GORDON, WOLF & CARNEY CHTD

February 13, 2024

Re: Request for an UNFAVORABLE report on HB 514

Dear Members of the Environment and Transportation Committee:

I write at this time to urge the Environment and Transportation Committee to give HB 514 an unfavorable report. If passed, HB 514 would: (1) statutorily establish non-consensual towing liens against decades of precedent; (2) attempt to wipe out a lawsuit currently pending in Federal Court which is intended to vindicate the rights of more than 33,500 Marylanders whose motor vehicles were towed between 2019 and the present, by Henry's Wrecker Service ("Henry's"), a notorious towing company that operates in Montgomery County; and (3) violate due process, to the extent that HB 514 would apply retroactively. *See Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002).

First, Maryland's appellate courts multiple times have considered the fundamental issue that would be impacted by this legislation and held that neither statutory nor common law permits a trespass tower to hold a vehicle until all towing fees are paid. More than forty years ago, in *T.R. v. Lee*, 55 Md. App. 629 (1983), the Maryland Appellate Court held that no possessory lien exists with respect to a towed vehicle at common law. Seven years later, in *Cade, t/a G&G Towing v. Montgomery County*, 83 Md. App. 419, 427 (1990), the Court repeated this point. The sound public policy behind these and other cases is that permitting towing companies, especially unscrupulous ones, to exercise a lien, encourages them to tow more vehicles because payment, whether the tow is proper or not, is guaranteed. However, it also has an effect on commerce because consumers do not want to return to where they believe their vehicles were improperly towed and held for ransom.

Second, HB 514 is intended to interfere with ongoing litigation, pending in Federal Court in Maryland. In particular, *Hall v. HWS, LLC, et al.*, Civil Action No. 8:22-cv-00996-PJM (filed on March 23, 2022), challenges Henry's widespread and unlawful scheme to tow more than 33,500 vehicles from shopping centers, apartment buildings and strip malls throughout Montgomery County, without the owners' consent. Once Henry's towed the vehicle, it refused to permit the owner or anyone else to reclaim it until someone paid all of Henry's fees and charges relating to the tow. The lawsuit further alleges that Henry's was well aware of *T.R. v. Lee* and *Cade, t/a G&G Towing v. Montgomery County* but did not care. Instead, at least since 2018, Henry's has ignored and usurped the power of the Courts and General Assembly to assert a lien anyway. Section 2 of HB 514, because it specifically will "apply retroactively and shall be applied to and interpreted to affect any [pending] action," will, no doubt be used by Henry's in Federal Court to argue that Henry's unilaterally created and imposed lien was nonetheless permissible.

Third, regardless, the retroactive provisions of HB 514 violate fundamental principles of due process. There is a vested right in an accrued cause of action and the Maryland Constitution precludes the impairment of such right. Furthermore, this principle applies to both common law and statutory causes of action. *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 633 (2002).

The *Dua* case arose from two separate and consolidated appeals regarding retroactive statutes, one of which retroactively established subrogation rights for HMOs, and the other which retroactively changed the law applicable to late fee charges by cable TV providers. The Maryland Supreme Court conducted a detailed and exhaustive analysis of the constitutionality of the two legislative acts which, it held, were unconstitutional because they retroactively impaired, interfered with, or abolished accrued causes of action and deprived plaintiffs of vested rights.

In *Dua*, the Supreme Court reviewed and or cited roughly 40 of its own prior decisions, spanning more than 180 years of consistent jurisprudence, to conclude that retroactive legislation is unconstitutional if it impairs vested rights. In addition to those Maryland cases, the Supreme Court approvingly cited and adopted similar holdings in cases from other States.

The Court relied upon *Gibson v. Commonwealth of Pennsylvania*, 490 Pa. 156, 160-162, 415 A.2d 80, 83-84 (1980), which illustrates conclusively that the retroactivity in HB 514 is unconstitutional:

> In an opinion by Justice Roberts, the Court held that a constitutional provision, like Article 19, providing that persons are entitled to justice "by the law of the land" means "that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in substance, by any subsequent law."

Dua, 370 Md. at 645. In this instance, the "law of the land" is the existing law at the time when the cause of action accrued – i.e. when a towing company asserts an illegal lien against the owner of a vehicle – and that law cannot be "altered, in substance, by any subsequent law." Because Section 2 of HB 514 retroactively impairs accrued causes of action, it is clearly unconstitutional.

Even if it did not completely wipe out Marylanders' ability to challenge the past behavior of towing companies (which it does), HB 514 is still unconstitutional. As *Dua* makes clear, a retroactive law is unconstitutional if it merely *impairs or interferes with* an accrued cause of action. Plainly, that is precisely what HB 514 does, and what it intends to do.

The constitutional standard for determining the validity of retroactive civil legislation "is whether vested rights are ***impaired***." 370 Md. at 623 (emphasis added). The provision of the Maryland constitution cited "for ***the principle that retroactive legislation impairing vested rights is invalid*** is Article 24 of the Declaration of Rights, which is often referred to as the Maryland Constitution's due process clause." 370 Md. at 628 (tracing history of Article 24 to the *Magna Carta*). This ancient principle of constitutional law precludes passage of HB 514.

Nobody (except perhaps lawyers who charge by the hour) benefits when the Legislature enacts an unconstitutional law. Such legislation spawns endless litigation over its validity until, finally, the Maryland Supreme Court declares what everyone already knew – that the law does not pass constitutional muster. Unconstitutional laws – like HB 514 – must not be enacted.

Respectfully,

Richard S. Gordon