the franchisee has agreed to with a bona fide buyer. A franchisor's right of first refusal can be problematic to a franchisee for a number of reasons. First, the franchisee has to have a bona fide offer from a third party, one that is final and agreed to on every point so that it can be taken to a franchisor for a decision. Next, potential purchasers can be hesitant as a result of the period -- 60 – 90 days is standard -- that the franchisor has to decide on whether to match the offer. Some purchasers will balk at the possibility of having to wait while the franchisor contemplates, only to find out that the opportunity to purchase the business or the assets was indeed exercised by the franchisor, thereby leaving the third party searching for a new business to purchase once again. Therefore, an attorney will best serve his client's interests by removing the right of first refusal altogether, and if unsuccessful, at least shortening the time period granted to the franchisor to decide on the offer so as to make the delay tolerable.

8. Dispute Resolution. Reviews are mixed in the franchise world as to the best dispute option for franchisors. A franchisor's choice of litigation, arbitration or mediation is a business decision cultivated through a franchisor's experience. Supporters of arbitration point to its cost-effectiveness, as well as its speed. Based on recent reports, however, both points can be seriously debated, since an arbitration nowadays is just as likely to cost as much as, and may take just as long as, any lawsuit. Likewise, supporters of litigation will be hard-pressed to show that a judge will provide a more reasoned and legally sound opinion, since associations such as the American Arbitration Association often provide an arbitrator with a background in franchise law to hear franchise cases.

In some instances, franchisors have chosen a mix of several dispute resolution methods that vary depending on the type and dollar amount of the claim. It is true that beauty is in the eye of the beholder with regard to the method by which a dispute is heard. Rather than argue over the method by which disputes will be heard, an attorney's time may be better spent attempting to negotiate the jurisdiction where disputes will be heard, since it is common for franchisors to use their home state as the place where disputes will be resolved. An attorney reviewing a franchise agreement must take into account the added expense a franchisee will have to undertake in the event a dispute needs to be litigated or

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arbitrated in a state other than Maryland. One solution is to add language, similar to what is already found in many state franchise laws, that allows a franchisee to sue or arbitrate in his home state, regardless of the state designated in the franchise agreement.

9. Recovery of Attorney Fees. The issue of the recovery of attorney fees spent by either party when a dispute arises between a franchisor and franchisee is a topic that must be looked at carefully when reviewing a franchise agreement. Fees paid to attorneys are costly in even the simplest of matters, and such fees can escalate dramatically as the disputes get more complex and the parties involved get more acrimonious towards one another. It is a priority when reviewing the franchise agreement to determine whether the recovery of attorney fees is addressed in the agreement, and if so, who has the right to recover such fees and how.

There are several different methods by which franchisors address the recovery of attorney fees. The most popular method for recovering attorney fees is through the use of a “prevailing party” clause, which enables the winner of a lawsuit or arbitration to collect its attorneys’ fees from the losing party, provided the judge or arbitrator chooses to enforce such language. This type of clause is popular with franchisors who believe it is useful as a deterrent to franchisees who may otherwise attempt to bring questionable actions against the franchisor. Other franchisors choose the opposite route and simply state that either party to a dispute is responsible to pay its own attorney fees and costs. A third type of clause is the one-sided franchisor attorney fees clause, which states that if the franchisor is forced to bring an action to enforce its rights under the agreement, or is forced to defend itself from an action brought by a franchisee, the franchisor is entitled to recover its fees as long as it prevails in the action. This language gives the franchisor the best of the prevailing party language without having to share the benefit with a franchisee. This one-sided type of clause is frowned upon by some courts due to the lack of mutuality between the parties. However, rather than rely on a court to strike the language down, it is recommended that a franchisee’s attorney look to change this language to make it mutual for both parties at the outset.

10. Territory. Some franchise systems grant franchisees “exclusive” territories, meaning that these

franchisees are protected from competition from other franchisees, and in many respects from the franchisor as well, inside this designated territory. Though it depends on the industry, many franchisees view a protected territory as a must. The franchisee believes this market protection will allow its business to flourish, and an agreement that does not contain a protected exclusive area will cause the franchised business to fail. There are several opinions on either side of this argument but hardly an exact answer.

As an attorney preparing to advise your franchise client, you must review the franchise agreement in order to understand what the franchisor is offering in the way of territories. While doing so you must keep the following questions in mind: Does the franchisee understand that even with a protected territory, he will still most likely be competing against several, if not dozens, of competitors from other brands inside an exclusive franchise territory? How does the franchisee view the theory of market saturation that the more of a particular brand, product, or service a customer sees, the more popular and acceptable the brand becomes? Given the choice, would the franchise client prefer to be a franchisee of a system that grants enormous exclusive territories to each franchisee, but with small number of total franchisees overall? Or would the client prefer a franchise system that grants smaller or even no territories, but where the number of franchisees, and thus the number of outlets at which the product or service is available, is much greater? In conjunction with the idea of exclusive territories, make sure to pay attention to the language of the franchise agreement discussing the franchisee’s right to advertise and sell products and services in areas located outside the franchisee’s territory that are not owned by other franchisees of the system. Just as important, also pay attention to any language that reserves to the franchisor the right to compete with the franchisee inside the franchisee’s territory, especially when it comes to the sales of products over the internet.

Conclusion: As mentioned above, the above tips address only some of the issues that you should be aware of when reviewing a franchise agreement. A diligent attorney reviewing a franchise agreement will often find several other issues that are material to the prospect’s decision to purchase a franchise. In addition, please note that this paper does not discuss registration or disclosure issues in the state of Maryland or elsewhere.

# General Assembly Bill Reinstates the Per Se Ban on Resale Price Maintenance in Maryland

By David L. Cahn and Jeffrey S. Fabian  
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During the 2009 General Assembly session, Maryland amended its Antitrust Act to nullify the United States Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), within Maryland. *Leegin* overruled the Supreme Court's holding in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and held that it is no longer *per se* unlawful for manufacturers and wholesalers to set minimum prices for resale of their products. Under *Leegin*, such vertical pricing restraints are now judged under the "rule of reason" standard. The 2009 amendment has re-instated the *per se* prohibition in Maryland.

The *Leegin* case involved a dispute between a high-end leather products manufacturer and one of its retail distributors. *Leegin*, the manufacturer, instituted a policy of refusing to sell its products to retailers who discounted below *Leegin*'s suggested retail prices, in exchange for limiting the number of retailers to whom it sold the products. When retailer PSKS lowered its prices below this threshold, *Leegin* cut off its supply to PSKS. The retailer filed suit alleging that *Leegin*'s actions violated U.S. antitrust law.

After the lower federal courts affirmed a substantial jury verdict in PSKS's favor by applying the *per se* standard, the Supreme Court reversed and remanded the case for retrial under the new rule of reason analysis. Following *Leegin*, the lower courts must analyze whether a minimum pricing restraint amounts to "an unreasonable restraint on competition," or whether it has "pro-competitive effects" that benefit the interests of consumers.

While the practical impact of the *Dr. Miles* decision had been tempered by the Court's subsequent decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), the blanket holding in *Leegin* still represented a significant break with the Court's existing doctrine. The Court held in *Colgate* that manufacturers could suggest resale prices to downstream distributors, and refuse to supply distributors who failed to adhere to the suggested prices. *Leegin* goes further by opening the door to absolute pricing restraints. The practical effect of this Supreme Court ruling was demonstrated when, on remand, the trial court granted *Leegin Creative Leather Products, Inc.*'s motion to dismiss the case. *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 2009 WL 038561 (E.D. Tex. 2009).

The amendment to the Maryland Antitrust Act under SB 239 (2009) provides that "a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade." Md. Code Ann., Commercial Law § 11-204(b) (2010). Thus, the amendment makes "resale price maintenance" *per se* unlawful once again in Maryland, and also extends the *per se* treatment to services provided under a common service mark. This application of the *per se* ban to pricing for services was not clearly established under the Supreme Court's precedent prior to *Leegin*.

Moreover, the Maryland legislation calls into question the validity of the *Colgate* doctrine within this state. While the statute clearly refers to "establish[ing] a minimum price," it is not beyond reason to view this language as pushing back against *Colgate*'s leniency for pricing "suggestions."

The "Discount Pricing Consumer Protection Act", U.S. Senate Bill 148 and House Bill 3190, is proposed legislation pending before the U.S. Congress that would overturn the *Leegin* decision in the same manner as the Maryland amendment. Both houses' versions of the bill have been reported favorably by their examining Committees, and have been cleared for a vote on the floor. With passage likely, U.S. and Maryland antitrust law concerning restrictions on "resale price maintenance" may soon be in line once again.



# Should An Arbitration Provision Be Included in a Contract?

By Lisa A. Olivieri and Matthew J. Gallagher  
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Whether an arbitration provision should be included in a contract is a question that should be addressed whenever a contract is drafted. However, the answer is not a simple “yes” or “no.” Often, in negotiating a contract, the forum and structure for dispute resolution is not given proper consideration, and the parties may end up with a “boiler plate” arbitration provision that does not serve either party well.

Depending upon the type of contract and the potential for material issues, arbitration may be a proper forum to resolve disputes. However, the decision to include or not to include an arbitration provision in a contract should only be made after the proper due diligence and detailed discussions with the client.

Boiler plate arbitration provisions may seem rather harmless on first reading and may appear to be a great alternative to a long and expensive court battle. Nevertheless, many of the standard procedures in boiler plate arbitration provisions may end up being more costly and may not be in the best interest of the client. For example, the filing fees for Complaints filed in Maryland District and Circuit Courts are generally in the range of \$30-\$125. Whereas, in most arbitrations the filing fees are generally set on a sliding scale, based upon the amount of the claim. *See American Arbitration Association, Commercial Arbitration Rules, Standard Fee Schedule, effective January 1, 2010.* By way of example, for claims between \$0 and \$10,000, the initial case filing fees charged by the American Arbitration Association are \$975 (\$775 initial filing fee plus \$200 case service fee if the case proceeds to first hearing, but payable in advance). *Id.*

Additionally, both parties to an arbitration must pay a filing fee for any claim filed, as well as the fee(s) for the arbitrator(s). *See Rules 49 and 51, American Arbitration Association, Commercial Arbitration Rules, effective June 1, 2009.* So, while arbitration is often considered a less expensive alternative to litigation, this is not always the case.

Another problem often associated with arbitration is that of pre-arbitration discovery. In most arbitrations, discovery is either not available or is within the sole discretion of the arbitrator(s). *See Rule 21, American Arbitration Association, Commercial Arbitration Rules, effective June 1, 2009.* This may result in one party not having the opportunity to gather

information and evidence from the opposing party prior to a hearing. The lack of formal discovery can place an undue burden on the client and counsel by limiting the preparation necessary to effectively and thoroughly prosecute or defend a claim. Even in those instances when discovery is permitted, it may not be governed by any specific rules of procedure. Consequently, getting information about the opponent’s case is difficult, at best.

Still another issue associated with arbitration concerns what can and cannot be submitted as evidence. Absent a specific agreement to the contrary, arbitrators are not bound by the rules of evidence. *See Rule 31, American Arbitration Association, Commercial Arbitration Rules, effective June 1, 2009.* This can limit counsel’s ability to properly evaluate or present a claim, as well as render the appropriate advice on settling or proceeding with a matter.

Further, arbitration generally does not provide a party with an opportunity to file a motion for summary judgment, which can result in spending a significant amount of money and time defending a frivolous claim at an arbitration hearing. *See American Arbitration Association, Commercial Arbitration Rules, effective June 1, 2009.* Such hearings may last for days, just like a trial, and as such can be very costly.

Last, and possibly most significant, is the limitation of appeal from arbitration. There is presumption at law that arbitration awards will be confirmed, resulting in a very narrow and limited judicial review of an arbitrator’s decision under the Federal Arbitration Act and Maryland Uniform Arbitration Act. *See 9 U.S.C.A. § 10; Md. Code Ann., Cts. & Jud. Proc. § 3-224; Mandl v. Bailey, 159 Md.App. 64, 858 A.2d 508 (Md. App. 2004); and Three S Delaware, Inc. v. DataQuick Information Systems, Inc., 492 F.3d 520 (4<sup>th</sup> Cir. 2007).* As such, getting an arbitrary and unjust arbitration award overturned, or seeking redress against a renegade arbitrator, is most difficult.

While there are potential drawbacks to arbitration, in some instances arbitration may be the best venue to resolve disputes between the parties. One advantage to arbitration is the ability to select an arbitrator(s) who specializes and/or has in-depth knowledge over the

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subject matter of the contract. Another advantage is that arbitrations provide the protection of confidentiality, as they are private proceedings, and not open to the public. Also, matters for the most part can generally be heard and decided much more speedily in arbitration compared with the court system.

Depending on the nature of the contract, the parties involved, and the potential amount in controversy, the use of arbitra-

tion as the designated method of dispute resolution should be carefully considered. If, thereafter, arbitration is selected as a means to resolve disputes, the arbitration provisions can be drafted to avoid the above noted problems with “boiler plate” arbitration provisions; for example, incorporating specific discovery procedures and evidentiary rules to govern the arbitration. This provision should be specifically negotiated and tailored to accommodate the vicissitudes of the subject contract.

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