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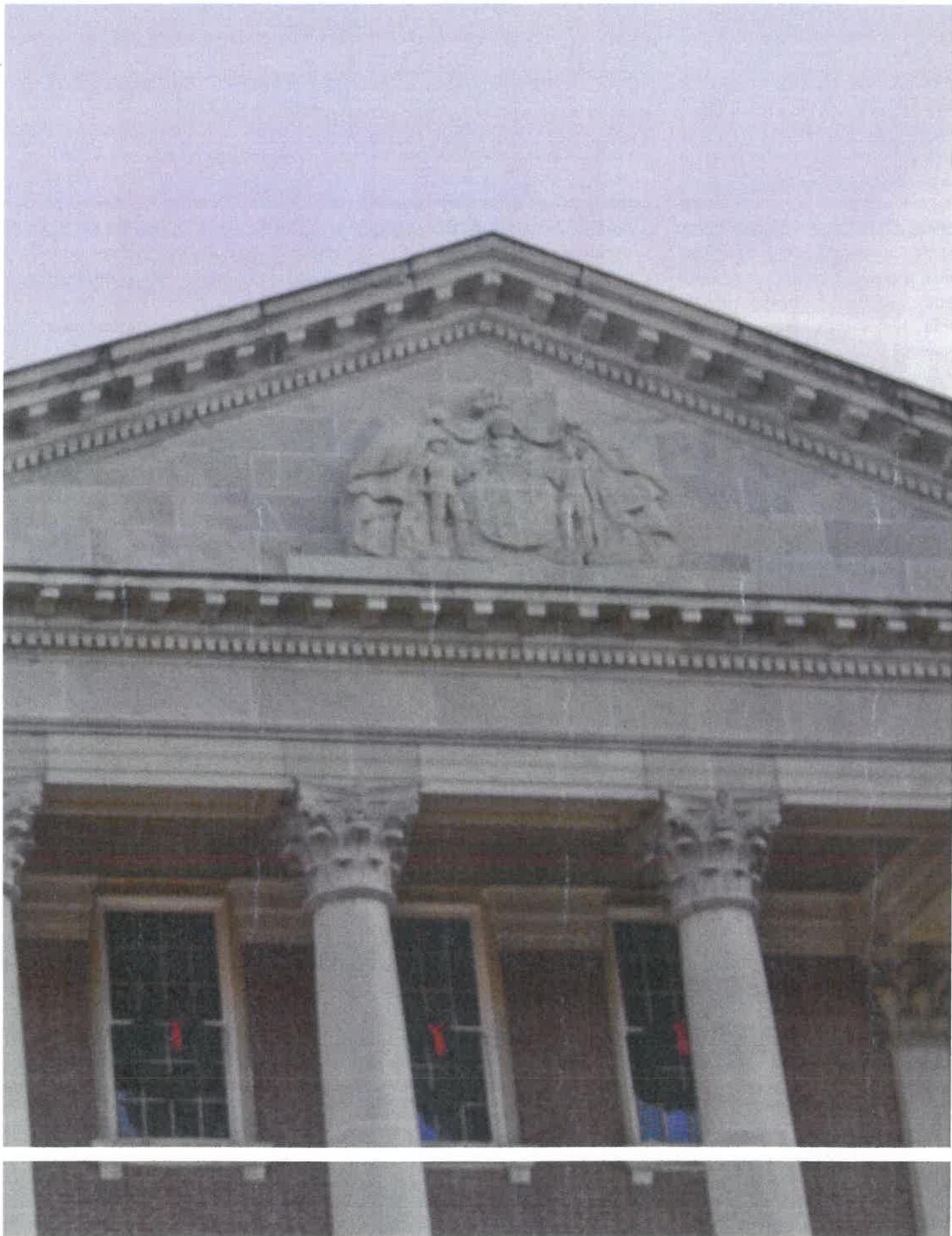


Election Law



PRIVATE CAUSE OF ACTION FOR INJUNCTIVE RELIEF UNDER MARYLAND'S CAMPAIGN FINANCE LAWS

By H. Mark Stichel and Joshua Greenfeld



On Friday, June 13, 2014, eleven days before Maryland's Primary election, all campaign finance entities (candidates, slates, political action committees and independent expenditure committees) were required to file campaign finance reports detailing their expenditures and donations. Md. Code Annotated Election Law §13-309. Campaign finance reports are vital so that the public, and also political allies and opponents, will know who or what is funding a particular campaign. As the Supreme Court of the United States stated in *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976), the landmark opinion that, *inter alia*, upheld disclosure require-

ments for federal campaigns:

[D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interest to which a candidate is most likely to be responsive and

thus facilitate predictions of future performance in office.

Given the Supreme Court's April 2, 2014, decision in *McCutcheon v. Federal Election Commission*, ___ U.S. ___, 134 S. Ct. 1434 (2014), which invalidated aggregate campaign contribution limits on First Amendment grounds, disclosure becomes even more important in a world in which political contributors have fewer limits on their spending.

On June 13, 2014, a political action committee (PAC) called Marylanders for Integrity in Government failed to file its campaign finance report



despite sending no fewer than three campaign mailers to thousands of Maryland voters with harsh negative attacks against Jon Cardin, a candidate for Attorney General of Maryland. These attacks included some of the most damning accusations seen in Maryland politics in decades, including a claim that Cardin's marriage proposal directly led to multiple individuals being shot. Naturally, Cardin desired to know who or what was funding these attacks so that his campaign could respond.

It is reasonable to assume that with millions of dollars and the state of Maryland's democratic system on the line, there would be a means for holding a non-compliant campaign finance entity responsible, but a review of Maryland campaign finance law reveals little more than small fines for violations of campaign finance law. Md. Code Annotated Election Law §13-331 (\$500 maximum late filing fee beginning January 1, 2015. Current maximum late fee is \$250). The only possible method of forcing the noncompliant campaign finance entity to comply with the law or cease election activities is through Election Law Article §3-605, which allows Maryland's Secretary of State, a political appointee, to seek an injunction against the non-compliant entity. §3-605 is silent as to whether a candidate or voter may bring a private cause of action to seek injunctive relief for non-compliance with campaign finance requirements.

One option for holding non-compliant campaign finance entities accountable is the filing of a complaint with the State Board of Elections (SBE). In the 2014 election cycle, SBE received dozens of complaints of violations of

various campaign finance laws. To date, SBE has issued no sanctions and many of the complaints would not have been investigated until after the November 4, 2014, General Election. Included in these complaints were serious violations of illegal campaign finance coordination between both gubernatorial campaigns and their affiliated PACs. Major Complaints of Violations in Brown-Hogan Race Unlikely to be Resolved Before Election, *MarylandReporter.com*, Sept. 24, 2014.

Time is of the Essence

In many cases of campaign finance non-compliance, the violation occurs within days or weeks of the election. The importance of reporting as an election approaches is reflected in the reporting schedule under Maryland's campaign finance law, which requires more frequent reporting as an election approaches. Once an election happens, allegations of campaign finance violation become moot and the damage is irreversible – the candidate has lost the election. For most campaigns, especially for higher levels of office where hundreds of thousands or even millions of dollars are spent to communicate, the threat of \$500 in late fees is insufficient to deter violations when an election is at stake. Too many candidates and their financial backers are willing to flout the law because \$500 in fines *after* the election pales in comparison to the threat of losing the election. By contrast, in most other types of cases in which time is of the essence with significant, irreversible damage, the law allows for injunctive action.

The Cardin Case

In Jon Cardin's case, the violation occurred eleven days before a hotly contested Primary election. In eleven days, none of it would matter any longer. If the mailers were effective in claiming that Cardin's marriage proposal was associated with people being shot, he would lose the election.

Cardin concluded that there was little, if any, chance that the Secretary of State would take action to file an injunction immediately and work to see it enforced. Meanwhile, the threat of a few hundred dollars in late fees to an organization already spending hundreds of thousands of dollars on campaign mailers was, apparently, no deterrent to flouting the law with a sense of impunity.

On Monday, June 16, 2014, Jon Cardin, both personally, and as a campaign entity, brought a civil action against Marylanders for Integrity in Government and requested that the Circuit Court for Baltimore City enjoin the political action committee from any further campaign communications until it became compliant with campaign finance law by disclosing its donors and expenditures. *See* Case No. 24-C-14-003700 (Circuit Court for Baltimore City). Cardin argued that while there was no explicit statutory right of action for a private party to seek an injunction, there was an implied private right of action based on the wording of Election Law Article §3-605 which is not explicitly limited to the Secretary of State.

Cardin relied upon *Baker v. Montgomery County, Maryland*, 427 Md. 691, 709, 50 A.3d 1112, 1122 (2012) (citing *Cort v. Ash* 422 U.S. 66, 78 (1975)). In *Baker*, the Court of Appeals of Maryland quoted *Cort v.*

Ash for the correct test to determine whether a statute implicitly contains a private cause of action.

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the class for whose especial benefit the statute was enacted [.]” Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Cardin argued that a private right of action was implied by the overall statutory scheme of Maryland’s campaign finance laws because the Maryland Constitution authorizes the General Assembly to enact laws “necessary for the preservation of the purity of Elections.” Maryland Constitution, Article I, Section 7. He further argued that both as an individual and as a candidate, he was part of the class of people § 3-605 was intended to protect because he could be deprived of his right to hold office, the right to a fair election and the right to free expression of political speech under the First Amendment. Just prior to a hearing for preliminary injunctive relief occurred, Marylanders for Integrity in Government elected to file their campaign finance report so this novel legal theory was never tested in a court of law.

Jon Cardin was not the first candidate to attempt to bring a private cause of action under Maryland’s campaign finance laws. Glenn L. Ross, an unsuccessful candidate for

the Baltimore City Council in the 2004 General Election, filed an action after the election to challenge the winning candidate’s qualifications to be on the ballot. Throughout 2003 and 2004, campaign finance entities raising funds for the victor’s campaign repeatedly failed to file campaign finance reports when they were due. One question that was raised in the case before the Court of Appeals of Maryland was whether there was a private cause of action to enforce the campaign finance reporting requirements of Title 13 of the Election Law Article. However, the Court of Appeals held that the case was barred by laches and did not reach the issue of a private cause of action. *Ross v. State Board of Elections*, 387 Md. 649, 658 n. 7, 876 A.2d 692, 697 n.7 (2005).

On June 20, 2014, four days after the Cardin case was filed and concluded, the Court of Appeals discussed *Ross* in the context of a voter’s challenging a candidate’s candidacy on the ground that she was not registered as a member the political party in whose primary election she had filed a certificate of candidacy. The candidate had argued that the voter did not have standing to bring a challenge. The Court of Appeals responded:

Appellant misinterprets the charge of §§5-301(b) and 5-304(e). The State Board’s “responsibility” does not preclude the existence of a private right of action *Ross* provides an example. We did not decide in that case whether there was a private cause of action under §12-202 because we had concluded that *Ross*’s claim was barred by the doctrine of laches, yet, in stating that the appellant’s

claim was governed by §12-202 we suggested that a private cause of action exists for challenging candidacy based on alleged violations on the campaign finance reporting requirements of the Election Law Article.

Cabrera v. Penate, 439 Md. 99, 109-10, 94 A.3d 50, 56 (2014) (emphasis added).

Maryland Should Create an Explicit Statutory Right to Injunctive Relief in §3-605

Jon Cardin’s case is not the only allegation of serious campaign finance violations to occur in Maryland’s 2014 Primary and General Election cycle. While the initiation of a legal action brought Marylanders for Integrity in Government into compliance, both Anthony Brown and Larry Hogan were accused of serious campaign finance violations that were not resolved before the November General Election. If the opposing campaigns or any other Maryland campaign had had access to a private right action for injunctive relief, this alleged scenario, which could seriously undermine American style democracy, may not have occurred. Violations could have been identified quickly, put before a neutral tribunal and resolved efficiently well in advance of the election.

§3-605 has an obscure and murky history. Maryland’s initial campaign finance act, the Corrupt Practices Act of 1908, was superseded by the Fair Election Practices Act of 1967. Neither the 1908 Act nor the 1967 Act included a provision for injunctive relief. §3-605’s prede-

cessor was inserted into the Fair Election Practices Act in 1969 upon recommendation of the Legislative Council of Maryland. *See* Legislative Council of Maryland, Report to the General Assembly of 1969, vol. 1, page 48. The Legislative Council did not state any reasoning in support of the provision, which as initially drafted, gave the Attorney General the power to seek injunctive relief. *Id.*

In 1968, a bill was proposed in the House of Delegates to regulate campaign literature that did not have a properly registered authority certification. *See* House Bill 467, 1968 Md. General Assembly. The bill included a provision requiring the appropriate State's Attorney to seek "an immediate injunction" against campaign literature without a proper certification. The proposed bill was based upon the findings and recommendations of a Baltimore City Grand Jury which found that campaign literature distributed during the 1967 Baltimore City municipal elections contained "false propaganda" from misidentified sources. *See* Report of the Grand Jury of Baltimore City, September Term 1967 at 10-14. House Bill 467 was studied by a "special committee" of the Legislative Council's Subcommittee on Elections after the 1968 session. Ultimately, the Subcommittee on Elections gave a favorable report to a bill drafted by the "special committee" to give the Attorney General the power to seek injunctive relief against "any violation of the Fair Election Practices Act." *See* Subcommittee on Elections, Minutes – Meeting, September 27, 1968 (on file with the Maryland Department of Legislative Services).

Existing records of the Legislative





Council do not explain the evolution of the injunctive relief provision from one requiring the State's Attorney to seek an injunction to combat misattributed campaign literature to one giving the Attorney General plenary authority to seek injunctive relief for any violation of the Fair Election Practices Act, the predecessor of Maryland's current campaign finance law. The House Judiciary Committee amended the Legislative Council's proposed bill and substituted the Secretary of State for the Attorney General. See 1969 Md. House Journal at 867-68 (March 5, 1969). The Legislative Council's proposal, as amended, was enacted and with the exception of minor changes in verbiage, has remained unchanged. See 1969 Md. Laws. Ch. 559.

At the time that the injunctive relief bill was amended by the House Judiciary Committee to substitute the Secretary of State for the Attorney General, the Secretary of State was the public official responsible for enforcement of election law. However, on the same day that Governor Mandel signed the injunctive relief provision into law, he signed another bill that established the State Administrative Board of Election Laws to be responsible for the administration of election laws instead of the Secretary of State. See 1969 Md. Laws. Ch. 555. In 1970, the Legislative Council of Maryland recognized that several provisions of the Maryland Code did not reflect the transfer of functions and responsibilities for election laws from the Secretary of State to the Board and recommended the adoption of a bill to make technical changes to reflect the transfer. See Legislative Council of Maryland,

Report to the General Assembly of 1970, vol. II, page 865. The proposed bill and the law that was eventually enacted, failed to address the injunctive relief provision. *Id.* at vol. I, page 131; see also 1970 Laws of Maryland, ch. 103.

Courts in other states have held that there is no private cause of action under their campaign finance and disclosure statutes. See, e.g., *Nichols v. Kansas Political Action Committee*, 270 Kan. 37, 11 P.3d 1134 (2000); *Crisman v. Pierce County fire Protection District No. 21*, 115 Wash. App. 16, 60 P.3d 652 (2002). The Ninth Circuit has held that there is no private cause of action under the Federal Election Campaign Act. *National Committee of the Reform Party of the United States of America v. Democratic National Committee*, 168 F.3d 360 (9th Cir. 1999). The Attorney

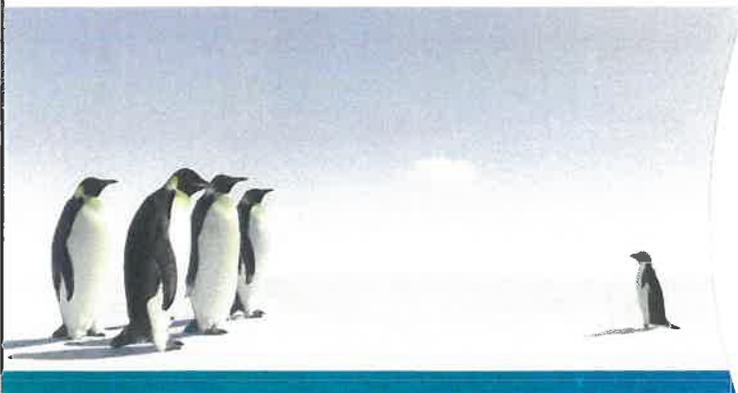
General of Virginia has opined that there is not a private right of action to enforce the Virginia Campaign Finance Disclosure Act. See Va. Atty. Gen. Op. 05-069 (October 12, 2005). Thus, notwithstanding the Court of Appeals' "suggestion" in *Ross* that there is a private cause of action in Maryland, there is the distinct possibility that the next time a candidate in Jon Cardin's shoes seeks an injunction pursuant to Section 13-605, he or she may have a tough row to hoe.

Several states provide a private cause of action for monetary damages when an opponent has violated campaign finance laws. See, e.g., N.C. Gen. Stat. §163-278.39A(f); Tex. Election Code §253.131. However, damages are no recompense for the irreparable injury that a candidate for public office sustains when he

or she loses an election. The General Assembly of Maryland should make explicit that which Jon Cardin argued was implicit – a candidate who is being affected by another candidate's or committee's failure to comply with campaign finance laws should have a private right of action to seek an injunction pursuant to §13-605.

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