BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	**)**	
AT&T Corporation	**)**	
	)	
	)	**Docket No. MSBCA 2754**
Under	**)**	
Department of Information	**)**	
Technology Contract	**)**	
Nos. DBM-9914-VPN & OTM-VN-9027	**)**	

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OPINION BY BOARD MEMBER DEMBROW

This appeal comes before the Maryland State Board of Contract Appeals (Board) presenting, among other issues, the question of whether the State is subject to any statute of limitations in connection with its attempt to recover certain funds principally in the nature of credits it claims appellant should have extended to the State to offset allegedly excessive sums paid by the State for the cost of telephone services provided under two separate contracts in force for a long period of time. Specifically, the State contends that it is exempt from any statute of limitations whatsoever and is therefore free to assert entitlement to reimbursement without regard to when its claims may have accrued. Before being compelled to address the

substantive merits of the State's claim, appellant argues first, that even if a liability exists, the State's effort to collect the debt at this late juncture is an untimely claim that is barred by law.

More particularly, it is undisputed that in 1991 the State entered into a contract with appellant American Telephone and Telegraph Company, predecessor to AT&T Corporation, to obtain certain telephone services to implement and operate a statewide telecommunications system. That contract included and incorporated a schedule of charges set forth in a federal filing known as a "tariff" with the Federal Communications Commission (FCC), intended to assure public notice of rates offered to the State by AT&T for intrastate, interstate, and international calls.

At the outset, the procurement was conducted and thereafter managed by the Department of General Services (DGS) and later by the Department of Information Technology (DoIT), which initially was a division of the Department of Budget Management (DBM) and in 2008 became a freestanding cabinet level agency working in coordination and cooperation with DGS, DBM, and other State agencies. The initial contract was extended on several occasions and was therefore in force from 1991 until 2000 and was known as Contract No. 9027.

In 2001, a second contract was entered into by and between the State and AT&T for continuing telephone service. That contract remained in force until 2006; so for the 15-year period between 1991 until 2006 the State has been billed and has paid in accordance with the statements it has routinely received from AT&T, first under a Contract known as No. 9027 and later under Contract No. 9914.

Payment issues initially arose during an audit that began in 2004 and ultimately identified six separate billing and payment issues. On November 6, 2009, the State made formal claim against

AT&T for approximately $7.5 million in total alleged overpayments and related liabilities during the life of the two contracts, an amount that was increased the following month first to the sum of $7,656,872 after correction for computational error, and finally revised to a total of $7,838,594.

Technically speaking, the State avers that the sums in dispute are not actually overcharges, but instead, at least in some instances, monies that should have been paid by AT&T into the State's Information Technology Investment Fund and its 2002 successor, the Major Information Technology Development Fund pursuant to Md. Annot. Code, State Finance and Procurement (SF&P), § 7-316.

To be more precise, the audit disclosed six separate issues alleged to account for AT&T's liability to the State. They include: (1) a shortfall of $1,633,518 in missing payments that AT&T should have made into the State's Technology Fund during three separate sporadic intervals between May 1997 and February 2001, that claimed amount being later reduced to a total of $539,706 in alleged underpayments; (2) an overcharge of $3,028,564, of which the State claims only $740,323 arising from miscalculated credits during the life of both contracts; (3) most importantly, $3,254,880 in charges under Contract No. 9914 that should have been waived for recurring use of certain circuits used to provide local call access, that sum being later adjusted to a total $2,452,172; (4) compensation of $405,630 for new line charges wrongly classified by AT&T under an account for which charges were in excess of the State's contracted rate; (5) $1,350,000 in credits agreed to be made by AT&T toward the State's account at various contract renewal and related dates certain; and last and least, (6) $9,521 in federal and State taxes wrongly charged to the State.

By final determination memorialized in correspondence dated December 8, 2010, DoIT thoroughly substantiated its assertions in

support of the foregoing claim of entitlement to a partial refund of past payments made to AT&T by the State. On January 7, 2011 AT&T filed with this Board a timely appeal of that decision as the instant case, which is docketed as MSBCA No. 2754. As a preliminary matter before either party may proceed to resolution of the substantive merits of the State's demand for payment, AT&T seeks a ruling by the Board dismissing all or part of the State's demand for payment on the basis that its claim was not made within the time periods specified by the pertinent statutes of limitations ordinarily applicable to such claims. Federal and State laws and regulations set forth in the Code of Maryland Regulations (COMAR) as well as numerous case authorities are cited by appellant to justify its position.

Md. Annot. Code, Courts and Judicial Proceedings, § 5-101 sets forth the well-known three-year statute of limitations for civil actions in the State, stating plainly, "A civil action at law shall be filed within three years from the date it accrues…". In addition, the Federal Communications Act of 1934, 47 USC 415(c), establishes a two-year statute of limitations on claims for refund of overcharges billed by a telephone carrier. That federal statute, which appears to preempt state law, provides as follows: "For recovery of [telephone service] overcharges action at law shall be begun or complaint filed with the [Federal Communications] Commission against carriers within two years from the time the cause of action accrues, and not after…", stating further that the running of the two-year federal statute of limitations for recoupment of phone service overcharges commences upon the time of notice by the carrier to a claimant of the carrier's disallowance of any claim having been earlier presented to the carrier in writing. Federal law further defines "overcharges" as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the [Federal Communications] Commissioner." 47 USC

415(g). As more fully addressed above, the monies here in dispute do indeed include some overcharges because the State claims in part that it was billed and paid bills in excess of the charges it should have received from AT&T in accordance with its FCC tariff. At least arguably, as the State contends, other components of the total claim of about $7.5 million may not be correctly classified as overcharges as defined by federal law, such as appellant's promise to remit revenues into the State's Information Technology Investment Fund.

Despite the somewhat complex compilation of State and federally prescribed rights relating to complaints arising from allegedly excessive charges for telephone service, the underlying claim in this appeal is relatively straightforward, premised on common law and asserting simple breach of contract. Appellant argues that as to interstate and international calls, the federal statute bars the State from asserting a claim for reimbursement of overcharges more than two years after the cause of action accrued, namely, the date of the overcharge. For intrastate calls, appellant asserts that the State statute of limitations similarly bars recovery for claims alleged more than three years after accrual. Both parties acknowledge that the State's claims for most if not all of the sums here in dispute were stated after the expiration of both the State and federal statutes of limitations governing civil actions in general and telephone overcharges in particular.

It has long been recognized that the legislature has the authority to restrict the time period during which formal legal action to recover damages may be effectively instituted. Maryland's first statute of limitations is said to date from the year 1715. 8 Md.L.Rev. 294, 296 (1944). It is indeed remarkable, therefore, that even after the passage of three decades of precedent in Board proceedings and three centuries of common law jurisprudence interpreting statutes of limitation,

highly experienced counsel from the Office of the Attorney General confidently claim in this matter that the State of Maryland is not subject to any statute of limitations, while equally competent and effective advocates for appellant assert with the same level of confidence that the State's claims are barred notwithstanding its status as sovereign. Thus the case at hand appears to present an unsettled question of first impression.

As every practitioner knows well, statutes of limitations are strictly enforced, occasionally with very harsh results. While unforgiving and absolutely depriving a prospective claimant of judicial remedy, time limitations on legal actions are established by the legislature and generally justified by its desire to protect due process by assuring that parties seeking to interject defenses to claims receive adequate timely notice thereof in order to preserve the ability to muster and offer a fair response. The nature and duration of the limitation is established by statutory law which is rigidly enforced in accordance with legislative intent. No exception on behalf of the State is included in the language of Maryland's statutory directive concerning the obligation to file a civil action within three years of accrual. In addition, to support further its argument in favor of applying the statute of limitations by reference to the provisions of the contract here at issue, appellant points out that, consistent with Maryland's three-year statute of limitations, Section 19 of the initial contract entered into by and between the State and appellant expressly requires AT&T to retain its billing records for only three years following payment.

During the hearing in this matter in response to the State's argument that it is not subject to any statute of limitations whatsoever, the Board, during the week of Baltimore's commemoration of the bicentennial of the commencement of the War

of 1812, posed the hypothetical of some historian discovering a 200-year-old allegation of a debt owed to the State by virtue of some asserted breach of contract dating to that period of history. Would such a claim be enforceable today?

Counsel for the State responded consistent with the State's position on the legal issue at hand, namely, that such a claim would not be barred by the statute of limitations and the State could therefore theoretically pursue the debtor or the successor in interest to such a debtor, either today or 100 years from now. While the Board appreciates DoIT's desire to recover from AT&T today the not insignificant sum of $7.5 million, the Board must strain to conceive that such magnanimous treatment of the State was intended by the legislature as to exempt all state contract claims from any statute of limitations at all. Such an exemption is not expressly stated in Maryland statute, and if it were, it would potentially create injustice to an alleged debtor seeking to defend against a claim that may have been stale for many decades, with near certain loss of documented memory or witness of any transaction or breach that may be claimed to have occurred. On the other hand, no state statute expressly confines contract claims made by the State to the same statute of limitations applicable to private parties.

The Board is concerned that in the absence of any statute of limitations applicable to State contract claims, the cost of government procurements in Maryland could increase. If an entity contracts with the State to provide goods or services, is it really in the State's long-term financial interest to compel that entity to retain records to eternity, and be prepared to defend an action for breach at any time in the future without any limitation at all? How many entities may decline to do business with the State under such conditions, and how much extra will be charged by those who seek a state contract, understanding the implicit need for indefinite records retention and the prospect

of having to defend against the State's potential for unilateral imposition of prospective liability on any undetermined date ever in the future?

At the same time, the Board recognizes that its prospective questions regarding the wisdom of extant statutory procurement policy are irrelevant. The Board has no power or authority to create new law, by its own initiative or by *post hoc* judicial fiat. The Board's responsibility, instead, is merely to decipher and apply the law as it exists. Only the legislature, with the approval of the chief executive, is endowed with the power to adopt changes in the legal rights and limitations of the parties to this appeal. If the legislature had sought to create an exception for the State to be able to pursue claims after the expiration of the three-year statute of limitations, it certainly had the authority to say so explicitly, but it is undisputed that it did not; though it is also unclear whether statutory silence on the question creates an exemption for State contract claims from the State statute of limitations, implied in current law as one of the very broad rights enjoyed by the State as a vestige of sovereign immunity, based originally upon the antiquated legal maxim, "the King can do no wrong."

Through sovereign immunity, the State does conditionally exclude itself from substantial potential liability to private parties pursuant to the Maryland Tort Claims Act, Md. Annot. Code, State Government, § 12-101, *et seq*. and elsewhere in statute. By comparison, when it comes to actions for breach of contract, raising sovereign immunity is expressly forbidden, but only as a defense to a claim against the State. Md. Annot. Code, State Government, § 12-201(a). Here, the State is affirmatively attempting to collect an alleged debt. No statutory authority or justification has been brought to the Board to support the conclusion that the Maryland General Assembly intended for the State to be bound by the same statute of limitations as

ordinarily applicable to all other parties to a cause of action. By the same token, there is no clear authority for the proposition that the State is exempt from the statute of limitations.

Fortunately, the question at hand has been at least tangentially analyzed in appellate opinions which offer some guidance to the Board in its attempt to recognize and apply the present state of Maryland law and thereby render a determination in compliance with statute and precedent. One is a case from the Court of Special Appeals which sheds some light on the question here at hand, namely, the applicability of the statute of limitations to restrict contract claims made by the State. In State of Maryland Central Collection Unit (CCU) v. DLD Associates LTD., 112 Md. App 502 (1996), the State, through its Central Collection Unit (CCU) sought to collect a debt of about $25,000 for an insurance policy issued to a private company by an agency of State creation, namely, the Injured Worker's Insurance Fund (IWIF). The unpaid premium for insurance was for coverage through July 27, 1991, but CCU did not file suit in the Circuit Court until September 29, 1995, after expiration of the three-year statute of limitations. Strictly construing the applicable statute and reasoning that the legislature did not waive sovereign immunity except when the State is defending a claim made against it by a contractor, Maryland's intermediate appellate court reversed the trial court's dismissal of CCU's claim and allowed the late filed claim to be pursued.

More importantly, Baltimore County v. RTKL Assoc., Inc., et al., 380 Md. 670 (2004) gave the Court of Appeals its premiere opportunity to address the issue of the extent to which a statute of limitations applies to governmental entities in Maryland. That case involved allegedly defective grading on a county construction project that was completed in 1998 pursuant to a design contract entered into in 1996 over which the County filed

suit in 2001. The opinion in RTKL is authored by Judge Wilner, who is noted personally in the instant Opinion in acknowledgement of his contribution to the Court's words which are extensively quoted and paraphrased below. The precedent established by the opinion in that case pertains solely to prospective actions brought on behalf of a county government rather than the State, but the high Court's very thorough discussion of the doctrine of *nullum tempus occurrit regi* (time does not run against the King) is very instructive *dicta* nonetheless. In that matter Baltimore County asserted that it was exempt from any statute of limitations, just as the State avers here. In closing its exhaustive historical review in RTKL, the Court of Appeals concluded:

> Indeed, this court has yet to consider whether the counties and municipalities enjoy or have ever enjoyed the benefit of *nullum tempus* in a contract action. It is an open question, which we now answer in the negative.
>
> One thing that is clear, at least in Maryland, is that the *nullum tempus* doctrine is an aspect of the more general sovereign immunity enjoyed by the King of England and, after Independence, by the State. The Central Coll. Unit case established that it was "the doctrine of sovereign immunity" that precluded the assertion of limitations against the State in a contract action….The counties and municipalities, we have made clear, do not enjoy common law sovereign immunity in contract cases, and, to the extent there could have been any doubt about it, ch. 450 erases that doubt, at least as to authorized written contracts. The entire underpinning of *nullum tempus* is therefore absent with respect to the counties and municipalities in contract actions…
>
> Accordingly, we hold that the county does not enjoy the benefit of *nullum tempus*, and that its action for breach of contract is governed by the three-year statute of

limitations set forth in CJP § 5-101. (688-689)

Prior to rendering the foregoing determination, the Court discussed the principles of sovereign immunity enjoyed by government entities, noting as follows:

> Art 25A, §1A was part of a law first enacted in 1976 (1976 Md. Laws, ch. 450) that, subject to certain conditions and limitations waived the sovereign immunity of the State and purported to waive sovereign immunity of the counties and municipalities of the State in actions against them for breach of a written contract. Until the enactment of that law, the State and its agencies enjoyed a common law sovereign immunity from suits in both contract and tort: ”neither a contract nor a tort action [could] be maintained against the State unless specific legislative consent has been given and funds (or the means to raise them) are available to satisfy the judgment.” *Dep’t of Natural Resources v. Welsh*, 308 Md. 54, 58-59 (1986).
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> Although the immunity enjoyed by the State, in both contract and tort actions, was a general one that had long been recognized, we noted in *American Structures, Inc. v. Baltimore*, 278 Md. 356, 359, 364 A.2d 55, 57 (1976), that "as regards counties and municipalities, however, the rule is different." Municipalities and counties enjoyed a limited immunity in tort actions. As we confirmed in *DiPino v. Davis*, 354 Md. 18, 47, 729 A.2d 354, 369-70 (1999), "[a] local governmental entity is liable for its torts if the tortious conduct occurs while the entity is acting in a private or proprietary capacity, but, unless its immunity is legislatively waived, it is immune from liability for tortious conduct committed while the entity is acting in a governmental capacity." We recounted in *American Structures*, however, that counties and municipalities "have been regularly subject to suit in *contract* actions, whether the contracts were made in performance of a governmental or proprietary function, as long

as the execution of the contract was within the power of the governmental unit." *Id*. at 359-60, 364 A.2d at 57, citing cases dating back to 1862 (Emphasis added). In *Montgomery County v. Revere*, 341 Md. 366, 671 A.2d 1 (1996), we confirmed that "under Maryland law counties and municipalities are normally bound by their contracts to the same extent as private entities" and that "Maryland law has never recognized the defense of governmental immunity in contract actions against counties and municipalities." *Id*. at 384, 671 A.2d at 10. *See also Harford Co. v. Bel Air*, 348 Md. 363, 372, 704 A.2d 421, 425 (1998); *Fraternal Order of Police v. Balto. Co.*, 340 Md. 157, 173, 665 A.2d 1029, 1037 (1995).

That distinction - that the immunity from contract actions enjoyed by the State did not apply to the counties and municipalities - appears to have been missed by the General Assembly when it enacted ch. 450 in 1976, for, in one of the "Whereas" clauses that introduced the bill, the Legislature stated that this Court had held that, "as a result of the common law doctrine of sovereign immunity, a suit cannot be maintained against the State *or its political subdivisions*, unless authorized by the Legislature, and funds are available to satisfy any judgment rendered." (Emphasis added). Under that assumption, and desiring to modify the effect of this common law doctrine in the belief that "there exists a moral obligation on the part of any contracting party, including the State or its political subdivisions, to fulfill the obligations of a contract," the Legislature proceeded, subject to certain conditions and limitations, to waive the immunity it knew was enjoyed by the State and the immunity it apparently thought was enjoyed by the counties and municipalities in actions for breach of a written contract.

The Legislature achieved that result by enacting, in the one bill, five sets of nearly identical provisions: one, now found in §§ 12-201 through 12-204 of the State

> Government Article, applicable to actions against the State or units of the State government; a second, codified in Art. 23A, § 1A, applicable to actions against incorporated municipalities; a third, codified in Art. 25, § 1A, applicable to actions against non-chartered, non-code counties; a fourth, codified in Art. 25A, § 1A, applicable to actions against chartered counties, such as Baltimore County; and the fifth, codified in Art. 25B, § 13A, applicable to actions against code counties.

Like RTKL, the Board notes that the matter at hand concerns an action in contract, to which a very different framework exists to define the parameters of prospective tort liability incurred by or to the government. Furthermore, the Board recognizes that although appellant here is the private entity that contracted with the State, the dispute arises from the State's determination of liability against that entity; so undisputedly the claimant is in actuality the sovereign while the private entity is defending against the government's demand and prayer for payment. Thus Maryland's statutory bar of sovereign immunity as a *defense* to a contract claim is inapplicable. Unlike RTKL, however, the sovereign here is the State, not a lesser form of local government like Baltimore County; so the crux of the substantive question addressed by the Court in RTKL is easily and properly distinguishable from the issue at hand, namely, whether the statute of limitations may bar civil actions brought by the State.

In RTKL the high court nonetheless aptly opined that "sovereign immunity as a defense has no meaning in the context of a claim by a governmental entity against someone else." (678) Reviewing the pertinent legislative history in some detail, the Court traced the evolution of sovereign immunity in tort and contract actions to the 1968 enactment of House Joint Resolution 65 in response to the Court's ruling in Weisner v. Bd. of

Education, 237 Md. 391, 206 A.2d 560 (1965), in which Resolution the legislature observed, "the present judicial doctrine of sovereign immunity often operates capriciously and unjustly to preclude recovery on many meritorious claims against state and local governments." Weisner concerned only liability in tort, and the 1968 House Joint Resolution adopted in response to the Weisner opinion resulted in the appointment of a Commission to study sovereign tort liability, though the Commission neither convened nor generated any report or recommendations.

Attention to the issue was renewed in 1972 by formal legislative review of the prospective need for a State insurance program. At that time, a specially appointed examining Legislative "Council noted that, although sovereign immunity was generally available, legislative exceptions had been made to that doctrine and a number of State and local agencies had obtained comprehensive insurance or had established self-insurance programs. The Council expressed the view that, the State, 'having made the basic decision to waive sovereign immunity in some cases, should make the waiver uniform in all cases by legislative act.'" (680) Legislation was subsequently introduced based upon the recommendations of that Legislative Council, but both of the bills ultimately passed by the full legislature were vetoed, first, in 1974 and again in 1975. Summarizing the somewhat tortured background on the status of sovereign immunity during this period of time, the Court held that the statute of limitations applied only to claims filed *against* a government entity, stating, "[t]here is nothing in this legislative history even to suggest an intent to shorten the statute of limitations applicable to an action *by* the State or one of its political subdivisions for breach of contract." (682)

In RTKL the Court also observed that the genesis of *nullum tempus* originated in the 13th Century. It is discussed as one of the prerogatives of the British Crown in Sir William Blackstone's

Commentaries on the Laws of England (1765-1769) and premised upon the notion of absolute royal infallibility. Accordingly, one may forcefully argue that it has no place in modern jurisprudence, nor should it have ever been applicable to a democratically elected republican form of governance, and that the doctrine may be particularly inapposite to contract enforcement in government procurement law.

But such arguments would speak only to the question of what the law should be. The issue before the Board is what the law is, and it is not disputed that *nullum tempus* was transferred to this nation in its infancy after the American Revolution, and is continued to be recognized by most state governments today "to some extent and in some fashion, no longer, of course, as a royal prerogative but as a matter of public policy." (685) In the same opinion the Court also observed that historically "Maryland seems to have gone both ways on whether the doctrine applied in this State," citing Lord Proprietary v. Bond, 1 H. & McH. 210 (1760) and Kelly's Lessee v. Greenfield, 2 H. & McH. 121 (1785) *cf*. Swearingen v. United States, 11 G. & J. 373 (1841) and Bonding Co. v. Mechanics' Bank, 97 Md. 598, 55 A. 395 (1903).

Summarizing the current state of the archaic common law principle known as *nullum tempus occurrit regi*, namely, that the sovereign is not subject to the statute of limitations because "time does not run against the King," the Maryland Court of Appeals in RTKL concluded, "We reject that approach in breach of contract actions brought by counties and municipalities and, because those issues are not now before us, reserve on whether we should continue to recognize it in actions brought by the State or its agencies or in tort actions brought by counties and municipalities." (683) That ruling was based in part on a number of appellate decisions rendered over the years, some of which are discussed below.

40 years ago the Court of Appeals applied the governmental

vs. proprietary function test to establish the applicability of sovereign immunity only for the former function but not for proprietary acts, holding in Goldberg v. Howard Co. Welfare Bd., 260 Md. 351, 272 A.2d 397 (1971) that the statute of limitations does not bar an action brought by a local governmental agency to recoup certain welfare benefits it claimed should not have been paid. The reasoning of the high Court in Goldberg included the conclusion that payment of welfare payments was a purely governmental function, stating, "when the action brought by a governmental agency or political subdivision or municipality has arisen out of its exercise of a strictly governmental function, such as rendering assistance for the aged, infirm, indigent and mentally incompetent, that the defense of limitations will not prevail against it." (358) It is entirely conceivable that the same governmental vs. proprietary function test could be applied here today, potentially exempting the State from the usefulness of sovereign immunity and thus the benefit of *nullum tempes* in its proprietary actions to secure telephone service, or a multitude of other government procurements.

This conclusion was affirmed five years after Goldberg with respect to an action brought not by a county, but by the State in Central Collection Unit v. Atlantic Container Line, Ltd., 277 Md. 626, 356 A.2d 555 (1976). However, in that case the Court appears to have criticized the governmental vs. proprietary function test, more directly observing instead merely that, "limitations may not be asserted against the State when, in its sovereign capacity, it sues in its own courts." (628) In that dispute, the State attempted to recoup damages done to a publicly owned port facility. The Court noted the origin of Maryland's statute of limitations in English law regarding adverse possession dating from the year 1623, in force in this State until the adoption of the first Maryland limitations statute in 1715; and by which principles in both contract and tort, *nullum*

tempes has long exempted the sovereign from the application of limitations.

Similarly, the Court reached the same result 30 years ago in reversing both the trial court and the Court of Special Appeals ruling with respect to dismissal of an action brought by a specialized bi-county creature of state law in Washington Suburban Sanitary Commission (WSSC) v. Pride Homes, 291 Md. 537, 435 A.2d 796 (1981), concluding, "We shall here hold that limitations do not run against the Washington Suburban Sanitary Commission because it is an agency of the State." (537) That case involved WSSC's pursuit of a claim seeking the imposition of liability for damage to its sewer lines as the result of defendant's deposit of excavated earth upon property for which WSSC held easement rights. Though not specifically indicated in the appellate opinion, WSSC's allegation of negligence in that case is a fair assumption, so the direct holding may be limited to tort claims. Basing its opinion not on the governmental vs. proprietary test adopted in older cases, the Court used the rationale that obligations of the State and by extension, WSSC, must be provided for by the allocation of adequate funds from a public budget, so sound public policy demanded that funding be planned and provided for in advance of the imposition of liability. The high court confirmed in that case the basis of *nullum tempes* stating, "the doctrine that limitations do not run against the State stems from the theory of sovereign immunity" (544) and concluding, "We hold that limitations are not a bar to a claim brought by the Commission." (545)

Finally, Anne Arundel County v. McCormick, 323 Md. 688, 594 A.2d 1138 (1991) concerned an effort by a county government seeking to collect on a subrogation claim against a private party alleged to have caused injury to a county employee resulting in the payment by the county of workers' compensation benefits to the employee. The Court directly referenced a different standard

of sovereign immunity for the State than for county governments, reasoning that the statute of limitations applies to counties in an action in tort arising from a proprietary or corporate function. In explaining its rationale in that case, the Court plainly stated, "The ancient common law maxim of *nullum tempus occurrit regi* has been adopted in this State and exempts the State and its agencies from the bar of a statute of limitations such as § 5-101 of the Courts and Judicial Proceedings Article, which does not expressly bar the State or its agencies." (694-695)

Moreover, at the end of the day the Board is left with some significant guidance but without definitive direction by the Court of Appeals or otherwise as to whether the statute of limitations bars the State's collection efforts in the case at hand. In the most comprehensive of several evolving analyses of sovereign immunity issued, the Court of Appeals specifically deferred determination of the question here in dispute. There is clear authority with respect to tort claims by or against the State. There is direct precedent with respect to claims by local governments and municipalities. There is plain statutory instruction with respect to the State's defense of a contract action. But outside of inference by occasional *dicta*, there appears to be no direct ruling or statement in Maryland law with respect to the question of whether the statute of limitations applies to the State's affirmative claims for breach of contract as set forth in the instant appeal.

This much is certain:

1. There existed in Maryland at some historic time the application of *nullum tempus* as an appendage of the ancient doctrine of sovereign immunity, and it existed as a continuing legal precept.

2. Over the course of time the doctrine of sovereign immunity has been greatly eroded by the enactment of several

express abrogating statutes, including Md. Annot. Code, State Government, § 12-201(a), which waives the State's sovereign immunity only with respect to *defense* of a contract action.

3. Appellate *dicta* suggests that the sovereign immunity principle of *nullum tempus* may remain in force in this State and no Maryland statute or case to date has expressly repealed the doctrine with respect to an affirmative claim by the State to recover damages for breach of contract.

Therefore in the absence of an enacted expression of legislative intent to abrogate the doctrine, the Board concludes that *nullum tempus* remains in effect and hence bars appellant from invoking the State's statute of limitations to compel dismissal of the claims here at issue.

Having thus determined that the State statute of limitations does not bar the claims that underlie the instant appeal, the Board turns its attention to the application of federal law. It is one thing to say that the State by omission in State statute has exempted itself from application of the State statute of limitations in its State courts. It is quite another to suggest that the State has the power or authority to exempt itself from the application of federal law. It does not. See Block v. North Dakota, 461 U.S. 273 (1982).

The Supreme Court precedent relied upon by the State in this regard, Alden v. Maine, 527 U.S. 706 (1999), is distinguishable from the case at bar because in Alden, the State of Maine invoked sovereign immunity to defend a private claim of violation of federal labor standards. Here, the State of Maryland acts in the capacity of a plaintiff seeking recovery against a private entity, not as a defendant responding to a complaint for damages filed against it. The other cases cited by the State are also inapplicable to the matter at hand because they affirm only the proposition that the federal government enjoys sovereign immunity from enforcement of certain federal laws, not the state

governments. Similarly, the Supreme Court cases relied upon by the procurement officer, namely, Weber v. Board of Harbor Commissioners, 85 U.S. 57 (1873) and Illinois v. Kentucky, 500 U.S. 380 (1991), are not useful to the resolution of the instant procurement claim dispute.

FCC statute plainly prescribes with respect to collection of monies alleged to be due from a telephone carrier, "For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after…." Federal law appears to be fairly unambiguous in this regard, and it trumps state law. Whether noted by administrative complaints or by actions at law, according to federal law, claims for reimbursement of overcharges must be filed within two years of accrual. Therefore in accordance with the special federal statute of limitations restricting the ability to recoup overcharges for telephone service, the State is barred from making claims for overcharge after two years following their accrual.

As a result, all of the State's claims for overcharges must be and are hereby dismissed. These appear to the Board to include those elements of the State's claim itemized on page three of this Opinion as Nos. 2, 3, 4, and 6; but not nos. 1 and 5. Item No. 1 is a deficiency claim for agreed upon payments that appellant was required to remit into the State's Information Technology Investment Funds, not alleged overcharges. Item No. 5 consists of three claims for promised but unapplied account credits of $450,000 each in months 3, 15 and 27 of the State's contract renewal conditioned upon the State's approval of contract no. 9914.

In the event that counsel for the parties cannot stipulate which components of the State's total claim may be rightfully classified as "overcharges" as the Board has preliminarily

determined above, appellant will be permitted at hearing to introduce evidence to support its prospective contention that the Board misinterprets federal law and wrongly classifies two elements of the State's claim as other than overcharges as defined by federal statute. By the same token, the State will be permitted at hearing to introduce evidence to support its prospective contention that the other four components of the State's total claim are not actually "overcharges" as defined by federal law and thereby exempted from application of the two-year federal statute of limitations.

To sum, the Board rules as a matter of law that the State's claim is not barred by the State statute of limitations but is barred by the applicable federal statute of limitations, except as to its assertion of entitlement to $539,706, reduced by audit correction from its initial claim of $1,633,518, that sum representing the State's claim of missing payments that AT&T should have made into the State's Information Technology Funds, in contrast to a claim to recoup overcharges. By the same rationale, the State's claim totaling $1,350,000 for the three promised annual credits of $450,000 each, conditioned upon contract renewal, is not barred by the federal statute of limitations governing recovery of overcharges billed by carriers of interstate telephone service. The Board further clarifies this ruling by noting that it holds *sub curia* all defenses invoking the doctrine of laches, which is generally disfavored in government procurement law but nonetheless may or may not be applicable to the State's collection efforts here appealed, depending upon the factual evidence to be adduced at a future hearing.

Finally, the Board addresses another of appellant's asserted grounds for dismissing the State's claim in its entirety, namely, that enforcing its claim would constitute retroactive application of statute and regulation. The pertinent case authority on this

point of law is University of Maryland v. MFE Inc., 345 Md. 86 (1996), also authored by Judge Wilner. That dispute concerned a claim for about $2.5 million that arose from problems encountered during the renovation and expansion of McKeldin Library, located on the campus of the University of Maryland in College Park. Construction on the project started in 1981, but it was not until 12 years later, in 1993, that the University provided MFE with written notice of its claim for delay damages and related extra construction costs resulting from alleged defects in MFE's architectural designs and specifications.

Even though it was not an issue brought to the Court of Appeals by the parties to that appeal, the high court realized *sua sponte* in the course of its analysis that this Board had no authority or jurisdiction affirmatively to allow the State to pursue a former contractor to collect a refund of monies already paid by the State. At the time of the opinion and the filing of the underlying claim, the statutory and regulatory framework supporting the existence and operation of the Board as an administrative tribunal was expressly defined to handle bid protests and contract claims by a contractor against the State, but not claims arising against a contractor for damages incurred by the State. The Court insightfully noted in that opinion that when a limited version of the current Board was initially created for the Maryland Department of Transportation (DOT) in 1978, no express provision was incorporated in statute to include claims for affirmative relief brought by the State against its contractors. During legislative consideration at that time, this presumed omission was pointed out by the Office of the Attorney General, which observed that a contractor with a claim against the State was required to pursue it before the Board, but the State's claim against a contractor could be pursued directly in Circuit Court. However, proposed amendments to correct this presumed defect were not adopted by the General Assembly.

Similarly, when the Board's jurisdiction was expanded in 1980 to include the requirement of exhaustion of administrative remedy before the Board in all procurements, rather than just DOT disputes, the new enabling statute also failed to include any legal authority for the Board to afford affirmative relief requested by the State against its contractors.

Although subsequently proposed regulations adopted by the Board of Public Works (BPW) provided Board procedures by which the State could ostensibly pursue a contractor for affirmative relief, the statutory authority for those regulations was absent, because it was never included in the underlying 1978 or 1980 statutes, nor afterwards, despite other changes in Board authority that were approved by the legislature in 1986 and 1988. As a result, the 1988 revision of COMAR provisions applicable to Board procedures with respect to claims made by the State had no statutory foundation or underpinning.

The Court of Appeals in MFE concluded therefore that legislative intent was deliberate and because no statute was ever enacted authorizing appeals to the Board in connection with the State's assertion of its right to affirmative recovery, the Board was without jurisdiction to entertain such appeals pursuant to the legislature's grant of Board authority under Md. Annot. Code, SF&P § 15-207 or otherwise. Remedy on behalf of the State before the Board was thereby limited to contests arising from the State's withholding of payment due a contractor for set-off of monies otherwise owed. That statutory gap was later closed by passage of legislation in the 2004 session of the Maryland General Assembly now codified as Md. Annot. Code, SF&P § 15-219.1 for which regulations were adopted effective May 9, 2005 known as COMAR 21.10.04.05-.10.

As a consequence of the Court's holding in MFE, appellant contends that the only forms of affirmative relief allowed to be afforded by the Board in connection with a contract entered into

prior to the 2005 adoption of the regulations referenced immediately above are limited to those in the nature of a set-off of obligations otherwise due and payable by the State, as distinguished from a direct monetary award against a contractor on behalf of the State. According to appellant, at least in part, this is because retroactive application of substantive rights is strictly prohibited by the federal and State Constitutions and laws. However, by contrast, procedural rights may be applied retroactively, as appellant readily concedes and the State concurs. See Roth v. Dimensions Health Corp., 332 Md. 627, 632 A.2d 1170 (1993); Gregg v. State, 409 Md. 698, 976 A.2d 999 (2009); Rawlings v. Rawlings, 362 Md. 535, 766 A.2d 98 (2001); Langston v. Riffe, 359 Md. 396, 754 A.2d 389 (2000).

The Board believes that appellant's understanding of the implication of MFE is erroneous because it is overly expansive. MFE does not stand for the proposition that no pre-2005 contract claim other than a set-off is allowed to be pursued by the State. MFE stands only for the proposition that no pre-2005 contract claim other than a set-off is allowed to be pursued before the Board. MFE did not and does not preempt the State from pursuing its debtors. It only did away with the requirement of exhaustion of administrative remedy as a prerequisite to filing an action in the Circuit Court. See McLean Contracting Co. v. Md. Transp. Auth., 70 Md. App. 514, 521 A.2d 1251 (1987); MNCPP v. Wash. Nat'l Arena, 282 Md. 588, 386 A.2d 1216 (1978); SHA v. Transamerica Ins. Co., 278 Md. 690, 367 A.2d 509 (1976); State v. Dashiell, 195 Md. 677, 75 A.2d 348 (1950).

As a consequence, the 2004 legislative expansion of the Board's authority in response to MFE resulted in approval not of substantive regulations, but of procedural ones. This is to say that the adoption of COMAR 21.10.04.05-.10 did not create a cause of action that previously did not exist. Instead, the new regulations established the manner by which that pre-existing

cause of action had to be pursued, namely, by first filing an appeal to this Board before taking recourse in a Circuit Court. Therefore appellant's prayer to dismiss the State's claim on the basis that it requires retroactive application of substantive rights under COMAR is denied. The rights sought to be exercised by the State before this Board are procedural in nature, not substantive, and therefore there is no bar to retroactive application.

WHEREFORE it is Ordered this _____ day of July, 2012 that appellant's Motion to Dismiss be and hereby is GRANTED except as to the State's claims not arising from the allegation of an overcharge for telephone service as defined by federal law, and it is further,

Ordered that the Board deems the instant ruling to be final and subject to interlocutory appeal at the election of either party or both parties on any or all of the legal issues addressed above in advance of the Board's receipt of testimony or other factual evidence to be adduced at further hearing in this matter.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2754, appeal of AT&T Corporation Under Department of Information Technology Contract Nos. DBM-9914-VPN & OTM-VN-9027.

Dated:

_____
Michael L. Carnahan
Deputy Clerk