

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



January – March 2009

## OPINIONS

### HEALTH

#### **MENTAL HEALTH – HEALTH INSURANCE – IMPACT ON MARYLAND LAW OF THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT OF 2008 ("PARITY ACT")**

Congress recently enacted the Mental Health Parity and Addiction Equity Act of 2008 (the "2008 Parity Act"), which builds upon the provisions of the Mental Health Parity Act of 1996. Together those laws establish requirements for health plans that offer mental health and substance abuse benefits. Maryland statutes governing health insurance and health maintenance organizations ("HMOs") also mandate mental health benefits, but are not identical to the federal Parity Acts.

**Question:** How is the health insurance market in the State affected by the recent federal legislation?

**Answer:** The 2008 Parity Act applies only to large group health insurance policies and to self-insured large group plans provided through employers. Large group policies (defined as health insurance policies covering more than 50 employees) are regulated by a combination of State and federal law concerning mental health and substance abuse benefits.

In general, the mandates in Maryland law remain effective, but as a result of the 2008 Parity Act large group policies may no longer treat mental health and substance abuse services or treatments more restrictively than they do the "predominant" medical and surgical benefits offered in the policy. A similar rule applies to self-insured health plans governed by ERISA, except that, because Maryland law does not apply to such plans, they are not required to cover mental health and substance abuse treatment at all. But if they do, such plans must cover these conditions on a par with their coverage of physical illnesses.

For employers purchasing a small group policy, the benefits outlined in Maryland law by the Maryland Health Care Commission will apply.

**Question:** What is the impact of the 2008 Parity Act on §15-802 of the Insurance Article ("IN"), which, among other things, contains specific cost-sharing requirements for outpatient treatment and specifies a maximum copayment for methadone treatment?

**Answer:** The 2008 Parity Act preempts certain aspects of §15-802 as they apply to large group policies, in particular its provisions relating to cost sharing for outpatient treatment, limits on partial hospitalization, and maximum co-pays for methadone treatment. Large group policies will no longer be permitted to offer lesser or more restrictive benefits for these services than for services to treat physical illnesses. Other sections of the Insurance Article are not preempted. These include §15-840 (residential crisis services), §15-824 (maintenance drugs), and §15-831 (prescription drugs).

**Question:** Does the 2008 Parity Act require any "corrective" State legislation?

**Answer:** No. When federal law preempts State law, it does so by virtue of the Supremacy Clause in Article VI of the United States Constitution and there is no legal requirement to amend State law to recognize that preemption.

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February 23, 2009*

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## MD HEALTH CARE COMMISSION

### **FEES – EFFECTIVE DATE OF LEGISLATION CREATING NEW ALLOCATION METHOD FOR COMMISSION FEES**

The Maryland Health Care Commission is funded by fees assessed against various health care entities and practitioners. During its 2001 session, the General

Assembly delegated to the Commission the authority to revise the allocation of those fees in its regulations according to certain criteria.

**Question:** Should the Commission have implemented the new allocation method for Fiscal Year 2002? Must the Commission take some corrective action now with respect to the 2002 fees?

**Answer:** The Commission should have implemented the 2001 law in FY 2002, by amending its regulations. However, there is no action for the Commission to take at this date. The new allocation scheme was to be established through amendment of the Commission's regulations, but those regulations were not amended by the time the fees were due for the 2002 Fiscal Year.

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February 23, 2009

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## RACING

### GAMING – WHETHER “INSTANT RACING” IS PARI-MUTUEL BETTING AUTHORIZED BY THE MARYLAND HORSE RACING ACT

**Question:** Is wagering on video replays of “historic” (previously held) horse races, by means of a product known as “Instant Racing,” authorized at race tracks and satellite simulcast betting (“SSB”) facilities in Maryland under current law?

**Answer:** No. Instant Racing is not permitted at race tracks or SSB facilities in the State because it does not constitute pari-mutuel betting, as contemplated by the Maryland Horse Racing Act.

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March 17, 2009

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## ADVICE LETTERS

### ATTORNEYS

#### UNAUTHORIZED PRACTICE OF LAW – PUBLIC OFFICERS AND EMPLOYEES – MUNICIPALITIES

**Question:** Is the City of Annapolis required to take corrective action as to any City business conducted by the Acting City Attorney during a two-month period when he had been temporarily de-certified from practicing?

**Answer:** No, the legal sufficiency of the City's actions does not usually depend on the bar status of its attorney. In a situation where it arguably could, a court would likely uphold the City Attorney's actions under the “*de facto* officer” doctrine.

*Letter to*  
**Ellen Moyer**  
*Mayor, City of Annapolis*  
January 26, 2009

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### DEATH PENALTY

#### EVIDENCE – RETROACTIVITY

**Question:** Is a single frame photograph “a video recording that conclusively links the defendant to the murder” and thus adequate proof for imposition of the death penalty under Senate Bill 279?

**Answer:** In light of the common dictionary definition of the term “video” and the construction of the term as used in Maryland law, it is unlikely that a defendant could be sentenced to death on the basis of a single frame photograph linking the defendant to the murder.

*Letter to*  
**Senator Alex X. Mooney**  
March 5, 2009

**Question:** Is fingerprint evidence included within the definition of “biological evidence” required to support use of the death penalty?

**Answer:** No. The term biological evidence “includes, but is not limited to, any blood, hair, saliva, semen, epithelial cells, or other bodily substances from which genetic marker groupings may be obtained.” Fingerprint evidence, by contrast, is based on the distinctive pattern of lines on human

fingerprints, not on genetic material. Fingerprint identification is therefore not a form of biological evidence that would allow imposition of the death penalty.

*Letter to  
Senator Alex X. Mooney  
March 4, 2009*

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## GAMING

### BINGO

**Question:** What is “bingo” under State law? Are the games played on certain “instant bingo” machines considered “bingo” in Maryland?

**Answer:** In bingo, players match pre-assigned numbers on a card with numbers randomly selected in a live “draw” until a winning pattern is formed. Bingo is a game played against other players, not simply against a machine, and the game continues until there is a winner. Among its required features under State law, there must be a live “draw” of numbers by a live caller located on the premises. Some features of the games on “instant bingo” machines resemble lottery games instead of bingo, but the legality of a particular machine depends on how the machine functions and how the game is conducted.

*Letter to  
Laura L. Martin  
State’s Attorney for Calvert County  
January 15, 2009*

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### SLOTS

At the 2008 General Election, voters ratified an amendment to the State constitution that authorizes video lottery terminals (“VLTs” or “slot machines”) at five locations in the State. The law implementing the placement of slot machines (“Slots Law”) established the Video Lottery Facility Location Commission (“Location Commission”) with authority to award up to five video lottery operation licenses.

**Question:** May the Location Commission consider a proposal for a VLT operation license if the proposal was submitted without the initial license fee?

**Answer:** No. When it issued its Request for Proposals (“RFP”), the Location Commission interpreted the Slots Law to require that the “initial license fee” must be included with the proposal for the proposal to be considered. Because that interpretation was reasonable, the Location Commission lacks discretion to change its rule after the proposals were submitted.

*Letter to  
Donald C. Fry, Chairman  
Video Lottery Facility Location Comm’n  
February 11, 2009*

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## LEGISLATIVE NEWSLETTERS

### PUBLICATION EXPENSES/ELECTRONIC COMMUNICATIONS

**Question:** Do the provisions of the Election Law Article governing legislative newsletters restrict the public funding and distribution of legislative e-mail communications?

**Answer:** Yes. The Election Law generally makes no distinction between print and electronic forms of communication. Restrictions on use of public funds apply equally to both.

*Letter to  
William G. Sommerville, Committee Counsel  
Joint Committee on Legislative Ethics  
February 2, 2009*

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### PROGRAM OPEN SPACE

Program Open Space (“POS”) was established “to make funds available to State agencies and subdivisions” to support the acquisition and development of needed outdoor recreation space and facilities.

**Question:** May POS funds be distributed directly to municipal corporations?

**Answer:** No. POS funds are to be directed to State agencies and counties (including Baltimore City), not municipal corporations. The counties may then direct POS funds to municipal corporations in the county.

*Letter to  
Delegate James J. King  
January 8, 2009*

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## PUBLIC ETHICS

### COUNTIES – COMMISSIONER COUNTIES

**Question:** May the Board of County Commissioners for Somerset County acquire real estate from the son and daughter of the Board’s president?

**Answer:** If the County Ethics Commission determines that a member of the Board has a conflict of interest in the transaction, that official may not participate in the Board’s decision. However, the conflict would not prevent other Board members from deciding whether to purchase the land.

*Letter to  
Daniel W. Powell, Esquire  
Somerset County Administrator  
February 19, 2009*

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### RECORDATION AND TRANSFER TAXES

#### FIRST TIME HOMEOWNERS

**Question:** Do the exemptions from recordation and transfer taxes for “first-time Maryland home buyers” apply to a person who owns a house in another state, but will use the house in Maryland as a principal residence?

**Answer:** A “first-time Maryland home buyer” is “an individual who has never owned in the State residential real property that has been the individual’s principal residence.” Therefore, a person who has owned a home as principal residence in another state is not disqualified.

*Letter to  
Delegate Rick Impallaria  
March 27, 2009*

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### TELEPHONE CONSUMER PROTECTION ACT

**Question:** Does the federal Telephone Consumer Protection Act (“TCPA”), which restricts “robo calls” – unsolicited artificial or prerecorded telephone calls – apply to pre-recorded political messages?

**Answer:** Yes. All automated calls made using pre-recorded messages, regardless of content, must state clearly the identity of the business or individual initiating the call and the telephone number or address of the caller. The TCPA does not violate the First Amendment by imposing identity and call-back requirements on these prerecorded messages.

*Letter to  
Delegate Rick Impallaria  
March 30, 2009*

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The Opinions, Advice and Legislative Quarterly News summarizes formal opinions of the Attorney General. Also included are letters of advice by Assistant Attorneys General that have been issued on the understanding that they may be made public. (Other advice provided by the OAG may be confidential under the attorney-client privilege.)

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