In The

COURT OF APPEALS OF MARYLAND

No. 106
September Term, 2007

CALVIN HOFFELD,
Petitioner,

v.

SHEPHERD ELECTRIC CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Special Appeals
No. 1085, September Term, 2006

Brief of Amici Curiae
Maryland Employment Lawyers Association
and the
Metropolitan Washington Employment Lawyers Association
in Support of Petitioner

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<u>**STATEMENT OF INTEREST**</u>

Amici, the Maryland Employment Lawyers Association (MELA) and the Metropolitan Washington Employment Lawyers Association (MWELA), organizationally and through their members, are attorneys who represent individuals under federal and state law that protects the interests of employees in receiving their wages earned for their work performed, including the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; the Maryland Wage and Hour Law, Md. Code, Lab. & Empl. § 3-401 *et seq*.; the Maryland Wage Payment and Collection Law, Md. Code, Lab. & Empl. § 3-501 *et seq*.; and Maryland common law. As longtime advocates for worker's rights, MELA/MWELA appreciate this opportunity to offer the Court their unique perspective on the issues presented in *Hoffeld v. Shepherd Electric,* 176 Md. App. 183, 932 A.2d 1197 (2007).

MELA and MWELA are sister local affiliates of the National Employment Lawyers Association. The joint membership of MELA/MWELA comprises over 300 members who represent plaintiffs in employment and civil rights litigation in Maryland and the metropolitan Washington area. The purpose of MELA/MWELA is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA and/or MWELA have participated as amicus curiae in the following recent cases: *Jordan v. Alternative Res. Corp.*, 448 F.3d 332, *reh'g en banc den.,* 467 F.3d 378 (4th Cir. 2006), *cert. den.,* 127 S. Ct. 2036 (Apr. 16, 2007); *Manor Country Club v. Flaa*, 387 Md. 297 (2005); *Towson Univ. v. Conte*, 376 Md. 543 (2003); *Friolo v. Frankel*, 373 Md. 501 (2003); *Barbour v.*

Washington Metro. Area Transit Auth., 374 F.3d 1161 (D.C. Cir. 2004); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874 (D.C. 2003) (en banc); *Hollins v. Federal Nat'l Mortgage Ass'n*, 760 A.2d 563 (D.C. 2000); *MacIntosh v. Building Owners & Managers Ass'n Int'l*, 355 F. Supp. 2d 223 (D.D.C. 2005); and *Lance v. United Mine Workers of Am. 1974 Pension Trust*, 400 F. Supp. 2d 29 (D.D.C. 2005).

Members of MELA and MWELA represent commissioned employees in a variety of industries whose employers erect arbitrary conditions to prevent said employees from receiving their wages earned for their work performed. Because the outcome of this case will have a direct impact upon the ability of MELA/MWELA members and their clients to protect employees' interest in receiving the fruits of their labors, MELA/MWELA have a specific interest in the fair resolution of the issues presented in this appeal.

STATEMENT OF THE CASE

Amici adopt the Petitioner's Statement of the Case.

QUESTION PRESENTED

May an employer forfeit a commission earned by an employee prior to the employee's termination but with the commission not calculated until after termination?

STATEMENT OF FACTS

Respondent Shepherd Electric is engaged in the business of supplying wholesale and retail electrical supplies for commercial use. The company employed Hoffeld as an

"outside salesman" from June 1993 through January 16, 2003, the date of Hoffeld's voluntary resignation. Hoffeld was paid solely on commission, meaning his compensation was a percentage of the value of the sales contracts he brought in. (App. 69, T. 53/5-12).

Shepherd Electric did not pay Hoffeld commissions for three jobs on which Hoffeld had obtained purchase orders from customers. (App. 18, T. 67/17-23). Hoffeld earned these commissions because he obtained purchase orders from the three customers for the jobs. (App. 9-10, T. 31/17-35/7 (J.E. Richards-Pakistani job)); (App. 12-13, T. 45/20-46/1 (VARCO/MAC-NIH job)); (App. 14-15, T. 53/18-54/21 (L.H. Cranston-GWU job)). No additional follow-up work on the purchase orders for those three jobs was needed after the purchase orders were submitted. (App. 35, T. 134/11-136/8; App. 39, T. 153/9-16; App. 65, T. 36/22-37/20; App. 67-68, T. 45/14-47/1). Shepherd Electric paid Hoffeld's commission on some of the items in these purchase orders, but refused to pay Hoffeld for the remaining items on these purchase orders because the items shipped after his last day of work. (App. 73, T.67/8-69/14).

ARGUMENT

I. Overview of Problem and Suggested Solution

An employee who decides to work in commission sales agrees to absorb a certain amount of risk. There are risks that his efforts will result in no sales and he will earn no money. However, the employee does not agree to risk arbitrary choices made by the

employer or arbitrary contingencies imposed on him by the employer which thwart his entitlement to commissions already earned and owed.

When an employer pays an employee not for his hours but for results (*i.e.*, on pure commission), this shifts the risk of low sales to the employee. Despite the shift in risk to the employee, Maryland law protects the wages earned by commissioned employees to the same extent as the hourly wages or salaries due other employees. The fact that commissions may be contingent on the decisions of third parties—the customers—to make a purchase does not provide the employer with any additional grounds to claim that an employee's wages should be forfeited when the sale is made. Commissions are a form of contingent pay, but the contingency is based on the decision of third parties to buy; when that contingency is satisfied, the wage is owed. In this case, the employer made the sale and received the benefits of Hoffeld's labor, but sought to avoid paying Hoffeld the commission he earned even though the only contingency—the completion of the sale—was, in fact, satisfied.

The issue here can affect commissioned and incentivized employees in a broad range of transactions. In many cases, there is a significant delay between the salesperson's work and the closing of a sale, *e.g.,* sales of new homes yet to be built, or the custom designing of cabinets, machinery or computer software. This delay means that there is a long "pipeline" for the commissions, and it is easy for a particular employee to have changed jobs during that time. This case presents an opportunity to clarify that, in the same way than an hourly employee is entitled to be paid for all work performed through the last day, a commissioned employee is similarly entitled to be paid

for work performed through the last day, even if payment is contingent on the completion of a sale and is months away.

A. Commissioned employees are particularly vulnerable to forfeiture of their earned wages.

Our nation and this State's economy are increasingly tied to the global economy. Employers are reacting to the increased competition by moving from the traditional fee-for-service model to a pay-for-performance model. *See* Bureau of Labor Statistics, *Overview of Report on the American Workforce 2001, Chapter 2, The Evolution of Compensation in a Changing Economy*, p. 82 (2001) (available at http://www.bls.gov/opub/rtaw/pdf/chapter2.pdf). Pay-for-performance is intended to increase employee productivity, but it also shifts risk from the employer to the employee. In a fee-for-service arrangement, labor costs are fixed and borne by the employer. In a pay-for-performance system, the employer only pays when both the employer and the employee are successful, *i.e.,* by completing a sale.

Salespeople typically are employees at-will and work at their employer's whim. *See Willard Packaging Co., Inc. v. Javier*, 169 Md. App. 109, 134, 899 A.2d 940, 955 (2006) (recognizing the "inequalities of bargaining power" in the salesperson-employer relationship). Outside salespeople are often exempt under both Federal and Maryland law from receiving the minimum wage and an overtime premium for overtime hours. *See* Fair Labor Standards Act, 29 U.S.C. § 213(a)(1) (2007) (exempting outside salespeople from the Fair Labor Standards Act's minimum wage and overtime protections); Maryland Wage and Hour Law, Md. Code, Lab & Empl. § 3-403(a)(4) (2007) (exempting outside

salespeople from the Maryland Wage and Hour Law's minimum wage and overtime protections).

Because they bear the risk of labor costs yet enjoy limited legal protection, commissioned salespeople are particularly vulnerable to the risk that employers will refuse to pay their earned wages when payable. Consider a hypothetical commissioned salesperson who invests enormous resources and succeeds in making a deal, only to have the rug pulled out at the last minute by an unscrupulous employer that terminates the employee shortly before the deal is signed or the goods are shipped, or just before payment is due to the employee. It is not hard to imagine such a scenario because much the same happened in this case. Indeed, Shepherd Electric paid Hoffeld commissions on some of the purchase orders that he closed with customers before his termination, but then refused to pay him commissions on the remaining portions of those same purchase orders merely because Shepherd shipped the goods and calculated his commission after Hoffeld's last day of work. For purposes of Maryland wage law, it does not matter whether the employee is terminated or leaves voluntarily; he or she is still entitled to be paid for the work performed prior to the termination. *Medex v. McCabe*, 372 Md. 28, 41-42, 811 A.2d 207, 305 (2002) ("Some states have separate provisions for voluntary and involuntary departures by employees. . . The Maryland statute makes no such distinction, giving equal protection to all departed employees.")

B. The "back end" problem: What happens when a commissioned employee leaves the employer with commissions still in the pipeline?

The problem presented in the *Hoffeld* case is faced, to some extent, by all commissioned employees. There is almost always a delay between the time that an employee performs the work and the time when the commission is paid.

This "pipeline," as it is called, impacts commissioned employees in two ways. First, when a commissioned employee starts work, it can be many weeks or months before he has enough sales "in the pipeline" such that he is getting regular compensation. This is the problem at the "front end." Second, and the issue presented in *Hoffeld*, is that whenever a commissioned employee leaves the employer—whether voluntarily or not—there are usually commissions in the pipeline. This is the problem at the "back end."

In some lines of work, this pipeline can last more than a year. For example, a builder developing a new subdivision may employ commissioned salespeople to sell new homes to be built on vacant lots, but not pay the commissions until the home is built and the sale consummated. This makes the pipeline a minimum of six to nine months, and with the risks and uncertainties in the development business, it could extend for more than a year. If the decision below stands, then a developer could hire a salesperson on commission, have that person sell dozens of lots, and then fire that person before the homes are completed and avoid paying any compensation to the salesperson for her efforts. Indeed, if the subdivision is successful, the lots may sell out long before completion, leaving the builder with no need to keep the sales staff around.

The above is an extreme example, but it illustrates the harm at issue in this case and in a large segment of our economy where compensation is wholly or partially contingent on sales or other performance goals. Employers use the carrot of large, albeit delayed, commission payments to entice employees to work. Unscrupulous employers may have an economic incentive to invent reasons to claim that their commissioned employees have forfeited earned wages.

C. The Court should use this opportunity to clarify how the Maryland Wage Payment and Collection Law addresses the "back end" problem.

Since enactment of the Wage Payment and Collection Law (MWPCL), Maryland courts have grappled with the question of when an employee's wages are "earned". *See, e.g., Medex v. McCabe*, 372 Md. 28, 811 A.2d 297 (2002); *Whiting-Turner v. Fitzpatrick*, 366 Md. 295, 783 A.2d 667 (2001); *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 745 A.2d 1026 (2000); *Battaglia v. Clinical Perfusionists, Inc.*, 338 Md. 352, 658 A.2d 680 (1995); *Stevenson v. Branch Banking & Trust Co.*, 159 Md. App. 620, 861 A.2d 735 (2004); *Magee v. DanSources Technical Servs., Inc.*, 137 Md. App. 527, 769 A.2d 231 (2001); *see also Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624 (D. Md. 2005); *McLaughlin v. Murphy*, 372 F. Supp. 2d 465 (D. Md. 2004).

The question of when a wage is "earned" is particularly important to commissioned employees. A salary or hourly wage is "earned" based on time spent on the job, regardless of results. For example, an employer who fires an hourly worker for unsatisfactory performance still has to pay for the hours worked up to the termination decision. The issue should not be any more complicated for a commissioned employee,

who has “earned” his wages when he has performed his work necessary toward the ultimate result, *i.e.,* a “sale”. The law permits employers to make payment of wages contingent on the decisions of customers or third parties to buy the product, but the law does not permit an employer to say, in effect: “Even though you made the sale, we are still not going to pay you simply because you were no longer our employee when the buyer closed.”

The decision below relies on the notion that the employee’s commission was not “earned” until the employer actually shipped and invoiced goods on the purchase orders that the employee had procured. *See Hoffeld,* 176 Md. App. at 204, 932 A.2d at 1209. To say the commission was not “earned” until shipping and invoicing occurs is inaccurate. The commission was not *calculated* until the date of shipping. “When a commission is earned” and “when a commission is calculated and paid” are two entirely different issues that should not be conflated. A salesperson should not be denied a commission when shipping is the employer’s job and the employee has no control over the shipping date. The commission incentivizes the making of sales; filling the orders is someone else’s job.

The decision below also relies on the supposition that, although the salesman might not have received the commissions he earned on the three jobs at issue, at least those commissions were paid over to his successor outside salesmen. *See Hoffeld,* 176 Md. App. at 200, 932 A.2d at 1206. Even if true (which the record does not reflect), such a scheme would violate the Maryland Wage Payment and Collection Law because it would deprive an individual employee of the fruits of his own labors. For example,

Hoffeld could bring in a million dollar purchase order; Shepherd Electric could fire Hoffeld and assign the account to some other outside salesman; and the favored salesman would receive the commission that ought to have been Hoffeld's. Such a scenario hardly comports with the law's requirement that "[e]ach employer shall pay an employee . . . all wages due for <u>work that the employee performed</u> . . . ." Md. Code, Lab. & Empl. § 3-505 (2007) (emphasis supplied); *see also Rogers*, 362 F. Supp. 2d at 645 (court was disturbed by the fact that managers who fired salespeople and took over pending loans received commissions of 43% of sale price instead of 16% they would have normally received).

Maryland law prohibits the forfeiture of wages that have already been earned. *See Medex*, 372 Md. at 39-41, 811 A.2d at 304-05 (a contract provision that results in a forfeiture of vested wages would violate public policy, citing with approval *Tuttle v. Geo. McQuesten Co.*, 642 N.Y.S.2d 356, 358 (N.Y. App. Div. 1996)); *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 29-30, 215 A.2d 222, 224-25 (1965) (employer could not forfeit bonus which constituted earned but deferred compensation for services rendered). In *Hoffeld*, this Court has the opportunity to state a clear, bright-line rule that disallows forfeiture of a commissioned employee's earned wages. *Cf. Haas v. Lockheed Martin Corp.*, 396 Md. 469, 497-98, 914 A.2d 735, 752 (2007) (adopting bright-line rule that statute of limitations for discriminatory discharge runs from last day worked, rather than from date of notice of termination). Such a clear statement of the law should help reduce the proliferation of litigation concerning when a commissioned employee's wage is "earned". Indeed, as Amici well know, lack of clarity in this field effectively results in a substantial discount of the employee's wages because every salesperson who leaves his

company must engage in an individualized negotiation over the value of commissions in the pipeline, against the background of the cost and uncertainty of recovering all that he is entitled to.

D. Proper construction of the statute addresses the "back end" problem and disallows forfeiture of a commissioned employee's earned wages.

The contingency in a contingent payment situation does not go to <u>whether</u> compensation is <u>earned</u>, but rather <u>when</u> compensation is <u>payable</u>. Compensation is "earned" when work is performed; it is "payable" when the contingency occurs.

Maryland law must be construed to effectuate the law's primary purpose: to provide a vehicle for employees to collect, and an incentive for employers to pay, wages earned for work employees have already performed. *See Battaglia*, 338 Md. at 364, 658 A.2d at 686 (citing Wage Payment and Collection Law, 1993: Hearings on H.B. 1006 Before the House Economic Matters Committee, Floor Report (microfilmed at H.B. 1006 Legislative Reference File (1993)). MELA/MWELA suggest the following formulation of a rule that properly construes the Maryland Wage Payment and Collection Law; is consistent with precedent; does not impair freedom of contract; can be easily applied; and yields fair and equitable results for both employees and employers:

A commissioned employee's wage is "earned" when he performed his work necessary toward the ultimate result, *e.g.,* a "sale" or a "closing". Thus a salesperson such as Hoffeld has "earned" the right to a commission when he brings in a sales order. The commission remains contingent on the actual sale. The wage is "payable" when the

contingency (*e.g.*, the sale) actually occurs, but in any event a "sale" occurs no later than the date that the employer collects proceeds from the sale.[1]

An employer cannot tell its hourly or salaried employees: "You must be a current employee on payday to be paid for your work." If that were the rule, then nearly every employee would forfeit compensation for their last few weeks on the job because nearly all employers pay for work in arrears. Similarly, being a current employee at the time of the sale or closing is not a lawful requirement for "earning" a commission. Nor can an employer impose a forfeiture condition beyond the ultimate goal of completing the sale, especially conditions beyond the employee's control, *e.g.,* the date the employer chooses to ship the goods, or complete construction, or calculate the commission. In some cases, it is appropriate to delay payment until these events, but the entitlement to be paid wages is not conditional on these events.

Once compensation has been earned, it cannot be forfeited, regardless of the employer's subjective evaluation of performance. Even an employee fired for poor performance must be paid for work done up to the time of termination. If an employee fails to handle ancillary duties, such as shaking hands or pushing some paper, that goes to

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[1] In this case, there is no dispute that the employer made the sale and was paid by customer. If the contingency never occurs—*e.g.*, the sales order is cancelled by the customer—then the contingency is not satisfied and no payment is owed. Care must be exercised in this area, however, to avoid giving the employer the power to game the system, in effect. For example, if the customer in this case had made a minor change to the sales order but still completed the sale, Hoffeld's commission would still be due on the modified sales order, and the employer should not be permitted to claim that a minor modification by the customer results in a new sales order for which Hoffeld need not be paid anything. The Court need not reach all of these permutations, but neither should it inadvertently create opportunities for future mischief.

the employer's evaluation of the quality of the work and might well be grounds for discipline or termination, but such failure does not provide grounds for forfeiting contingent compensation if the contingency is satisfied. The compensation is contingent, as in this case, on the sale; it is not contingent on being a "good employee".

There is no situation where it is proper for an employer to keep the commission or contingent payment that it had offered to an employee as compensation for his work performed. Where more than one commissioned employee has contributed to the result and would normally have a claim to some or all of the commission or contingent payment, the employer may apportion the commission among such employees (including former employees), so long as it does so on a reasonable basis that does not cause a forfeiture or penalty, or favor current employees over former employees solely because of their status.

II. The Proper Construction of MWPCL Section 3-505

A. Both clauses of Section 3-505 support the post-termination payment of commissions earned despite a termination.

As noted in *Medex*, the principal purpose of the Maryland Wage Payment and Collection Law "was to provide a vehicle for employees to collect, and an incentive for employers to pay, back wages." *Medex*, 372 Md. at 39, 811 A.2d at 304 (quoting *Battaglia*, 338 Md. at 364, 658 A.2d at 686). Section 3-505, "Payment on cessation of employment" provides as follows:

> Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on

> which the employee would have been paid the wages if the employment had not been terminated.

Md. Code, Lab & Empl. § 3-505 (2007). Analytically, this provision can be divided into two clauses, each of which must be given full force and effect. *See Taylor v. NationsBank, N.A.*, 365 Md. 166, 181, 776 A.2d 645, 654-55 (2001) ("whenever possible, the statute should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory"); *Blondell v. Baltimore City Police Dep't,* 341 Md. 680, 691, 672 A.2d 639, 644 (1996) ("We interpret statutes to give every word effect, avoiding constructions that render any portion of the language superfluous or redundant."); *see also Adamson v. Correctional Med. Servs., Inc.,* 359 Md. 238, 252, 753 A.2d 501, 508 (2000) (statute should be construed so as to "avoid unreasonable or illogical results that defy common sense").

Clause One is "all wages due for work that the employee performed before the termination of employment". This clause defines when a terminated employee's wage is "earned". A commissioned employee has "earned" his wage when he has performed his work necessary to achieve the end result, *e.g.,* a sale.

An hourly wage employee gets paid for every hour of work, regardless of the quality of work or the degree of completion. A commissioned employee, whose compensation is contingent on completed sales or other benchmarks of success, should not be any more vulnerable to forfeiture. If a sale is eventually consummated, then a commission has presumptively been earned by the salesperson.

Clause Two is "on or before the day on which the employee would have been paid the wages if the employment had not been terminated". This clause defines when a terminated employee's wage is "payable", which is distinct from when his wage is "earned". A commissioned employee's wage is "payable" whenever the end result—a sale or a closing—actually occurs. The fact that the date of payment is variable for a commissioned employee does not render him any more subject to forfeiture than any other employee in Maryland.

The wage of an hourly wage or salaried employee is "payable" at whatever regular time interval paychecks are issued. The wage of a commissioned employee is "payable" when the end result is achieved. Again, if a sale is eventually consummated, then a commission is presumptively payable to the salesperson. The employer cannot forfeit the employee's commission when the employer gets paid for the sale.

The structure of Section 3-505 recognizes the reality that wages can be earned (*i.e.*, "due for work . . . performed") well in advance of when they are paid (*i.e.*, "on or before the day on which the employee would have been paid the wages if the employment had not been terminated"). In other words, the law permits an employer to delay the date it pays its employee wages. It does not, however, permit an employer to deny payment of wages once earned.

In Hoffeld's case, his commission was "earned" when he obtained a purchase order from a customer. A purchase order constituted a firm commitment by the customer to buy the electrical goods needed for a particular job from Shepherd Electric. Once he obtained a purchase order, Hoffeld, who was employed as an "outside salesman," had

performed the work necessary to result in a sale. *See Hoffeld*, 176 Md. App. at 195, 932 A.2d at 1203-04 (Dave Pullias, Shepherd Electric's former vice president for sales: "It starts with the purchase order, a contract. We have a sale, and then the process of shipping. . . . Once I have an order form, you give me an order, a purchase order, I have a sale.").[2]

In Hoffeld's case, his commission was "payable" when Shepherd Electric shipped the goods, invoiced the customer, and calculated his commission for the shipment. There is no dispute that Shepherd Electric did all the above, and pocketed the proceeds of the sale. Therefore, the contingency was satisfied. According to the record, the payday after the commissions were calculated was the day on which Shepherd Electric would have paid Hoffeld if his employment had not terminated. *See Hoffeld*, 176 Md. App. at 192-93, 932 A.2d at 1202. Shepherd Electric was permitted to delay payment of Hoffeld's commission, but it was not permitted deny payment.

B. This construction of Section 3-505 is consistent with Section 3-507.1, "Action to recover unpaid wages."

As this Court noted in *Medex*, "our reading of this one portion of the Act, § 3-505, must be construed in the context of the entire statutory scheme of the Wage Payment and Collection Law." *Medex*, 372 Md. at 38, 811 A.2d at 303 (citing *Whiting-Turner*, 366

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[2] Amici note that a purchase order is an enforceable contract for sale of future goods under the Maryland Uniform Commercial Code. *See* Md. Code, Com. Law, § 2-106(1) (2007) (defining "contract for sale"); *id*. § 2-105(1) (defining "goods"); *id*. § 2-105(2) ("A purported present sale of future goods or of any interest therein operates as a contract to sell."); *Ritz-Craft Corp. v. Stanford Mgmt. Group*, 800 F. Supp. 1312, 1317 (D. Md. 1992) (contract to supply modular housing units manufactured to buyer's specifications was contract for sale of goods governed by Maryland UCC).

Md. at 302, 783 A.2d at 671; *Blondell*, 341 Md. at 691, 672 A.2d at 645); *see also Harris v. State*, 331 Md. 137, 146, 626 A.2d 946, 950 (1993) (court may look at statute's purpose when interpreting its text). Section 3-507.1, "Action to recover unpaid wages", provides as follows:

> Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

Md. Code, Lab & Empl. § 3-507.1 (2007). Reading Sections 3-505 and 3-507.1 together, it is apparent that the Maryland legislature contemplated that there will always be some delay between the time that wages are "earned" and when they are "payable". Once earned wages become payable, however, they must be timely paid. If wages are paid untimely (*e.g.,* cases in which the employer's response to a suit for unpaid wages is to send to the plaintiff a check for the underlying amount pleaded as owed), the employer is not relieved of liability. Remedies are available under Section 3-507 as to the amount of unpaid wages, plus statutory multipliers, attorney's fees and costs. *See* Md. Code, Lab & Empl. § 3-507.1 (2007).

III. This Construction of Section 3-505 is Consistent with Maryland Precedent

A. Admiral Mortgage

In *Admiral Mortgage*, this Court found that an employee whose job was to generate and develop loans was entitled to commissions for loans he completely

developed that closed after his resignation. *See Admiral Mortgage*, 357 Md. at 537, 540, 745 A.2d at 1028, 1029. The facts were as follows:

> Cooper worked for Admiral as a "mortgage originator" or "loan officer" from January to August, 1995. His job was to generate and pursue leads on potential mortgage loans. According to Admiral's president, Floyd Rothstein, a loan officer was to obtain a completed application and other necessary documents and then turn the file over to another employee for further processing and closing. If Admiral initially generated a lead that Cooper developed, Cooper was to receive a commission equal to 20% of the fee received by Admiral when the loan was closed. If Cooper generated the lead, his commission was to be 40%.
>
> When Cooper quit his employment in August, 1995, there were pending eleven outstanding loan applications that he had developed but which had not yet closed. Cooper said that he offered to continue to assist Admiral in processing those applications but that Admiral declined his offer. Within a few months after he left, five of the loan applications were approved, including a large loan that closed in September, and Cooper made demand for payment of commissions on those loans. Admiral declined, taking the position that no commissions were due on any loan that had not closed by the time Cooper left.

357 Md. at 540, 745 A.2d at 1028.

In *Admiral Mortgage*, this Court recognized the distinction between when a commission was "due" (meaning "earned") and when it was "payable." "Under [Section 3-505], if Cooper was due a commission on the closing of a loan generated or developed by him, the commission should have been paid, at the latest, when the loan was closed." *Admiral Mortgage*, 357 Md. at 540, 745 A.2d at 1029. The Court noted in a footnote that Section 3-502 of the MWPCL, which requires employers to set regular pay periods for employees other than "administrative, executive, or professional" employees, "does not seem to take account of such an arrangement, where the commission is neither **due** nor

payable until the happening of a future event." 357 Md. at 540 n.6, 745 A.2d at 1029 n.6 (emphasis supplied). The Court left that question until another day. *Id*.

Construing the MWCPL as described in Section II above is consistent with *Admiral Mortgage* and answers the question of when a commission is due and payable. A commission is "due" (or "earned", to use *Medex* terminology) when the employee has performed his work necessary toward the end result. Cooper "earned" his commission when he developed a lead and obtained a completed loan application. *See Admiral Mortgage*, 357 Md. at 537, 745 A.2d at 1028. Cooper's commission was "payable" when the loan closed. *See id.*

B. Medex

In *Medex*, this Court held that a contract provision which results in a forfeiture of wages earned by an employee for work performed prior to termination is unenforceable and contrary to the public policy of Maryland as set forth in the Wage Payment and Collection Law. *See Medex*, 372 Md. at 39-41, 811 A.2d at 304-05. The facts were as follows:

> McCabe [a sales representative for Medex, a medical supplies manufacturer,] earned a base salary plus "incentive fees" that were payable in accordance with a series of incentive compensation plans. Under this compensation scheme, "some of the incentive fees 'begin to earn' at meeting 80% of a target goal, while another '[i]ncentive begins' upon the sale of certain goods." Medex identified these incentive fees as one part of the employee's "'Total Target Cash Compensation'" in that they "were supplemental to the fixed salary as a combined measure of compensation." But the payment of incentive fees was explicitly "'conditional upon . . . the [sales representative] being an employee at the end of the incentive plan (generally the fiscal year) and being employed at the time of actual payment.'" McCabe resigned on January 31, 2000, four days after the incentive period ended, but before incentive fees were paid on March 31,

> 2000. Invoking the requirement that he be employed by Medex at the time of payment, the company refused to pay McCabe the fees.

Hoffeld, 176 Md. App. at 201, 932 A.2d at 1207 (citing *Medex*, internal citations omitted). This Court concluded that McCabe's "incentive fees" were tantamount to sales commissions, and so fell within the definition of wages under the MWPCL. *See Medex*, 372 Md. at 37, 811 A.2d at 302-03. The Court held that "the incentive payments were wages **earned** by the employee and, thus, McCabe was entitled to recover as wages the incentive fees under the Act." *Medex*, 372 Md. at 33, 811 A.3d at 300 (emphasis supplied). The Court also noted: "Commissions are clearly within the scope of the Act, and a cause may arise under the Act for an employer's failure to pay commissions **earned** during employment yet not **payable** until after resignation." 372 Md. at 35, 811 A.2d at 302 (citing *Admiral Mortgage*, 357 Md. at 540, 745 A.2d at 1029; *Magee*, 137 Md. App. at 574, 769 A.2d at 258-59) (emphasis supplied).

In *Medex*, this Court examined the language of Section 3-505 and construed it as follows:

> Having determined that the incentive fees constitute wages, we must determine whether they are owed to McCabe as "wages due."
>
> ……
>
> Section 3-505 states as follows:
>
> "Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated."
>
> Restated simply, where an employee earns wages under the Act, the employer must pay them, regardless of the ensuing termination of the employee. In *Whiting-Turner* we looked at the language of § 3-505 and concluded that:

> "what is due an employee who terminates employment with an employer are wages for work performed before termination, or all compensation due to the employee as a result of employment including any remuneration, other than salary, that is promised in exchange for the employee's work."

Medex, 372 Md. at 38-39, 811 A.2d at 303-04 (quoting *Whiting-Turner*, 366 Md. at 303, 783 A.2d at 671). In short, *Medex* (and by implication *Whiting-Turner*) construed the term "wages due" in Clause One, "all wages due for work that the employee performed before the termination of employment," to mean "earned."

Construing the MWCPL as described in Section II above is consistent with *Medex*. A commission is "due" or "earned" (or "vested" [3]) when the employee has performed his work necessary toward the end result. Having performed all the work necessary throughout the incentive period to satisfy the objective sales benchmarks, McCabe "earned" his commission. *See Medex*, 372 Md. at 42, 811 A.2d at 305. McCabe's commission was "payable" when the employer would normally have made payments under the incentive plan (in McCabe's case, three months after the end of the fiscal year). *See* 372 Md. at 33-34, 811 A.2d at 301.

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[3] The Court also repeatedly used the term "vested" in *Medex* to refer to the same concept as "due" or "earned": "In accordance with the policy underlying the Maryland Act, an employee's right to compensation vests when the employee does everything required to earn the wages." 372 Md. at 41, 811 A.2d at 305. "Here, the employee's right to the payment of wages vests without satisfaction of the provision of continued employment." 372 Md. at 42, 811 A.2d at 305. *See also* 372 Md. at 40, 811 A.2d at 304-05 (quoting with approval *Tuttle*, 642 N.Y.S.2d at 358, which refers the employee's "vested right" to earned wages).

C. This construction fits the policy goals of the MWPCL.

No section of the MWPCL allows an employer to cause an employee to forfeit wages once earned. "Contractual language between the parties cannot be used to eliminate the requirement and public policy that employees have a right to be compensated for their efforts." *Medex*, 372 Md. at 39, 811 A.2d at 304. "A contract that necessitates the deprivation of some portion of the fees worked for by the employee contravenes the purposes of the Act." 372 Md. at 41, 811 A.2d at 305. In particular, *Admiral Mortgage* and *Medex* make clear that an employer may not impose an arbitrary condition that is beyond the employee's control, *e.g.,* continued employment, upon the "earning" of wages. *See Medex*, 372 Md. at 341-42, 811 A.2d at 305 (rejecting employer's position that departed employees would fail to achieve requirements of incentive plan, and thus not have "wages due"); *Admiral Mortgage*, 357 Md. at 537, 540, 745 A.2d at 1028, 1029 (employee whose job was to generate and develop loans was entitled to commissions for loans he developed that closed after his resignation). The employer may not force the risk of forfeiting all compensation after having performed the work upon the employee. Where an employee has "earned" a commission or contingent payment, it violates Maryland law for an employer to compel forfeiture of such vested commissions based on circumstances within the employer's control:

> Here, the employee's right to the payment of wages vests without satisfaction of the provision of continued employment. To hold otherwise would place the rights of employees to these wages at the whim of the employer, who could simply terminate any at-will employee whose incentive fees it didn't wish to pay.

Medex, 372 Md. at 342, 811 A.2d at 305.

IV. This Construction of Section 3-505 Does Not Impair Freedom of Contract

This Court has long recognized that "[a]s a general rule, parties are free to contract as they wish [but a] contractual provision that violates public policy is invalid . . . to the extent of the conflict between the stated public policy and the contractual provision." *Finch v. Holladay-Tyler Printing, Inc.,* 322 Md. 197, 206, 586 A.2d 1275, 1280 (1991) (quoting *State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co.*, 307 Md. 631, 643, 516 A.2d 586, 592 (1986)). In *Medex*, this Court held that a contract provision which results in a forfeiture of wages earned by an employee for work performed prior to termination is unenforceable and contrary to the public policy of Maryland as set forth in the MWCPL. *See Medex*, 372 Md. at 39-41, 811 A.2d at 304-05 ("[A] contract conflicting with public policy set forth in a statute is invalid to the extent of the conflict between the contract and that policy."). "It is clear that the [wage payment] statute establishes a rule of public policy, and that the natural right of the employer and the employee to contract between themselves must yield to what the legislature has established as the law.'" 372 Md. at 40, 811 A.2d at 304 (quoting *Burdette v. Broadview Dairy Co*., 123 Wash. 158, 163, 212 P. 181, 182-83 (1923)).

The construction of the MWPCL set forth in Section II does not impair freedom of contract. Parties may still contract as they wish as long as the contract will not produce a forfeiture of a commissioned employee's earned wages. A contract which imposes an arbitrary condition that is beyond the employee's control upon the "earning" of wages, *e.g.,* shipping and invoicing of goods or calculation of a commission, will inevitably

cause a forfeiture of the commissions "in the pipeline" upon termination, as occurred in Hoffeld's case. Such a contract will not be favored. *Harris v. Wye Tree Experts, Inc.*, 273 Md. 454, 457, 330 A.2d 189, 191 (1975) ("reading (of a contract) which produces a forfeiture will not be favored", quoting *Garfinkel v. Schwartzman,* 253 Md. 710, 720, 254 A.2d 667, 673 (1969)); *see generally B & P Enters. v. Overland Equip. Co*., 133 Md. App. 583, 610, 758 A.2d 1026, 1040 (2000) (where non-occurrence of condition would cause disproportionate forfeiture, court may excuse the non-occurrence of that condition, citing Restatement (Second) of Contracts § 229 (1981)).

V. This Construction of Section 3-505 is Easy to Apply

The "back end" problem is not merely hypothetical. Employers in this State have imposed and continue to impose arbitrary conditions to force their employees to forfeit earned wages. *Medex* is a perfect example. Continued employment had nothing to do with the work McCabe had completed to earn the incentive fees. In the case at bar, Hoffeld performed the all of the sales work necessary to earn his commissions. He had nothing to do with when or how Shepherd calculated his commissions.

With the focus placed properly on the sale, when an employee earns wages is readily determinable in nearly every instance. Below is an analysis of fact patterns drawn from Maryland cases, including some that our members have litigated.

> Q. Assume an employer requires a real estate salesperson to be present at closing so that she can shake hands with the buyer. The employer terminates the salesperson, ostensibly "for cause", before the closing. Has the salesperson earned a commission?

Analysis: A salesperson such as Hoffeld is hired to sell. We know that because he gets paid based on the sale price. *See, e.g., Hoffeld*, 176 Md. App. at 191, 932 A.2d at 1202 ("Throughout Hoffeld's employment with Shepherd, he was paid entirely on the basis of gross margin, which is 'the difference between cost and sales.'"). The court should not engage in the legal fiction that the follow-up—shaking hands or pushing paperwork—is what the salesperson is really getting paid for, or that he has not "earned" his wage if the sale falls through. For example, it is the practice that real estate brokers have earned a commission if they merely introduce the buyer and seller and take no other action but a sale is consummated. While some brokers may perform many services to aid the transaction, those services are not a necessary component of earning the commission.

The facts above are drawn from *Rogers v. Savings First*, 362 F. Supp. 2d at 643-46. There, the plaintiffs were loan officers who sued their employer for unpaid commissions on loans that went to closing after a "voluntary or involuntary" termination. The employer's policy was not to pay a commission to a loan officer on any deal that went to closing after a loan officer's employment terminated.

The federal district court denied the employer's motion for summary judgment. The court noted that the loan officers at Savings First developed leads *then assigned most of the administrative work to other employees*. After the plaintiffs terminated their employment, Savings First did not hire new loan officers to complete the work; it just kept the money. In such circumstances, the court could "[n]ot conclude that Defendants'

bright line rule denying all Plaintiffs their terminal commissions reasonable." *Rogers*, 362 F. Supp. 2d at 646.

By so holding the court in *Rogers* recognized that when a salesperson's compensation is contingent on closing a sale, and the contingency occurs, the failure to pay the contingent compensation is likely an unlawful forfeiture. This is so even if an employee does not handle ancillary duties, such as being present at a closing. Even if not required to "earn" a commission, however, a salesperson still has every incentive to follow-up with the customer because doing so makes it more likely that the sale will go through and there will be some proceeds from which he will get paid.

> Q. What happens if the sale is cancelled after the salesperson is terminated?

Analysis: The salesperson has "earned" a wage because he has performed all his work necessary toward the end result. The value of the wage, however, may be nil ($0) if the employer never collects proceeds of the sale. That is the nature of contingent compensation. Just as with a lawyer who takes a case on contingency, sometimes he or she works, but does not get paid.

> Q. An employer requires its employees to sign a detailed job description or contract at the outset of employment listing the duties required to earn a commission. Is the contract language determinative?

Analysis: A written document is evidence of what is required to complete a sale, but no contract can require that an employee forfeiture earned wages once earned. *See Medex*, 372 Md. at 39, 811 at 304 ("Contractual language between the parties cannot be

used to eliminate the requirement and public policy [of § 3-505] that employees have a right to compensated for their efforts.”). The MWPCL and *Medex* require a comparison of contractual duties with what actually occurred, *i.e.*, did the salesperson’s work lead to a consummated sale? Blind adherence to contractual language without regard for the consequences will surely result in employers creating forfeiture provisions. *See Willard Packaging Co.*, 169 Md. App. at 134, 899 A.2d at 955 (recognizing the “inequalities of bargaining power” in the salesperson-employer relationship).

Existing Maryland law already requires this analysis. For example, in *Holloway v. Faw, Casson & Co.,* 78 Md. App. 205, 242-43, 552 A.2d 1311, 1330 (1989), *aff'd in part and rev'd in part*, 319 Md. 324, 572 A.2d 510 (1990), the Court of Special Appeals struck a contract provision requiring a departing partner to forfeit earned fees for any breach of a partnership agreement. The provision “constitutes a penalty,” which the Court deemed to be unlawful. *Id.* Similarly, in *MacIntosh v. Brunswick Corp.*, 241 Md. at 29-30, 215 A.2d at 224-25, this Court struck an employer’s attempt to impose a post-employment non-compete obligations, breach of which resulted in forfeiture of an earned bonus.

Here, a searching analysis of each of Hoffeld’s sales is required. The opinion below suggests that Shepherd Electric lawfully withheld all of Hoffeld’s commissions based on an agreement that he would not be paid if *deals were pending at the time of this termination*. *See Hoffeld*, 176 Md. App. at 206, 932 A.2d at 1210. A federal district court reached a similar conclusion in *McLaughlin v. Murphy*, 372 F.Supp.2d at 472-73, denying a loan officer’s claim for commissions in part *because his employment agreement required him to perform ancillary duties, including being present at closing.*

These decisions misapplied Maryland law. Missing from both decisions is an analysis of whether the work of the salespeople, Hoffeld or McLaughlin, led to sales which were eventually consummated. If they did, a contract denying them compensation would be contrary to the public policy of Section 3-505 that employees have a right to compensated for their efforts.

> Q. Assume the employer does not collect payment on a sale until months or years after the salesperson performs the work. In such case, does an employer have an obligation to pay the employee?

Analysis: Yes. The structure of Section 3-505 recognizes the reality that wages can be earned (*i.e.,* "due for work . . . performed") in advance of when they are paid (*i.e.,* "on or before the day on which the employee would have been paid the wages if the employment had not been terminated"). The MWPCL permits an employer to delay the date it pays its employee wages. If the employer eventually collects proceeds from the sale, however, the passage of time is no excuse for not paying the salesperson. Restated simply, the rule is "paid when paid".

> Q. Assume an employer has longstanding relationships with its customers. What shall an employer do when several salespeople participate in servicing an account?

Analysis: Commissions are intended to pay salespeople for selling. In the case at bar, it was self-evident that Hoffeld's job was to sell, not to "service accounts", because he was paid a percentage of the proceeds that the employer collected on the sale. In the rare circumstance where a sale would not have been consummated without the efforts of

two or more persons, then the employer should apportion the commission between the salespeople so long as the apportion is reasonable and does not cause a forfeiture.

In no event, however, may the employer simply pay over the commission one salesperson has earned to another salesperson. The opinion below relies heavily on the supposition that, although the salesman might not have received the commissions he earned on the three jobs at issue, at least those commissions were paid over to his successor outside salesmen. *See, e.g., Hoffeld*, 176 Md. App. at 193-94, 206, 932 A.2d at 1202-03, 1206. As explained in Section I-C above, this is incorrect on the record, and wrong as a matter of law.

> Q. Assuming the employer terminates the salesperson for cause or the salesperson quits, is he or she still entitled to commission?

Analysis: Nothing in the MWPCL permits employers to use the circumstances of an employee's termination in deciding whether to pay him or her wages. "Some states have separate provisions for voluntary and involuntary departures by employees. *See e.g.* Mich. Comp. Laws Ann. § 408.475 (2002). The Maryland statute makes no such distinction, giving equal protection to all departed employees. *See* § 3-505." *Medex*, 372 Md. at 41-42, 811 A.2d at 305; *cf. McLaughlin*, 377 F. Supp. 2d at 474 n.6 (noting that McLaughlin was terminated for cause for lying about his dealings with a client). Consider the case of an hourly laborer tasked with building a deck for a home. May an employer withhold the laborer's wages merely because in the employer's view the laborer's performance was deficient? Of course not, because "[t]o hold otherwise would

place the rights of employees to these wages at the whim of the employer, who could simply terminate any at-will employee whose incentive fees it didn't wish to pay." *Medex*, 372 Md. at 42, 811 A.2d at 305.

VI. This Construction of Section 3-505 Yields Fair and Equitable Results

As shown above, the proper construction of MWPCL Section 3-505 results in a rule that is easy to understand and easy to apply for both employees and employers. This construction should avert ingenious post hoc rationalizations about what the commissioned employee's duties "really" were, or who was responsible for what. A salesperson is hired to sell. We know that because he or she gets paid based on the sale price.

This construction is also fair and equitable to both parties. A commissioned employee has fully performed the substance at his or her end, by accomplishing the sale or other transaction. The employer has obtained the benefit of the bargain once the buyer makes the payment or otherwise goes through with the transaction. The employer would be unjustly enriched if the employee is deprived of the commission.

Finally, the risk of nonpayment is fairly distributed. A salesperson has every incentive to excel in his or her job by making the sale, and the employer has every incentive to engage in whatever post-sale activities—arranging payment or credit, shipping, installation—to follow up with the customer to make sure that the sale actually goes through. If the law is to be clear enough to avoid the need for litigation, employers should not be allowed to engage in the legal fiction that the follow-up activity is what the

salesperson gets paid for, or that he or she has not “earned” a wage if the sale falls through. A salesperson gets paid for bringing in the business. Sometimes that may turn out to be a percentage of a substantial amount, and sometimes that may turn out to be a percentage of nothing. Whatever the amount, that is the amount a former employee has earned and must be paid.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, as well as the reasons set forth in the Brief of Petitioner Calvin Hoffeld, Amici respectfully suggest that this Honorable Court reverse the judgment below, or vacate the judgment and remand the case for a new trial on the merits in accordance with this Court's decision.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Due to the extraordinarily wide scope of the effects of this decision, Amici respectfully request to participate in oral argument. Amici will so move separately.

Respectfully submitted,

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This brief was printed in Times New Roman 13-point font.

ADDENDUM

The following pertinent statutes were referred to in the Brief of Amici Curiae, and the text has been provided below: Md. Code, Lab. & Empl. § 3-505 (2007); Md. Code, Lab & Empl. § 3-507.1 (2007).

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MD Code, Labor and Employment, § 3-505. Payment on cessation of employment

Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

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MD Code, Labor and Employment, § 3-507.1. Recovery of unpaid wages

(a) Notwithstanding any remedy available under § 3-507 of this subtitle, if an employer fails to pay an employee in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.

(b) If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this ___ day of January, 2008, a copy of this Brief of Amici Curiae Maryland Employment Lawyers Association and the Metropolitan Washington Employment Lawyers Association in Support of Petitioner were sent via first-class mail, postage prepaid to:

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